



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION TO DISMISS GRANTED IN PART; APPELLANT'S
MOTION TO AMEND COMPLAINT GRANTED IN PART: January 21, 2021

CBCA 6892

AHTNA CONSTRUCTION & PRIMARY PRODUCTS COMPANY, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Adam W. Cook and Shane C. Coffey of Birch Horton Bittner & Cherot, Anchorage, AK, counsel for Appellant.

Jennifer McVey Thomas and Boykin D. Lucas, Office of the General Counsel, Department of Agriculture, Juneau, AK, counsel for Respondent.

Before Board Judges **SHERIDAN**, **BEARDSLEY**, and **CHADWICK**.

SHERIDAN, Board Judge.

Appellant, Ahtna Construction & Primary Products Company, LLC (ACPPC), filed an initial complaint with the Board on September 8, 2020, seeking costs incurred performing a contract with differing site conditions, defective specifications, excusable delay, and constructive acceleration. Respondent, Department of Agriculture (the Government), filed an answer and a partial motion to dismiss on October 7, 2020. In response, ACPPC moved for leave to file an amended complaint. Respondent objects to the motion, arguing that the amendment presents new claims and continually fails to state a claim on some issues. For the reasons set forth below, we grant, in part, ACPPC's motion for leave to amend and grant, in part, the Government's motion to dismiss.

Background

I. ACPPC's Original Claim

In February 2018, the Government awarded contract 12SPEC18C0009 to ACPPC. The contract concerned the remediation of the Delta-Clearwater Project Phase 2 in Delta Junction, Alaska. The work consisted of creating a storm water diversion basin and stabilizing the area with plants and woody debris. More specifically, the work involved excavating and using “fill” from the project site and other sources to regrade the basin.

The contract specified that the work be completed 150 days from the date of issuance of the notice to proceed (NTP). Alaska is very cold and the native soils remain frozen for most of the year, which means that there is a short construction season in which the soils are thawed. Per the contract specifications, materials used as fill could not contain frozen matter. A limited NTP was issued on March 12, 2018, in which ACPPC was allowed to begin mobilization and staging. In April and May, ACPPC dug test holes at the site and discovered frost. Government representatives were present during one of the May testings. The official NTP was issued on June 4, 2018. ACPPC completed the contract on September 14, 2019. Throughout performance, ACPPC alleges it encountered differing site conditions, weather issues, delay, and acceleration.

ACPPC filed a certified claim with the contracting officer on February 11, 2020. ACPPC sought an equitable adjustment for \$3,190,599.41 based on alleged type I differing site conditions, defective specifications, acceleration, and delay.

Regarding type I differing site conditions, ACPPC alleged that the Government represented that the fill would be suitable to use to regrade the basin. ACPPC claimed that during the pre-bid process it learned nothing about the fill conditions because the ground was covered in snow, so it relied on the specifications and representations from the Government. ACPPC alleged that the fill was still partly frozen when work commenced, which caused delay and other issues because ACPPC could not use the frozen material for regrading.

ACPPC asserts that the specifications were defective regarding the suitability of the onsite fill and the quantity of suitable riprap. ACPPC also found fault with the specification regarding the seeding and planting component of the contract. ACPPC alleges that it followed the specifications for seeding and planting but still had most of its work rejected by the Government.

Concerning acceleration, ACPPC argued that the contracting officer had it accelerate to working seven days a week for twelve hours each day. ACPPC's final argument sought

costs for delay. ACPPC argued that site conditions, defective specifications, and severe weather, notably heavy rainfall, all combined to delay the project seventy-seven days.

