UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO AMEND COMPLAINT GRANTED; MOTION TO STAY DENIED:
January 6, 2020

CBCA 6559, 6647

WILLIAMS BUILDING COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Kevin M. Cox of Camardo Law Firm, P.C., Auburn, NY, counsel for Appellant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

Before Board Judges **VERGILIO**, **GOODMAN**, and **CHADWICK**.

CHADWICK, Board Judge.

The contractor, Williams Building Company, Inc. (WBC), seeks leave to amend its complaint in CBCA 6559 and asks the Board to stay the consolidated case "until the parties have finished negotiating WBC's termination settlement proposal." The Department of Veterans Affairs (VA) earlier filed a motion to dismiss the original complaint in CBCA 6559 for failure to state a claim for relief. VA opposes WBC's motion to amend the complaint, arguing that amendment is futile, and it argues that staying the case would serve "no legitimate purpose" as WBC "already had an opportunity to negotiate" for the amount at issue here. We grant leave to amend the complaint but we decline to stay the proceedings.

Background

VA awarded WBC a task order for construction work at a medical center in West Haven, Connecticut. According to WBC's proposed amended complaint in CBCA 6559, VA issued the notice to proceed in November 2016. In May 2018, VA suspended work on the contract for a period it described as "14 days or less."

The proposed amended complaint alleges: "On or about April 29, 2019, WBC submitted a request for equitable adjustment ('REA') in the amount of $59,678 . . . for delay costs following the . . . May 21, 2018 suspension . . . . [T]he REA was submitted almost one year after the suspension notice was issued with no certainty from the VA as to how long the delay period would last." The REA sought relief it described as "Eichleay formula for Suspension of Work (Attachment H: 05/21/18–06/15/19)." The *Eichleay* formula, when applicable, allocates unabsorbed home office overhead to a period of no contract billings. *E.g.*, *Nicon, Inc. v. United States*, 331 F.3d 878, 882 (Fed. Cir. 2003). WBC converted the REA to a claim in May 2019.

The contracting officer denied the claim in June 2019. He wrote in relevant part, "The Contractor was not required to remain [o]n standby to immediately resume construction on the site during the suspension." WBC filed CBCA 6559 in July 2019.

The proposed amended complaint in CBCA 6559 alleges that a month later, in August 2019, WBC submitted a "supplemental claim" to the contracting officer for the same "*Eichleay* costs." The proposed amended complaint incorporates by reference WBC's "supplemental claim" and alleges that "[i]n the Supplemental Claim, WBC asserts, *inter alia*, that there was a VA-caused delay, the delay extended the time of performance of the Contract, and [WBC] was required to remain on standby during the delay. These facts, if proven, establish a *prima facie* case for Eichleay damages," citing *P.J. Dick Inc. v. Principi*, 324 F.3d 1364, 1370 (Fed. Cir. 2003).

Also in August 2019, VA moved to dismiss the original complaint in CBCA 6559 for failure to state a claim. WBC opposed dismissal on the grounds that VA's motion was "moot," given that the contracting officer had recently terminated the task order for the convenience of the Government. WBC argued that, in light of the alleged mootness, we should allow WBC to "discontinue[]" CBCA 6559 "without prejudice," an option VA opposed. *See* Board Rule 12(b)(2) (48 CFR 6101.12(b)(2) (2019)) ("[T]he Board will dismiss all or part of a case on the terms requested if the appellant . . . moves for dismissal with prejudice or moves jointly with the respondent for dismissal . . . without prejudice."). In the alternative, WBC argued that the Board should stay CBCA 6559 "until the Board ha[d]

jurisdiction" in an appeal from a denial of WBC's August 2019 "supplemental claim." WBC did not argue that its original complaint in CBCA 6559 stated a claim for relief.

In November 2019, after a warning from the panel that the appeal did not appear to be "moot" and that "[t]he Board is disinclined to sit on a complaint that the agency has pointed out, and WBC seems to agree, does not state a claim for relief," WBC filed the instant motion to amend its complaint in CBCA 6559 and to stay the case.

