UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR FAILURE TO STATE A CLAIM: August 18, 2016

CBCA 5354

FINANCIAL & REALTY SERVICES, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Eden Brown Gaines of Brown Gaines, LLC, Washington, DC, counsel for Appellant.

Catherine Crow, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

CHADWICK, Board Judge.

Financial & Realty Services, Inc. (FRS or appellant) appealed a contracting officer's decision denying its claim for $49,280 in unpaid invoices under a fixed-price General Services Administration (GSA or respondent) task order. FRS elected the small claims procedure of Board Rule 52 (48 CFR 6101.52 (2015)), which provides for an expedited, nonprecedential decision by a single board judge. GSA then filed a motion under Rule 8(c)(1) (*id.* 6101.8(c)(1)) to dismiss the appeal for failure to state a claim on which the Board could grant relief. We grant GSA's motion.

Background

We base this summary on the complaint's factual allegations, which we treat as true for this purpose, and on contract documents attached to or integral to the complaint.

FRS has held GSA schedule contract GS-06F-0022P for facilities maintenance and management services (schedule 03FAC) since 2004. "Refresh 21" of the contract, issued by bilateral modification in July 2013 (Appeal File, Exhibit 1), included, among other standard clauses: Federal Acquisition Regulation (FAR) clause 52.212-4, Contract Terms and Conditions–Commercial Items (Alternate I, Aug. 2012) (Deviation I, Feb. 2007) (48 CFR 52.212-4 (2012)); FAR clause 52.216-18, Ordering (Oct. 1995) (Deviation II, Feb. 2007) (*id*. 52.216-18); and FAR clause 52.216-22, Indefinite Quantity (Oct. 1995) (Deviation I, Jan. 1994) (*id*. 52.216-22). The Ordering clause stated that orders issued under the contract were "subject to the terms and conditions of this contract. In the event of conflict between a delivery order or task order and this contract, the contract shall control."

GSA awarded FRS task order GS-P-07-13-UD-0034 under the contract in September 2013. Complaint, Exhibit B; Appeal File, Exhibit 3. This order described itself as "a non-personnel [sic] services task order for . . . property management/lease administration services for the Service Centers Division, Greater Southwest Region (R7) of [GSA] in support of various federal[ly] owned and leased buildings in the Dallas/Fort Worth [Texas] Service Center, Fort Worth Field Office." In general, the task order required FRS to provide one property manager to assist a contracting officer's representative (COR) on a daily basis at a GSA Public Buildings Service office in Fort Worth and "in various federally owned and leased buildings in the Fort Worth area." The order allowed GSA to review the resumes of candidates for the property manager position (but not to select the employee), and said that contractor personnel "must be able to obtain" a National Agency Check with Inquiries (NACI) clearance within three months of award and keep the clearance "for the life of the contract." It also said, "The Contractor must at all times maintain an adequate work force for the uninterrupted performance of" the task order requirements. We discuss other provisions below.

The task order was priced in firm fixed annual amounts. GSA agreed that FRS could invoice in fixed monthly increments.

An FRS employee initially served as the property manager under the task order. "In the late summer or early fall of 2014, the Government, without notifying or negotiating with FRS, solicited [that employee] from FRS'[s] employment by offering him a position performing the same duties in the same office in which he performed work on behalf of FRS." Complaint ¶ 8. He accepted that position and resigned from FRS effective October 3, 2014. FRS submitted the name of a replacement candidate to GSA on November 12, 2014. The complaint alleges that "the Government purports" to have completed that candidate's NACI clearance on December 22, 2014, but FRS "did

not immediately receive" notice, and the candidate accepted another job at some point "because of the Government delay." *Id*. ¶ 11. "FRS submitted a second alternate [candidate] in January 2015 and a third alternate in February 2015. [The third candidate] began work in March 2015." *Id*.[1]

FRS submitted invoices totaling $49,280 for the five months between October 15, 2014, and March 15, 2015, when the task order was not staffed. GSA did not pay the invoices. FRS submitted a certified claim for the disputed amount (plus an amount that GSA has since paid), which the contracting officer denied in April 2016. FRS appealed in June 2016. The complaint seeks relief on the grounds that GSA "breached its contract with FRS by thwarting or precluding FRS'[s] performance of the Contract and by failing to pay the full Contract price." *Id*. at 3. FRS attached as exhibits to the complaint the contracting officer's decision and the task order, without FRS's incorporated proposal, which FRS considers proprietary. GSA submitted the schedule contract, without objection, as part of the appeal file. GSA moved to dismiss for failure to state a claim on July 14, 2016. FRS responded on August 12, 2016.

Discussion

I. Standards and Scope of Review

We have jurisdiction of this timely appeal under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012). FRS would have the burden at a hearing to prove that its invoices should have been paid. *Systems Integration & Management, Inc. v. General Services Administration*, CBCA 1512, et al., 13 BCA ¶ 35,417, at 173,765. While we assume the facts alleged in the complaint are true, and we construe them in FRS's favor, the complaint "must plead factual allegations that support a facially 'plausible' claim to relief in order to avoid dismissal for failure to state a claim." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). The *Twombly* plausibility test altered the prior rule that we should dismiss for failure to state a claim only if "it appear[ed] beyond doubt that the [claimant could] prove no set of facts . . . which would entitle it to relief." *Conley v. Gibson*, 355 U.S. 41, 46 (1957), *abrogated in relevant part by Twombly*, 550 U.S. at 561-63. "A claim has facial plausibility when the plaintiff pleads factual content that allows the [tribunal] to

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[1] The contracting officer's decision, which FRS attached to the complaint and did not factually contradict, stated that FRS withdrew the second candidate after thirty days and that the third candidate was cleared in three weeks and started work on March 19, 2015. Complaint, Exhibit A.

draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557), *quoted in Sioux Honey Ass'n v. Hartford Fire Insurance Co.*, 672 F.3d 1041, 1062 (Fed. Cir. 2012).

Because FRS attached the task order (which it calls "the Contract") to its complaint and pleaded the contract requirements, both the task order and the schedule contract under which it was issued are incorporated in the pleadings, and we may consider them without converting GSA's motion to dismiss to a motion for summary relief. *See Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,790; *Bristol Bay Area Health Corp. v. United States*, 110 Fed. Cl. 251, 262 (2013). (If we had it before us, we could also consider FRS's proposal, which the parties agree was part of the task order.)

We interpret contracts as far as possible in accordance with their plain and ordinary meaning. *See Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965); *A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,209. We must deny GSA's motion to dismiss if we discern a relevant contractual ambiguity that could plausibly be resolved in FRS's favor by considering evidence outside the pleadings. *See Martin Marietta Corp. v. International Telecommunications Satellite Organization*, 991 F.2d 94, 97 (4th Cir. 1992); *Hastings Development, LLC v. Evanston Insurance Co.*, 141 F. Supp. 3d 203, 216 (E.D.N.Y. 2015); *cf. Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988) ("To the extent that the contract terms are ambiguous, requiring weighing of external evidence, the matter is not amenable to summary resolution.").

II. Analysis

The parties agree that FRS did not provide a property manager in Fort Worth under the task order during the five months for which it was not paid. They disagree about the possible contractual implications of that gap. The parties dispute at the outset what services FRS was required to provide. GSA argues that "the task order clearly required FRS to provide property management/lease administration services to GSA's Dallas/Fort Worth Service Center . . . during regular business hours and to produce a variety of regular deliverables." Respondent's Motion to Dismiss at 9. FRS contends that the task order did not "require that a Contractor [employee] be *on-site*. Instead, [it said that] the [employee] must be 'accessible' during typical office hours" and required FRS to "maintain a workforce sufficient for the performance of [required] tasks . . . rather than a workforce which [was] *present* in an office Monday through Friday during regular office

hours." Appellant's Response at 2. In a footnote, FRS reserves the right to argue that it did not need to provide services during the five months after its employee resigned, because GSA "fail[ed] to request [on-site] services during this period." *Id*. at 8 n.5.