II. The Contracting Officer's Decision

On July 17, 2020, the contracting officer issued a final decision denying the claim in its entirety. The contracting officer denied the type I differing site conditions claim, finding that the Government made no representations as to the conditions of the fill. He remarked that the actual subsurface conditions were reasonably foreseeable and that ACPPC incurred costs due to its faulty work plan, not differing site conditions. The contracting officer also found that the specifications were not defective, and instead asserted that ACPPC incurred costs because it did not adequately comply with the specifications for the onsite fill, the riprap, and the seeding and planting. The contracting officer denied the delay claims ACPPC attributed to differing site conditions and defective specifications, but credited ACPPC with fifteen days of excusable weather delay during the initial period of performance. However, the contracting officer refused to grant excusable delay claims outside of the allotted performance time. Regarding the alleged acceleration, the contracting officer argued that it was necessary because ACPPC had fallen behind the approved schedule, thus allowing the contracting officer to order acceleration without compensation.

III. ACPPC's Original Complaint to the Board

ACPPC timely appealed the contracting officer's final decision to the Board on August 6, 2020. The complaint contained one count on the same grounds discussed in the claim filed with the contracting officer. Namely, the complaint stated that ACPPC seeks an equitable adjustment of \$3,190,599.41 for costs incurred during performance due to type I differing site conditions, defective specifications, delay, and acceleration. ACPPC also sought reasonable attorney fees and a reversal of the contracting officer's final decision.

IV. The Government's Response

The Government responded with an answer and a partial motion to dismiss, specifically seeking to dismiss the type I differing site conditions claim, the claim alleging defective specifications related to the fill and planting aspects of the contract, and the delay claim. The Government argues that ACPPC did not perform adequately because it completed the project eleven months after the original completion date. The Government seeks to dismiss several claims for "failure to state grounds on which the Board can grant relief."

Regarding the type I differing site conditions claim, the Government argues that it should be dismissed because ACPPC did not allege that it relied on affirmative

representations from the Government regarding the suitability of the fill and the subsurface conditions. Further, the Government posits, even if ACPPC did allege that it relied on representations from the Government, that argument is precluded based on a plain reading of the contract because a plain reading of the contract did not include any indications as to the subsurface conditions at the project site.

Regarding the defective specifications claim, the Government objects to the claim involving the onsite fill and the planting. As for the fill claim, the Government repeats the arguments it made regarding the differing site conditions claim. The Government asserts that with the planting claim, ACPPC alleges that there were no contract specifications for planting and so ACPPC cannot argue that it reasonably relied on defective specifications.

Finally, the Government argues that the delay claim was not presented to the contracting officer in the certified claim and so it must be dismissed for lack of subject matter jurisdiction.

V. The Motion to Amend

ACPPC subsequently filed a motion for leave to file an amended complaint. ACPPC seeks to amend its complaint to drop one cause of action while clarifying the other causes of action and supplementing the facts. The amended complaint goes into more detail in the facts section, laying out what the contract specifications said and how ACPPC encountered different circumstances and other difficulties during performance. The amended complaint contains seven distinct causes of action.

The Government responded saying that ACPPC's amendment is futile because there are new and old claims subject to dismissal that were not presented to the contracting officer and the differing site conditions and defective specification arguments still fail to state a claim because they are refuted by the plain language of the contract.

Discussion

We have before us the Government's partial motion to dismiss for failure to state a claim. The Government alleges that appellant has failed to state a claim with regard to ACPPC's type I differing site conditions claim, and its defective specifications claims relating to subsurface conditions in stockpiled borrow and planting. The Government also alleges that the Board lacks subject matter jurisdiction to consider a "new" delay claim that was not submitted to the contracting officer. Appellant requested leave to submit an amended complaint, presumably to correct some of the issues raised by the Government in its motion.

I. The Amended Complaint Contains Claims for which Relief Cannot be Granted

The Government objects to ACPPC's motion for leave to amend for two reasons. First, the Government argues that the amended complaint is futile because it still fails to state a claim with regard to both ACPPC's type I differing site conditions claim, and its defective specifications claims relating to subsurface conditions in stockpiled borrow and planting. Concerning futility and a motion to amend, the Board applies "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 (citing Board Rule 8(e) (48 CFR 6101.8(e) (2018))). For purposes of deciding a motion to dismiss, the Board "presume[s] that the facts are as alleged in the complaint, and make[s] all reasonable inferences in favor of the [appellant]." *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009). In the government contracts context, the motion to dismiss standard requires a plaintiff or appellant to provide "sufficient factual allegations in the complaint to support success on the type of contract claim alleged in the complaint." *Extreme Coatings, Inc. v. United States*, 109 Fed. Cl. 450, 455 (2013) (citing *Todd Construction, L.P. v. United States*, 656 F.3d 1306, 1317 (Fed. Cir. 2011)).

ACPPC alleges that it encountered a type I differing site condition because the ground was still partly frozen when it commenced work. To prove a type I differing site condition, ACPPC must establish the following elements: (1) "the conditions 'indicated' in the contract differ materially from those it encounter[ed] during performance," (2) "[t]he conditions encountered must have been reasonably unforeseeable based on all the information available to the contractor at the time of bidding," (3) "it reasonably relied upon its interpretation of the contract and contract-related documents," and (4) "it was damaged as a result of the material variation between the expected and the encountered conditions." *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, et al., 16-1 BCA ¶ 36,468 (quoting *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987) (citations omitted)). Additionally, "[a] contractor is not eligible for an equitable adjustment for a Type I differing site condition unless the contract indicated what that condition would be." *Tucci & Sons, Inc. v. Department of Transportation*, CBCA 4779, 17-1 BCA ¶ 36,599 (2016) (quoting *Control, Inc. v. United States*, 294 F.3d 1357, 1363 (Fed. Cir. 2002)).

The Government argues that ACPPC's type I differing site conditions claim must be dismissed because ACPPC does not "allege an affirmative representation or indication in contract documents about the frozen soil at issue in this case." Additionally, the plain language of the contract shows that the Government made no representations as to the subsurface conditions.

We agree. ACPPC points to the contract specifications that prohibited use of frozen earth or material and the contract language that stated that the Government would issue the

NTP “once the weather conditions are suitable for actual construction work to commence at the project site.” ACPPC argues that because frozen material could not be used, it did not expect to encounter any. ACPPC also interprets the NTP language to indicate that the Government was waiting for the earth to thaw completely. But ACPPC does not mention any specific language in the contract that says there would be no frozen material in the ground. Further, the Government makes a compelling argument in that because frozen material is expressly prohibited from use, ACPPC was put on notice that frozen material might be encountered. Finally, ACPPC references verbal conversations with Government officials in which ACPPC alleges it was told the NTP would not be issued before the ground was thawed. But verbal communications do not supersede contract language. *See RMA Engineering S.A.R.L. v. United States*, 140 Fed. Cl. 191, 232 (2018) (“Even assuming that a government official represented that the soils were of appropriate bearing capacity, such a statement was not reflected in the Contract so no misrepresentation was made.”). The contract makes no representations as to the subsurface conditions at the work site, and because it is foreseeable that frozen earth and material might be encountered, ACPPC has not met the burden to plead a type I differing site condition claim.

Second, the Government moves to dismiss the defective specifications claims regarding the stockpiled borrow and planting. “When the Government provides a contractor with design specifications, such that the contractor is bound by contract to build according to the specifications, the contract carries an implied warranty that the specifications are free from design defects.” *Drennon Construction & Consulting, Inc. v. Department of the Interior*, CBCA 2391, 13 BCA ¶ 35,213 (quoting *White v. Edsall Construction Co.*, 296 F.3d 1081, 1084 (Fed. Cir. 2002)). “The overall rationale for an equitable adjustment of this type is that the contractor experienced additional costs in completing the project which were caused by its reliance on defective specifications or plans.” *Magnus Pacific Corp. v. United States*, 133 Fed. Cl. 640, 676 (2017).

The Government argues that the defective specifications claim for the stockpiled borrow is a repackaging of the type I differing site conditions claim. ACPPC, however, is not challenging contract indications or government representations of the conditions of the stockpiled borrow. Rather, ACPPC argues that “contract provisions describing the start date, duration of work, space of operation, and quantities required” were defective based on the actual conditions encountered at the work site. We find that ACPPC’s defective specifications claim is not a repeat of the type I differing site condition claim but rather is a distinct claim alleging that it incurred additional costs by relying on defective contract provisions.

For the planting, ACPPC alleges that it performed according to the contract specifications but had most of its work rejected by the Government, forcing them to redo it. The Government argues that the contract specifications were clear and suggests that ACPPC

may not have reached the required depth for the plants. ACPPC responds by pointing out that if the depth was not right, then the specification was defective because it dug to the depth stated in the specification. ACPPC also argues that if the specification was not defective, the Government constructively changed the specification when it had ACPPC redo the work. We find that ACPPC may make alternative arguments regarding this matter without it becoming a new claim.

II. The Amended Complaint Contains No New Operative Facts or Claims

The Government argues that ACPPC's amendment contains numerous references to new operative facts and brings additional claims that were not presented to the contracting officer. As a result, the Government argues, the new claims and facts would be subject to dismissal for lack of jurisdiction. Accordingly, adding these new facts and claims would be futile.

The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018), 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. *SBBI, Inc. v. International Boundary & Water Commission*, CBCA 4994, 17-1 BCA ¶ 36,786. "Claim" is not defined in the CDA, but is defined 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." *Id.* (quoting 48 CFR 2.101). Claims over \$100,000 require certification. 41 U.S.C. § 7103(b).

As we stated in *SBBI, Inc.*:

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," 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 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.” *Id.* (quoting *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)). “This standard, however, does not require rigid 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). “[A]dding factual details or legal arguments does not create a different claim.” *K-Con Building Systems*, 778 F.3d at 1006. Instead, a contractor presents a jurisdictionally-precluded claim to the Board when the claim “either request[s] different remedies (whether monetary or nonmonetary) 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.

In its reply to ACPPC’s amendment, the Government lists several facts that it argues are new and were not presented to the contracting officer. The main contention is that the amended complaint discusses new facts regarding the conditions of the work site. The amended complaint details how ACPPC found frozen materials and frozen earth where it expected the conditions to be thawed enough for work. It describes the difficulties ACPPC had thawing earth and fill in an effort to complete the project.

We disagree with the Government’s arguments that ACPPC’s amended complaint contains factual allegations that were not encompassed in the certified claim. Indeed, the “new” factual allegations were all before the contracting officer and not in an opaque or inferential way. The factual allegations presented in ACPPC’s amended complaint are readily found in the certified claim or the supporting documentation to that claim. Throughout the certified claim, ACPPC remarked that it expected the conditions to be thawed enough for them to work and were disheartened to discover that the earth and onsite material was still partially frozen. ACPPC also clearly mentioned that it was struggling to thaw the materials in the space allotted.

In the event that the Government still objects to the weather delay claim, we find that not only did ACPPC specifically delineate severe weather as a separate cause of action in the certified claim, ACPPC also included weather delay facts with the other causes of action.

There are no new operative facts here. Rather, ACPPC gave a more detailed fact statement augmenting the initial facts presented to the contracting officer.

III. Appellant's Request to Withdraw Certain Arguments

Appellant has indicated that the only substantive change between the original claim and the amended complaint is "the voluntary removal of a claim relating to organic materials." The Government does not object to ACPPC not pursuing this portion of its original assertions. We see no need to take formal action to dismiss the arguments. It is up to the parties to decide which arguments it wishes to pursue or not pursue in this matter, provided those arguments are consistent with the original claim. The Board will take steps to assure that the issues that are properly before it in this matter are fully articulated well in advance of any hearing in this matter.

Decision

For the foregoing reasons, ACPPC's motion for leave to file an amended complaint is **GRANTED IN PART**. The Government's motion to dismiss is **GRANTED IN PART**. ACPPC's type I differing site conditions claim is dismissed. ACPPC may proceed with the other claims pled in its amended complaint.

Patricia J. Sheridan

PATRICIA J. SHERIDAN

Board Judge

We concur:

Erica J. Beardsley

ERICA J. BEARDSLEY

Board Judge

Kyle E. Chadwick

KYLE E. CHADWICK

Board Judge