UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION TO PRECLUDE GRANTED;
APPELLANT'S MOTION TO COMPEL DENIED:
August 9, 2021

CBCA 6597

ACTIVE CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Terry R. Marston II of Marston Legal, PLLC, Kirkland, WA, counsel for Appellant.

Rayann L. Speakman, Office of the Chief Counsel, Federal Highway Administration, Department of Transportation, Vancouver, WA, counsel for Respondent.

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

LESTER, Board Judge.

Appellant, Active Construction, Inc. (ACI), filed a motion to compel the Federal Highway Administration (FHWA) to produce documents that, according to ACI, relate to its argument that FHWA surreptitiously blamed ACI for delays and changes to cover up their real cause: a lack of sufficient funding to support ACI's contract. FHWA has refused to produce those documents based upon its belief that contract funding and bad faith issues are not properly before the Board. FHWA also invoked the deliberative process privilege as a basis for withholding 1162 documents responsive to FHWA's funding issue document production requests.

After ACI filed its motion to compel, FHWA filed its own motion to preclude ACI from arguing that FHWA surreptitiously hid funding deficiencies, asserting that, because the certified claim underlying this appeal did not include that issue, the Board lacks jurisdiction to entertain it. FHWA argues that (1) the Board should preclude ACI from seeking damages based upon that issue in this appeal, and (2) because the documents, the production of which ACI seeks, are irrelevant to any issue in this appeal other than funding and surreptitious conduct matters, ACI's motion to compel should be denied.

As we explain further below, we agree with FHWA that the Board lacks jurisdiction to entertain ACI's implied duty breach claim arising out of FHWA's alleged lack of funding. Accordingly, we grant FHWA's motion to preclude ACI from raising that issue in this appeal. Because the documents that ACI is seeking are irrelevant to any issue properly before the Board, we deny ACI's motion to compel.

Background

ACI entered into a contract with FHWA on March 12, 2014, to reconstruct approximately 9.7 miles of Middle Fork Road in North Bend, Washington.

On April 5, 2018, ACI submitted to the FHWA contracting officer a 222-page "consolidated" request for equitable adjustment (REA) in which it asserted entitlement to more than $7 million in costs allegedly incurred as a result of constructive changes, differing site conditions, and delays. Among other things, ACI alleged in the REA that it had depended upon blasting work to process and use rocks for this project but that differing site conditions hindered that work, forcing ACI to import rocks from other areas. ACI further alleged that FHWA's failure timely to specify corrective measures caused extensive delays in the completion of the project. In the REA, ACI broke its request down into fifty-four individual claims, with the factual circumstances giving rise to each particular claim being explained in some detail.

ACI converted the REA to a certified claim on November 8, 2018. On August 16, 2019, the FHWA contracting officer issued a 279-page decision denying all but $297,923.36 of ACI's claim.

ACI appealed the contracting officer's decision to the Board on September 9, 2019. At the parties' request, after the complaint and answer were filed and the Rule 4 appeal file submitted, the Board issued a scheduling order giving the parties until March 13, 2020, to serve written discovery requests, followed by an extended period for document review, expert witness disclosures, and fact and expert depositions. Following requests for enlargements of time from the parties, the deadline for completing fact and expert discovery was ultimately set as April 16, 2021.

In accordance with the Board's scheduling order, ACI served written requests for production of documents on FHWA by the original March 13, 2020, deadline. In request no. 2, ACI sought production of "[a]ll documents, accounting, or other information pertaining to whether, at any time during the Project, an officer or employee of the United States Government authorized an expenditure or an obligation for work performed or to be performed on the Middle Fork Project exceeding the amount available in any appropriation or fund for that expenditure or obligation." In its May 22, 2020, written response, FHWA objected to the relevance of this request, stating that neither ACI's claim nor its complaint contained any allegations about surreptitious conduct or funding issues and that, as a result, such issues could not be litigated in this appeal.

The record identifies no further communications about request no. 2 until ten months later. On March 22, 2021, ACI wrote to FHWA challenging the agency's alleged failure properly to respond to request no. 2. ACI asserted that documents responsive to that request were relevant because, "[a]fter the first year of the project, FHWA was denying, undervaluing, and/or taking no action on change order requests with such frequency that ACI was forced to conclude that FHWA did not have sufficient funds to pay for the changes" and "that FHWA resorted to bad faith practices to keep the project moving—at ACI's expense—due to its lack of timely access to the funds necessary to pay for legitimate changes."

On April 5, 2021, two weeks before discovery was scheduled to conclude, ACI filed a motion to compel. It alleged that FHWA's lack of adequate funding to pay for changes encountered on the project was a cause of project delays and that "FHWA's non-responsiveness, its issuance of unilateral modifications lacking mechanisms for interim payments, and its denial of legitimate changes were all symptoms of its lack of sufficient funding." ACI asserted that FHWA, instead of acknowledging that lack of funding during contract performance, engaged in a subterfuge designed to cover up those funding problems and improperly blamed ACI for problems arising on the job. It challenged FWHA's deliberative process privilege claims and demanded that FWHA produce all documents responsive to its written document production requests that would show FWHA's funding availability at various times during the project and other related documents.

FHWA declined to produce funding documents and, as part of its response to the motion to compel, provided the Board with a declaration from the Division Director for FHWA's Western Federal Lands Highway Division formally invoking the deliberative process privilege over many responsive documents. Further, on June 3, 2021, FHWA filed a motion to strike ACI's arguments about funding issues and FHWA's alleged bad faith, arguing that the Board lacks jurisdiction to consider them because they were not set forth in ACI's certified claim. Both ACI's motion to compel and FHWA's motion to strike are fully briefed.

Discussion

FWHA's Motion to Bar ACI's Funding Deficiencies Argument

ACI asserts in its briefing that its "theory of the case is not simply that [FHWA] denied its claims, but that many of ACI's claims (and certainly its delay and impact claims) would not have arisen but for FHWA's lack of timely, adequate funding to pay for the changes encountered on the project" and FHWA's efforts to conceal that lack of funding. And yet, the certified claim underlying this appeal says nothing about funding issues, funding deficiencies, or surreptitious concealment efforts.

FHWA has labeled its motion as one to strike ACI's allegations about funding deficiencies and bad faith cover-ups, but there are no specific allegations about funding or bad faith in ACI's complaint to strike. The basis of FHWA's motion is that the Board lacks jurisdiction to consider those arguments because ACI did not include them in its certified claim and that ACI should be barred from pursuing monetary relief on those arguments here. FHWA's motion is, in essence, a motion to preclude the introduction of any evidence or argument in this appeal about ACI's claim of bad faith relating to funding. *See, e.g.*, *Font v. EQT Production Co.*, No. 1:15-CV-68, 2018 WL 1725608 (N.D. W. Va. Apr. 6, 2018) (granting motion to preclude certain factual arguments from being raised in the litigation); *Smith v. Andersen*, No. 01-CV-0218, 2005 WL 5976558 (D. Ariz. Dec. 1, 2005) (same). We consider the motion in that context.

Our jurisdiction to entertain an appeal from a contractor seeking monetary relief in a case under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), is framed by and dependent upon the certified claim that the contractor originally submitted to the contracting officer. *Kneeland Construction Corp.*, DOTCAB 4060, 99-2 BCA ¶ 30,574. A claim "must contain 'a clear and unequivocal statement that gives the contracting officer notice of the basis and amount of the claim.'" *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (quoting *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1997)). Its purpose is to "giv[e] the contracting officer an ample pre-suit opportunity to rule on a request, knowing at least the relief sought and what substantive issues are raised by the request." *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015).

Once a contracting officer's decision on a contractor's claim is appealed to the Board, the Board's jurisdiction is limited to "those claims which satisfy the requirements of an adequate statement of the amount sought and an adequate statement of the basis of the request." *K-Con Building Systems*, 778 F.3d at 1005. "Although a contractor, when proceeding before this Board, may increase the amount of [a] claim" previously submitted to the contracting officer, "it 'may not raise any new claims not [previously] presented and

certified to the contracting officer."' *Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539 (quoting *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987)). Part of the test for whether a new legal theory or argument is a separate "claim" from what the contractor originally submitted is whether both arise out of the same operative facts:

> "In determining whether a contractor's attempt to alter the legal theories underlying its claim constitutes a 'new' claim, tribunals 'look at whether the new issue is based on the same set of operative facts' as the claim submitted to the contracting officer." [*Crane & Co.*] (quoting *Foley Co. v. United States*, 26 Cl. Ct. 936, 940 (1992), *aff'd*, 11 F.3d 1032 (Fed. Cir. 1993)). "Operative facts are the essential facts that give rise to a cause of action," *id.* (quoting *Kiewit Construction Co. v. United States*, 56 Fed. Cl. 414, 420 (2003)), and "[a] claim is new when it 'present[s] a materially different factual or legal theory' of relief." *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017) (quoting *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015)).

VSE Corp. v. Department of Justice, CBCA 5116, 18-1 BCA ¶ 36,928 (2017). In evaluating whether a newly raised issue substantially shares the same operative facts as those identified in the underlying certified claim, "we have to take a common-sense look at the degree to which the facts underlying both [the original claim and the new issue] are intertwined and interrelated, considering whether 'the same or related evidence' is relevant to both." *Quality Control International v. General Services Administration*, CBCA 5008, 17-1 BCA ¶ 36,675 (quoting *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)).

ACI acknowledges that it did not expressly mention funding issues, surreptitious conduct, or bad faith in its REA. It did not need to, it asserts, because the twenty-third claim in its REA is based upon a breach of the implied duty of good faith and fair dealing, which is the same *legal* theory upon which it is now relying to support its funding deficiencies issue. Specifically, in its twenty-third claim, ACI alleged that it had asked FHWA to allow it to substitute certain concrete overlay mixes for the latex modified concrete that the contract identified. FHWA responded that it would consider ACI's request for an alternative overlay material, and ACI subsequently prepared a Value Engineering Change Proposal (VECP) that FHWA eventually approved. ACI alleged in its REA, however, that the entire process took an unreasonable amount of time and that FHWA's "inability to respond in a timely manner and failure to comply with the implied duty to co-operate . . . forced [ACI] to cancel the work and reschedule for [the following] year." ACI further asserted that "FHWA's untimely insistence on the submission of a VECP before permitting ACI to place the [alternative] overlay prevented ACI from placing the overlay as scheduled" and that, as a result, it was

entitled to $7241.32 "for costs arising from FHWA['s] failure of its duty to do what is reasonably necessary to keep the project in a state of forwardness."

As ACI correctly notes, a breach of the duty to cooperate, as alleged in ACI's twenty-third claim, is one of the implied duties encompassed within the broader duty of good faith and fair dealing. *Agility Public Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370, 1384 (Fed. Cir. 2017). Just because ACI raised one implied duty breach argument in its certified claim, however, does not necessarily provide the Board with jurisdiction to consider *other* implied duty breach arguments. In looking to whether a contractor has raised a new claim before the Board that is not encompassed within the underlying certified claim, we look not at the legal theories that the contractor identified in its claim but at the *factual allegations* in the certified claim. Only if "the new issue is based on the same set of operative facts as the claim submitted to the contracting officer" can we find that the contractor has not raised a new claim. *Crane & Co.* (internal quotation mark removed). "The 'sameness' of operative facts is based on the underlying events causing the litigation, not the legal theories asserted, the identity of the defendants, or the portion of facts litigated." *Regents of New Mexico State University v. United States*, No. 92-627C, 1994 WL 16867518, at *2 (Fed. C1. May 31, 1994).

The twenty-third claim in ACI's REA has nothing to do with funding issues, funding discrepancies, or surreptitious attempts by FHWA to blame ACI for delays and changes that were actually caused by funding problems. Simply because both ACI's funding discrepancies claim and its VECP claim can be described as involving good faith and fair dealing duty breaches does not mean that they are one and the same. To the contrary, the good faith and fair dealing duty doctrine "is not truly a single concept capable of a concise definition, but a duty that encompasses numerous concepts" involving at least six different types of violations. *CAE Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377. ACI's twenty-third claim identifies a good faith duty breach involving a failure to cooperate, without any mention of intent, while the good faith duty breach now being alleged involves intentional misrepresentations and intentionally surreptitious conduct, a different type of good faith duty breach bordering on bad faith. *See Lee's Ford Dock*, 865 F.3d at 1370 (allegations involving an agency's actions based on mistaken belief or negligence are "logically inconsistent" and not based on the same set of operative facts as allegations of intentional misrepresentation). "Once the role of the contracting officer has been circumvented by predicating a claim on a new factual theory," as here, "the party has submitted a claim differing from the basic operative facts of the original claim." *Ketchikan*

Indian Community v. Department of Health & Human Services, CBCA 1053-ISDA, et al., 13-1 BCA ¶ 35,436.[1]

That ACI's funding deficiencies cover-up claim is not based upon the same operative facts as the other claims in its REA is supported by the fact that the discovery necessary for the new claim is different than, and separate from, that necessary for its REA claims. *See Placeway Construction*, 920 F.2d at 907 (focusing on whether "the same or related evidence" supports both claims). In its motion to compel, ACI identifies Federal Acquisition Regulation (FAR) 43.105 (48 CFR 43.105 (2020)), titled "Availability of Funds," as support for its new theory, citing that provision's requirement that contracting officers not execute contract modifications "without first having obtained a certification of fund availability." ACI acknowledges in its briefing that the documents that ACI seeks, relating to such certifications, appropriations allocations and spending information, and internal agency discussions about funding, relate only to ACI's new theory. That separateness of discovery evidences that the operative facts underlying the REA and ACI's funding claim are not the same.

Finally, ACI asserts that its funding deficiencies cover-up issue was sufficiently preserved because, even if it did not adequately raise the duty of good faith and fair dealing in its REA, it raised it in its complaint. Yet, it is the certified claim, not the complaint, that defines the Board's jurisdiction to consider an issue. *P.K. Management Group, Inc. v. Department of Housing & Urban Development*, CBCA 6185, 19-1 BCA ¶ 37,417, *aff'd*, 987 F.3d 1030 (Fed. Cir. 2021). Similarly, ACI's assertion that its counsel raised the funding issue with FHWA counsel in early litigation conversations, if true, is of no effect. If the operative facts of a claim are not encompassed within the claim document submitted to the contracting officer, we lack jurisdiction to consider the claim, regardless of disclosures made during the appeal.[2] *See EnergX, LLC v. Department of Energy*, CBCA 3060, 17-1 BCA ¶ 36,633 ("The lack of a claim cannot be cured [during appeal].").

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[1] We similarly reject ACI's additional argument that it adequately provided notice of its current funding deficiencies cover-up claim when it asserted in the first, second, third, fourth, fifth, twelfth, twenty-first, and thirty-third claims in its REA that FHWA did not respond, or delayed in responding, to various submissions that ACI had made during the course of contract performance. None of those claims mentions or is related to funding or illicit motives. Similarly, ACI's mention of "inadequate coordination" in its claim for labor and equipment inefficiency (ACI's fifty-fourth claim) provides no notice of and is not based on the same operative facts as ACI's funding deficiencies cover-up claim.

[2] In any event, the mention of the good faith and fair dealing doctrine in ACI's complaint was wholly conclusory and provided no notice of what facts ACI believed created a breach of that duty.

ACI's Motion to Compel

ACI acknowledges that the documents it seeks are tied solely to its funding deficiencies cover-up issue, an issue that we lack jurisdiction to consider. Pursuant to Rule 26(b)(1) of the Federal Rules of Civil Procedure, which governs the scope of discovery before the Board (48 CFR 6101.13(b)), a party "may obtain discovery regarding any nonprivileged matter that is relevant to [the] party's claim or defense and proportional to the needs of the case." Because we lack jurisdiction to consider ACI's funding deficiencies claim, the documents that ACI is seeking are not relevant to any issue properly before us. Accordingly, ACI's motion to compel is denied.[3]

Decision

For the foregoing reasons, FHWA's motion to preclude ACI from pursuing in this appeal its claim regarding FHWA efforts to cover up funding discrepancies is **GRANTED**. ACI's motion to compel the production of documents in support of that claim is **DENIED**.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

[3] In light of this disposition, we need not address FHWA's arguments that ACI failed properly to meet and confer before filing its motion to compel and that ACI's motion to compel was untimely filed, ACI's argument that FHWA's invocation of the deliberative process privilege was procedurally defective, or the merits of FHWA's deliberative process privilege claims.