The task order's plain language supports GSA's reading. Section 1.3, "Scope," stated that "[p]roperty management services [we]re required *in* various federally owned and leased buildings in the Fort Worth area" (emphasis added), not simply "for" those buildings. Section 1.5, "General Information," specified regular work hours and a place of performance—a GSA Public Buildings Service office on Taylor Street in Fort Worth—with telework "permitted on a situational basis only, and coordinated with the COR." Part 5 of the task order, "Specific Tasks," estimated that ninety-five percent of the workload would consist of "property management," including such tasks as "interacting extensively with building tenants on a recurring basis," "attend[ing] meetings as required," "assist[ing] the COR with periodic inspections of leased facilities," preparing documents for review and signature by a GSA official, and submitting a monthly report on the "[s]tatus of all tasks . . . in the [contractor's] project management plan" as well as "[p]roblems encountered . . . and any . . . action that was taken to correct identified problems." The remaining five percent of the work was expected to consist of attending GSA training and internal agency meetings. Appeal File, Exhibit 3 at 3-4, 11. Read as a whole, *see Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991), these provisions unambiguously required the presence of an FRS employee at the GSA office or at an approved, alternate site on a daily basis. We reject any argument that the task order required further "requests" by GSA for the employee's presence.

The parties also dispute the basis on which FRS was to be paid. FRS argues that its complaint states a claim for wrongful nonpayment simply by alleging that (1) the task order was for a firm fixed price, (2) GSA "lack[ed] supervisory authority over FRS personnel," and (3) GSA did not pay the disputed invoices. Appellant's Response at 6. GSA, for its part, argues that "[e]ven under a firm fixed price contract, a contractor is only entitled to payment for work [it] has performed. . . . FRS performed no work; there should be no reward." Respondent's Motion at 10.[2]

Again, the unambiguous contract language supports GSA, although for a more specific reason than the respondent offers. Most significant to us in this regard is the

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[2] While FRS cites no authority for the elements of a claim for nonpayment of fixed-price invoices, GSA cites a nonprecedential decision of the Court of Appeals for the Federal Circuit, *Bender GMBH v. Harvey*, 126 F. App'x 948 (Fed. Cir. 2005), which we do not find instructive here as it involved fixed unit prices rather than a fixed annual rate.

Payment provision of the Commercial Items clause of the schedule contract (48 CFR 52.212-4(i)), which stated, "Payment shall be made for items *accepted* by the ordering activity that have been *delivered* to the delivery destinations set forth in this contract" (emphasis added). ("Items" include "services." *Id*. 52.212-4(a).) The schedule contract's Indefinite Quantity clause (*id*. 52.216-22), in turn, allowed the Government to "issue orders requiring delivery to multiple destinations or performance at multiple locations." Thus, to state a claim, FRS must allege facts plausibly suggesting that (1) the services ordered by GSA were *delivered and accepted* at a location specified in the order, or (2) GSA frustrated or improperly rejected FRS's delivery of the ordered services. *See Systems Integration & Management*, 13 BCA at 173,765; *ALK Services, Inc. v. Department of Veterans Affairs*, CBCA 1789, et al., 13 BCA ¶ 35,260, at 173,076-78 (noting that where no services were delivered the measure of damages is not the fixed price but "lost profits on work that would have been [performed] but for the breach").

The factual allegations of the complaint foreclose the first type of claim. FRS says it did *not* send anyone to work in Fort Worth during the five months at issue. Complaint ¶¶ 8-14. As discussed above, FRS may argue that it was performing the task order in some other way, but we disagree. FRS was not delivering the property management services that GSA ordered. Notwithstanding the task order's "fixed price," GSA was obligated to pay only for services that were delivered and accepted. Whether GSA could "supervise" the FRS employee who performed the services is immaterial. In light of the complaint's allegations that FRS did not staff the task order during the months in dispute, the allegation that GSA "fail[ed] to pay the full Contract price" for that same period, *id*. at 3, does not state a claim on which the Board could grant relief.

FRS mistakenly labels GSA's position that it need not pay for undelivered services an "affirmative defense," and argues that GSA "waive[d] any claim [of] breach" by working with FRS to replace the FRS employee rather than terminating the task order for cause. Appellant's Response at 7, 10-11. GSA has not raised an affirmative defense or alleged a breach. FRS is the claimant and bears the burden to state a claim.

