UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION
GRANTED IN PART: May 16, 2019

CBCA 6208

FLUX RESOURCES, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Eric Whytsell and Rodney W. Stieger of Stinson Leonard Street, LLP, Denver, CO, counsel for Appellant.

Donna Oden-Orr and Jon Wright, Bonneville Power Administration, Department of Energy, Portland, OR, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **SHERIDAN**, and **SULLIVAN**.

**SOMERS**, Board Judge.

Flux Resources, LLC (Flux) appealed a contracting officer's (CO) final decision denying its claim for $338,782.30. The Department of Energy (DOE), through the Bonneville Power Administration (BPA), filed a motion to dismiss the appeal asserting that we lack jurisdiction over the claim and that Flux fails to state a claim upon which relief can be granted. After reviewing all of the submissions by the parties, we grant BPA's motion in part and dismiss a portion of the claim for lack of jurisdiction.

## 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.

On April 25, 2012, DOE and BPA entered into contract no. 00056930, a master agreement entitled "Supplemental Labor-Standard Agreement." On May 1, 2017, BPA and Flux entered into an additional contract, contract no. 00075827. This appeal addresses contract no. 00056930 and contract no. 00075827 collectively as the "Contract."

BPA identified, publicized, and filled its needs for supplemental labor by providing job postings under its Supplemental Labor Information Management System (SLIM). After the issuance of an assignment, Flux provided the services as outlined in the statement of work found on SLIM. BPA determined the hourly rates to be paid for each assignment by "multiplying the appropriate hourly rates prescribed in the Schedule by the number of direct labor hours performed." For each position, the contractor conducted candidate interviews while BPA conducted a skills assessment of the proposed candidates. BPA ultimately chose which individual would fill the position and informed the contractor of its choice.

Flux submitted a candidate for an open Engineering Support Specialist (ESS) 2 position, and BPA approved the hiring of the candidate as an ESS 2 in February 2013. In February 2015, BPA promoted Flux's employee to an ESS 3 position—paying Flux a higher regular time rate for her services. Despite this promotion, Flux maintained that the employee had been operating at an even higher grade, that of a Project Manager (PM) 2 level, for years and was still acting as such despite the lower pay and job titles. Two years later, following discussions focused on the employee's job classification, BPA promoted her to a PM 1 position.

On December 21, 2017, Flux submitted a request for equitable adjustment (REA) for $327,765.60, alleging that the employee had been misclassified and underpaid. Flux calculated the REA by looking at the difference between the actual amounts BPA paid the employee versus the amount that BPA would have paid had the employee been classified as a PM 2 over the time period Flux believed she operated outside of the scope of her job description.

On February 21, 2018, Flux's president submitted a certified claim for $338,782.30 that included a breakdown of Flux's calculations on the amount owed due to the perceived misclassification of its employee. Flux based its relief on the theories of constructive change and a breach of the implied covenant of good faith and fair dealing. On May 24, 2018, the CO issued his final decision denying Flux's claim. The CO found:

> Based upon our review of the projects performed by [the employee], I cannot find any evidence that BPA had made any constructive changes or breached the implied covenant of good faith and fair dealing.... BPA has received no indication that Flux has suffered any sum-certain financial damages…. I find that the contracts in question were performed within scope and at the agreed upon price.

(emphasis removed).

Flux timely appealed the final decision, which identified the amount in dispute as $327,765.60. We do not know the reason behind the discrepancy in cost between the certified claim amount and the amount claimed in the appeal.

*Civil Lawsuit*

On July 31, 2017, Flux's employee filed a civil suit for $300,000 against BPA in the U.S. District Court for the District of Oregon. The suit alleged that BPA violated 42 U.S.C. § 200e-(2)(a)(1) and ORS 659A.030 by "discriminating against [her] in the terms and conditions of her employment, and by not promoting her because she was a woman." In addition, the complaint alleged that BPA violated 29 U.S.C. § 206(d) by paying the employee at an unequal rate since February 2014. The employee sought 1) economic damages including back pay and benefits; 2) non-economic damages; 3) punitive damages; 4) reasonable attorney's fees and costs; 5) a declaration that defendant violated her rights; and 5) other relief as the court considered proper.

On March 18, 2019, the district court granted BPA's motion to dismiss for lack of subject matter jurisdiction on the grounds that the employee had failed to exhaust her administrative remedies before filing her lawsuit.

## Discussion

Pending before us is BPA's motion to dismiss Flux's appeal for lack of jurisdiction and for failure to state a claim upon which relief may be granted. We grant BPA's motion to dismiss Flux's claim for unjust enrichment and lost opportunity on jurisdictional grounds. We deny BPA's motion to dismiss for failure to state a claim.