Also in November 2019, WBC filed an appeal (CBCA 6647) from a deemed denial of its August 2019 "supplemental claim." The Board granted a joint motion to consolidate the two appeals and to waive separate pleadings in CBCA 6647.

Discussion

VA urges us to deny WBC leave to amend (and to revive VA's earlier motion) on the grounds that the proposed complaint "would not survive a motion to dismiss," an indicator of futility. *See Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. de C.V.*, 464 F.3d 1339, 1354–55 (Fed. Cir. 2006). We disagree. "We apply essentially the same standard as would a federal trial court when ruling on a motion to dismiss for failure to state a claim." *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272, at 181,366 (citing Board Rule 8(e)). Under this standard, a complaint must allege facts "'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). The *Twombly* plausibility test altered the prior rule that a tribunal 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, 45–46 (1957), *abrogated in relevant part by Twombly*, 550 U.S. at 561–63. Although the "no set of facts" standard still occasionally appears in dicta in our decisions, federal courts have not used it for over a decade. *See, e.g.*, *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009).

While inartfully drafted, the proposed first amended complaint in CBCA 6559 plausibly alleges that WBC was on standby, as is required to recover using the *Eichleay* formula. *E.g.*, *BCPeabody Construction Services, Inc. v. Department of Veterans Affairs*, CBCA 5410, 18-1 BCA ¶ 37,013, at 180,256. WBC's August 2019 "supplemental claim," which WBC's proposed pleading incorporates "by reference," alleges in so many words that WBC "was on 'stand-by' during the suspension." Although we do not know why WBC does not simply repeat that direct allegation in its pleading, *see* Rule 6(a) (a complaint should "stat[e] in simple, concise, and direct terms the factual basis for each claim"), the incorporation achieves the same result. We understand WBC to be alleging that its August

2019 assertion regarding its standby status is true. We reject VA's arguments that the proposed amendment is deficient because WBC does not go on to allege in detail, for example, that it "was required to keep workers or equipment on site," or that VA expressly imposed "a requirement to resume work immediately or on short notice after the suspension." Those aspects of standby status can be explored in discovery but need not be itemized in a notice pleading. *E.g.*, *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) ("Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." (internal quotation marks omitted)).

With the complaint amended, we see no grounds to stay the case over VA's objection. The Board seeks "the just, informal, expeditious, and inexpensive resolution of every case." Rule 1(c). WBC argues for a stay pending the negotiation of its termination settlement proposal because "the burden on a contractor to prove Eichleay damages is far less in the context of a termination settlement than in a normal claim setting," citing *Nicon*. We see nothing in *Nicon* that supports WBC's argument, and we know of no other basis for it. *Nicon* involved "a unique factual situation." 331 F.3d at 883. The agency had "terminated the contract after a lengthy delay, and the contractor was never permitted to perform any aspect of the contract." *Id*. The Court of Appeals agreed with the court below "that the *Eichleay* formula is only applicable in situations in which contract performance has begun," but it proceeded to hold that "a contractor, *who is required to remain on standby* because of a government-caused delay but is never allowed to begin performance, may . . . receive some of its unabsorbed home office overhead as part of its termination for convenience settlement by some other method of allocation." *Id*. at 884 (emphasis added). The limited rule announced in *Nicon* has no application here. WBC performed for a year and a half and proposes an *Eichleay* calculation. We are cited no authority relaxing, in any context, the rule that "[s]tandby combined with an inability to take on additional work are the two prerequisites for application of the *Eichleay* formula, because taken together they prevent the contractor from mitigating unabsorbed overhead when it is incurred." *Interstate General Government Contractors, Inc. v. West*, 12 F.3d 1053, 1058 (Fed. Cir. 1993).

As WBC gives us no reason to expect that addressing its claim for unabsorbed home office overhead in the context of a termination settlement dispute, rather than in the appeals before us, would make any difference, and it offers no other grounds to stay the case over VA's objection, we decline to do so.

Decision

We **GRANT** WBC's motion to amend its complaint in CBCA 6559, effective on the date of this decision, and **DENY** the motion to stay.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge