



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT GRANTED:  
June 23, 2017

CBCA 4994

SBBI, INC.,

Appellant,

v.

INTERNATIONAL BOUNDARY AND WATER COMMISSION,

Respondent.

John T. Flynn, Scott A. Witzigreuter, and Joseph J. Minock of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, Atlanta, GA, counsel for Appellant.

Joseph A. Pixley, Civil Division, Commercial Litigation Branch, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **SULLIVAN**, and **RUSSELL**.

**RUSSELL**, Board Judge.

Appellant, SBBI, Inc. (SBBI), filed an amended complaint without seeking permission from the Board pursuant to Board Rule 6(e). 48 CFR 6101.6(e) (2016). Respondent, International Boundary and Water Commission (IBWC), moved to strike the amended complaint. SBBI then moved for leave to file its amended complaint, which IBWC opposed. For the reasons stated below, IBWC's motion to strike is denied, and SBBI's motion for leave to amend its complaint is granted.

### Background

In December 2009, SBBI entered into a contract with IBWC for the rehabilitation of a levee and dike located adjacent to the Rio Grande River in Hidalgo County, Texas. In October 2012, SBBI achieved substantial completion on the project and, in January 2013, it demobilized from the work site. By letter dated May 21, 2015, SBBI submitted a certified claim to the IBWC based on a modified total cost recovery method. In its claim, SBBI asserted that it was entitled to recover unanticipated costs incurred due to the actions or inactions of the IBWC including, but not limited to, those related to “flawed plans and specifications, stop work orders, delays, untimely responses to [requests for information] and other reasons which concurrently occurred throughout the project.” SBBI supported its claim with references to an extensive twenty-eight volume record which was provided to the IBWC’s contracting officer. IBWC denied the claim and SBBI appealed the decision to the Board. SBBI subsequently filed its complaint in this appeal, which IBWC answered.

The parties engaged in discovery over an approximate seven-month period, and about three weeks before discovery was scheduled to close, SBBI filed a first amended complaint. SBBI’s requested amount of monetary relief and theory of recovery in its proposed amended complaint were no different from those included in its claim to the IBWC and original complaint filed with the Board. However, SBBI’s proposed amended complaint included greater detail on the factual allegations than the company’s originally-filed complaint with the Board. SBBI’s proposed amended complaint, unlike its original complaint, included contentions related to contract mismanagement, wrongful withholding of progress payments and contract funds, and IBWC’s purported substantial changes to the contract. IBWC moved to strike SBBI’s amended complaint, arguing that SBBI filed the complaint without seeking permission of the Board in violation Board Rule 6(e) and without notifying IBWC. IBWC also argued that SBBI raised a number of new issues in the amended complaint that were not in SBBI’s original complaint, and complained that the timing of SBBI’s filing of its proposed amended complaint, so close to the end of the discovery period, was prejudicial to IBWC.

SBBI subsequently moved for leave to file its first amended complaint, which IBWC opposed. IBWC requests that the Board deny SBBI’s motion for leave on jurisdictional grounds, or alternatively, issue a new scheduling order so that IBWC may respond to SBBI’s amended complaint and take additional discovery on the purported new allegations presented in the amended complaint.

### Discussion

The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), vests authority in the Board to decide federal contractors' challenges to agency denials of contract claims, and sets forth the jurisdictional requirements which must be met to bring those challenges before the Board. "Claim" is not defined in the CDA, but is in the implementing regulations as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 CFR 2.101. Claims over \$100,000 require certification.<sup>1</sup> 41 U.S.C. § 7103(b).

To establish the Board's jurisdiction, a contractor must, prior to seeking the Board's review, submit a written claim to the agency for a final decision and have that claim denied, or "deemed denied,"<sup>2</sup> by the contracting officer. 41 U.S.C. § 7103(a); *see also Raytheon Co. v. United States*, 747 F.3d 1341, 1354 (Fed. Cir. 2014) ("Under the [CDA], obtaining a final decision is a jurisdictional prerequisite to any subsequent action before a Board of Contract Appeals or the trial court."). The purpose behind the requirement for a written claim is to provide the contracting officer with "an ample pre-suit opportunity to rule on a [claim], knowing at least the relief sought and what substantive issues are raised." *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015).

A claim appealed to the Board "must be based on the same claim previously presented to and denied by the contracting officer." *Cerberonics, Inc. v. United States*, 13 Cl. Ct. 415, 417 (1987). To assess whether the claims presented to the contracting officer and the Board are the same, the Board examines whether "the claims are based on a common or related set of operative facts." *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990). "This standard, however, does not require ridged adherence to the exact language or structure of the original administrative . . . claim" brought before the contracting officer. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). For example, a contractor's adjustment to its claim amount based on matters developed in

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<sup>1</sup> Specifically, for claims over \$100,000, a contractor must certify that the claim is made in good faith, supporting data are accurate to the contractor's knowledge and belief, the amount requested accurately reflects what the contractor believes is the Government's liability, and the certifier is authorized to certify the contractor's claim. 41 U.S.C. § 7103(b).

<sup>2</sup> A "deemed" denial of a claim occurs when the contracting officer fails to issue a written decision on the contractor's claim within the CDA's prescribed time period. 41 U.S.C. § 7103(f). After such period lapses, the contractor may seek review of its claim before a board of contract appeals or the Court of Federal Claims.

litigation before the Board is not a bar to jurisdiction. *K-Con Building Systems*, 778 F.3d at 1006. “In a similar vein, merely adding factual details or legal argumentation does not create a different claim.” *Id.* Instead, a contractor presents a jurisdictionally-precluded claim to the Board when the claim “*either* request[s] different remedies (whether monetary or non-monetary) *or* assert[s] grounds that are materially different . . . either factually or legally” from those presented in the written claim to the contracting officer. *Id.* at 1005. Notably, if the Board would have to review and rely on different evidence to make its decision on the claim presented to the Board compared to that presented to the contracting officer, then the claims are materially different. *Placeway Construction Corp.*, 920 F.2d at 907.

To support its opposition to SBBI’s proposed amended complaint, IBWC argues that SBBI has raised entirely new contentions in the amended complaint not presented in SBBI’s original complaint or its claim to the contracting officer, and provides, by way of example, SBBI’s allegations that:

[C]urrent and former agency employees “mismanaged” SBBI’s contract by, among other things: failing to assure that the contracting officer acted independently; failing to have “sufficient staffing” in line with the level of appropriations; failing to have competent personnel serve as contracting officer and contracting officer’s representatives; failing to properly survey project site; failing to make timely decisions of the scope of work; and failing to properly manage the Value Engineering process.

IBWC adds that:

These factual allegations regarding the purported deficiencies are made for the first time in the amended pleading. Indeed, the word “mismanagement” does not appear in the [original] complaint or the certified claim. SBBI also alleges for the first time that the agency breached the contract for “wrongfully and totally withholding” progress payments.

We disagree with IBWC that SBBI has raised factual allegations in its proposed amended complaint that were not encompassed in the company’s claim. Indeed, the “new” factual allegations as IBWC deems them were all before the contracting officer, and not in an opaque or inferential way. The factual allegations presented in SBBI’s amended complaint are readily found in SBBI’s claim or the supporting documentation to that claim. SBBI, in the supporting documentation, expressly alleged that IBWC mismanaged the contract under the topic heading “Mismanagement,” and provided factual contentions to support this allegation. On the issue of project control, SBBI, in its claim, raised concerns about the level of control that the construction management company exerted over the

project. As to the competency of IBWC personnel, SBBI, again, asserted in its claim, that the contracting officer's representative (COR) was changed three times with only the last having experience in levee construction, repair, and maintenance. SBBI, also in its claim, contended that the COR failed to provide timely replies to SBBI's submittals and other documents requiring responses from IBWC. Further, SBBI's contentions regarding IBWC's failure to properly survey the project site and manage the value engineering process can also be easily found in either the claim or its supporting documentation. As for the allegation regarding cardinal change, SBBI discusses, in its claim, purported "dramatically changed conditions" adversely affecting its chosen method of construction, and, as for the allegation related to payment, contends that it was prejudiced by IBWC's delay and reduction of payments.

In short, a cursory review of SBBI's seven-page claim reveals the substantial overlap in operative facts presented in the claim and SBBI's proposed first amended complaint. Further review of the extensive supporting documentation to that claim would show, contrary to IBWC's contention, that SBBI has not presented factual allegations in its proposed amended complaint that were not raised in the claim before the contracting officer. Thus, the contracting officer had adequate notice of the factual allegations presented in SBBI's proposed amended complaint well before SBBI filed its appeal, as those allegations were included in SBBI's claim and the accompanying supporting documentation. Accordingly, the Board has jurisdiction to consider the claim presented in the proposed amended complaint.

We now turn to the issue of whether the Board should preclude SBBI from filing its proposed amended pleading, or strike the pleading, on grounds other than jurisdiction. The question of whether the Board should allow SBBI to amend its pleading at this late stage of the litigation is governed by Board Rule 6(e). That rule states that a party is allowed to amend its pleading once without leave of the Board before a responsive pleading is filed, and the Board "may permit other amendments on conditions fair to both parties." As for motions to strike, the Board's rules do not specifically address such motions. Instead, the Board has examined motions to strike under Rule 12(f) of the Federal Rules of Civil Procedure. *Mission Support Alliance, LLC v. Department of Energy*, CBCA 4985, 16-1 BCA ¶ 36,210, at 176,683. The rule states that a tribunal, either on its own or pursuant to motion of a party, may strike a pleading that contains material that is "redundant, immaterial, impertinent, or scandalous." Fed. R. Civ. P. 12(f). The granting of this relief, however, is disfavored. *Mission Support Alliance*, 16-1 BCA at 176,683. Here, given that the factual allegations presented in SBBI's proposed amended complaint should have come as no surprise to IBWC, and further, that there is no argument that the factual allegations in the amended complaint are of a kind that fall under any of the descriptive categories in Rule 12(f), the Board will deny IBWC's motion to strike and grant SBBI's motion to file the

amended complaint. We note that the Board has already extended the discovery period for two months based on IBWC's concerns about the timing of SBBI's filing of its proposed first amended complaint. This action mitigates any potential prejudice to IBWC.

Decision

For the foregoing reasons, SBBI's motion for leave to file its first amended complaint is granted, and the first amended complaint is deemed filed. IBWC shall file its answer to the first amended complaint within thirty days of the date of this decision.

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BEVERLY M. RUSSELL  
Board Judge

We concur:

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JERI KAYLENE SOMERS  
Board Judge

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MARIAN E. SULLIVAN  
Board Judge