### I. Motion to Dismiss for Lack of Jurisdiction

A tribunal usually considers a motion to dismiss on jurisdictional grounds before any other motion because without jurisdiction, the tribunal cannot examine the additional matters

placed before it. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95 (1998). BPA asserts that we lack jurisdiction over this appeal because Flux's employee is pursuing claims against BPA in federal district court, and Flux is presenting new claims on appeal that were not presented to the CO.

BPA first argues that 28 U.S.C. § 1500 (2012) (section 1500) provides grounds to dismiss for lack of jurisdiction. Under section 1500:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Thus, a plaintiff that files suit in a district court cannot, while the district court action is still pending, file a suit based on the same claim at the U.S. Court of Federal Claims (COFC). *Harbuck v. United States*, 508 U.S. 200, 212 (1993). However, as the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) observed in *Fort Vancouver Plywood Co.*, section 1500 does not extend to the boards of contract appeals. 860 F.2d 409, 412. While BPA may wish for us to apply the doctrine here, section 1500 does not preclude or eliminate the Board's jurisdiction.

Similarly, BPA asserts that the Board lacks jurisdiction over this case due to the "first filed" doctrine, citing *Appeal of Expedient Services, Inc*., NASABCA 1181-15, 82-1 BCA ¶ 15,662, for the proposition that "administrative contract appeals boards will usually dismiss an appeal where the same parties are litigating the same issue in a federal court." However, the first filed doctrine also rests on the premise that the same parties are in dispute at both venues. Here, the appellant is Flux. In the district court, the plaintiff is the individual employee. Thus, the "first filed" doctrine does not apply.

Next, BPA asserts, under the *Severin* doctrine, that the claim should be dismissed because "any purported derivative liability of Flux is essentially extinguished by [the employee's] election to pursue direct relief" in district court.[1] BPA argues that with the passage of time, the *Severin* doctrine has evolved to allow pass-through claims on behalf of

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[1] *Severin v. United States* held that in the disputes process, a subcontractor's claim may only be recognized if the prime contractor is obligated to pay the subcontractor. 99 Ct. Cl. 435 (1943).

a subcontractor. However, Flux's employee is not a subcontractor, and BPA fails to provide any support for its theory that the doctrine can be applied beyond a prime contractor and subcontractor relationship. We find that the *Severin* doctrine does not apply here.

*Unjust Enrichment Claim*

In addition, BPA asserts that the unjust enrichment portion of Flux's claim does not fall under the Board's Contract Disputes Act (CDA) jurisdiction. 41 U.S.C. § 7102. BPA argues that the CDA only allows for claims arising from express contracts or "implied-in-fact" contracts, and asserts that an unjust enrichment claim arises from an "implied-in-law" contract—falling outside of the Board's jurisdiction. We agree.

The CDA grants us jurisdiction over claims arising from "any express or implied contract" made by an executive agency to procure property, services, or construction, and to dispose of property. 41 U.S.C. § 7102(a). The CDA does not grant the contract appeals boards jurisdiction over claims arising from "implied-in-law" contracts. *Public Warehousing Co.*, ASBCA 56022, 11-2 BCA ¶ 34,788, at 171,227 (citing *Beyley Construction Group Corp.*, ASBCA No. 55692, 08-2 BCA ¶ 33,999, at 168,141; *Amplitronics, Inc*., ASBCA No. 44,119, 94-1 BCA ¶ 26,520, at 131,995; *Eaton Corp.*, ASBCA No. 38386, 91-1 BCA ¶ 23,398, at 117,403). As "an equitable doctrine applied to those situations where the rights and liabilities of the parties are not defined in a valid contract," a claim for unjust enrichment arises from a "implied-in-law" contract. *Jack D. Higgins*, ASBCA 33086, 87-3 BCA ¶ 20,132, at 101,924. Therefore, Flux's claim for unjust enrichment must be dismissed for lack of jurisdiction.

II. Claim Not Presented to CO

BPA asserts that we lack jurisdiction over the part of Flux's claim that was not previously presented to the CO. The Board's CDA jurisdiction can only attach to a claim that was already presented to the CO and denied or deemed denied. 41 U.S.C. §§ 7103, 7104(a). Therefore, a claim made in litigation must be "based on the same claim previously presented to and denied by the [CO]." *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003) (quoting *Cerberonics, Inc. v. United States*, 13 Cl. Ct. 415, 417 (1987)). "A litigated claim differs from a claim presented to the contracting officer if it asserts a new theory of relief involving 'a different or unrelated set of operative facts.'" *Bank of America, National Ass'n. v. Department of Housing and Urban Development*, CBCA 5571, 18-1 BCA ¶ 36,927, at 179,893 (2017) (quoting *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 1990)).

For the first time, in its response to the motion to dismiss, Flux asserts a new claim based on the idea of lost "opportunity cost." Flux argues that "BPA deprived Flux of the opportunity of competing to fill the PM 2 position for the corresponding, higher rate." Essentially, Flux seeks additional compensation for being denied the opportunity to fill a PM 2 position at a higher rate. This claim was not previously presented to the CO in Flux's certified claim. As explained above, in order for the Board to exercise jurisdiction over this claim, it must arise from the same operative facts. The facts before the CO center around the work performed by Flux's employee, not on the work opportunities lost while Flux's employee performed under the contract. Based on Flux's description of how it views lost opportunities, determining costs from these lost opportunities would require the Board to examine a separate set of operative facts that look to whether 1) Flux would have had the opportunity to bid on an open PM 2 position; 2) Flux's employee qualified for the position; and 3) Flux's employee would have been chosen for the position. This claim falls outside the scope of the facts presented to the CO and must be dismissed.

## III. Motion to Dismiss for Failure to State a Claim

Next, we examine BPA's motion to dismiss for failure to state a claim upon which relief may be granted—pursuant to Board Rule 8(c)(1) (48 CFR 6101.8(c)(1) (2017)). Mirroring Federal Rule of Civil Procedure Rule 12(b)(6), to survive this motion before the Board, the "complaint must allege facts [that plausibly suggest] a showing of entitlement to relief." *Kam-Almaz v. United States*, 682 F.3d 1364, 1367 (Fed. Cir. 2012). Assuming that all facts in the complaint are true, the alleged facts must be more than speculative. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This standard does not require the appellant to set out, in detail, all the facts that the claim relies on; however, enough facts must be given that it is plausible for relief. *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009). "Dismissal for failure to state a claim should not be granted unless it appears beyond doubt that the appellant cannot prove any set of facts in support of its claim that would entitle it to relief." *Kiewit-Turner, a Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 14-1 BCA ¶ 35,705, at 174,846.

BPA argues that Flux 1) cannot plead facts sufficient to establish entitlement to relief under the constructive change doctrine and 2) fails to allege facts sufficient to support that BPA breached the implied covenant of good faith and fair dealing. First, BPA asserts that Flux did not allege an additional cost arising from its employee's mischaracterization–-resulting in the failure to state all elements of a constructive change. Second, BPA asserts that because Flux 1) received the expected contract price and 2) does not allege that BPA interfered, Flux fails to allege facts sufficient to support its theory of a breach of good faith and fair dealing.

To survive a motion for dismissal for failure to state a claim, Flux's complaint must allege facts that support the claim that BPA required it to perform outside of the contract's scope and that it is entitled to compensation for this additional work. In addition, Flux's complaint must have alleged facts that plausibly support that BPA breached its duty of good faith and fair dealing by refusing to negotiate with Flux regarding the mischaracterization of its employee. Here, Flux alleges "the misalignment between [its employee's] position and [her] responsibilities was the direct result of BPA's express assignment of the additional responsibilities to [her] above and beyond" her position. Because of these additional assignments and responsibility, Flux claims that it is owed the cost of its employee performing as a higher paid employee.

In addition, Flux claims BPA refused to discuss the problems that Flux continuously brought to its attention, which ultimately resulted from BPA's refusal to negotiate as to the employee's classification as required by the contract. Flux claims that BPA required the employee to perform work beyond contract requirements. Also, according to Flux, the contract called for BPA to work with Flux to classify employees. By refusing to participate in this portion of the contract, Flux asserts a breach.

We accept these legal allegations as true for determining the sufficiency of the complaint. There is no dispute that the employee performed work under the contract. However, the issues of 1) whether the employee performed work outside of the contract's description; 2) whether Flux can substantiate the amount of work that falls outside the work that it was compensated for; and 3) whether Flux can prove that BPA purposefully refused to reclassify the employee for its own profit cannot be resolved by us in this early stage of litigation.

## Decision

BPA's motion to dismiss is granted in part. Flux's claim for unjust enrichment and lost opportunity costs are **DISMISSED FOR LACK OF JURISDICTION**. BPA's motion to dismiss in respect to all other claims for jurisdictional grounds and failure to state a claim is denied.

*Jeri Kaylene Somers*

JERI KAYLENE SOMERS
Board Judge

We concur:

*Patricia J. Sheridan*
PATRICIA J. SHERIDAN
Board Judge

*Marian E. Sullivan*
MARIAN E. SULLIVAN
Board Judge