The complaint also sounds in the second type of nonpayment claim, by alleging that GSA precluded FRS's performance. Complaint at 3. The facts alleged to support this conclusion are that GSA "solicited [the employee] from FRS'[s] employment [in 2014] by offering him a position performing the same duties in the same office," and that GSA was responsible for delays in obtaining NACI clearances for replacement candidates that caused the job to remain vacant until March 2015. *Id*. ¶¶ 8-14.

Neither party has much more to say about these allegations at this point. GSA argues that "even assuming" the agency "solicited" the FRS employee, the task order

required FRS to maintain the ability to provide uninterrupted services. GSA further argues that the complaint fails to allege that delays associated with clearances were unreasonable and not in part FRS's fault. Respondent's Motion at 11-13. FRS focuses mainly on disputing GSA's reading of the contract. FRS declined our requests, in a telephonic conference and two scheduling orders, to set forth with particularity the facts known to FRS underlying the allegation that GSA "solicited" the employee. Appellant's Response at 10 ("Ultimately, FRS need not prove or establish with evidence that the Government solicited [the employee] . . . [but] need only point to allegations in the Complaint . . . that the Government prevented [FRS's] full performance."); *see also id*. at 3 n.3 (stating FRS "will seek evidence" in discovery that GSA "recruited and hired [the employee] via his service [for] FRS" rather than through a public job posting).

We specifically asked FRS to flesh out the allegation of "solicitation" because that term is subject to interpretation and does not by itself plausibly suggest that GSA interfered with FRS's performance. FRS, in its response, still identifies no factual basis to suspect that GSA did anything inconsistent with the normal federal hiring process. We cannot view this as "more than a sheer possibility." *Sioux Honey Ass'n*, 672 F.3d at 1062. Further, we see nothing in the schedule contract or the task order that barred GSA from "soliciting" or hiring an FRS employee, or that required GSA to notify FRS before doing so. Without commenting on whether the facts alleged here might provide a defense to a government claim, we do not see how an otherwise lawful recruitment or hiring action that an agency was not contractually barred from taking—which is all that has been plausibly alleged—could constitute undue interference entitling a contractor to be paid for work it did not perform. *E.g.*, *Metcalf Construction Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014) (noting that the implied duty of good faith and fair dealing cannot alter a "contract's discernible allocation of risks and benefits").

Finally, the complaint does not state a claim for relief based on the pace at which GSA reviewed and investigated the candidates to replace the initial employee. The principal difficulty for FRS here is that neither the schedule contract nor the task order imposed any specific obligations on GSA if the sole FRS employee assigned to the task order resigned. Instead, the task order required FRS to designate a property manager who could be cleared within three months of award, and it imposed a duty on FRS to "at all times maintain an adequate work force for the performance of all tasks." Appeal File, Exhibit 3 at 4. FRS argues that the task order obligated GSA to process replacement candidates within thirty days. The relevant language in section 4.1, however, said only that GSA could direct the contractor in writing to replace an employee, and that "[a] position will be deemed delinquent if after 30 calendar days (from the date of formal request from GSA) the position is not filled by the contractor." *Id*. at 10. This

contingency did not arise. GSA does not argue that the property manager position was "delinquent," only that the agency should not have to pay for services it did not receive.

Absent a contractual duty on GSA's part to clear job candidates within a specified time, and given that the task order provided up to three months for the initial clearance, the investigation durations alleged in the pleadings—something more than forty days (including Thanksgiving weekend) for the first candidate, and roughly one month each for the second and third candidates—cannot not plausibly be considered unreasonable and cannot form a basis of entitlement to payment for services that FRS did not deliver. FRS argues that the complaint states a claim for "inexcusable delay," but strictly speaking, that is not a claim. Excusable delay is a contractor's defense to a claim. Here, FRS is the claimant, and the question is not whether its five months of nonperformance were "excusable," but whether GSA breached the contract by frustrating FRS's efforts to perform. The complaint alleges no facts that plausibly support such a claim.

Decision

The appeal is **DISMISSED FOR FAILURE TO STATE A CLAIM**.

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KYLE CHADWICK
Board Judge