UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART FOR LACK OF JURISDICTION: December 9, 2024

CBCA 8148

CARING HEARTS EMS, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Jason A. Blindauer of Blindauer Law PLLC, Washington, DC, counsel for Appellant.

Kathleen Ramos, Office of General Counsel, Department of Veterans Affairs, Arlington, TX, counsel for Respondent.

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

CHADWICK, Board Judge.

Appellant, Caring Hearts EMS, Inc. (Caring Hearts), provided shuttle bus service to respondent, Department of Veterans Affairs (VA). Caring Hearts seeks damages for breach of the implied duty of good faith and fair dealing and for wrongful refusal to exercise an option year of the contract. VA moves to dismiss part of the appeal for lack of jurisdiction and seeks judgment on the merits as to the remainder of the case.

We grant the motion in part. We dismiss a portion of count one of the complaint for lack of jurisdiction. We deny VA's motion as to merits issues.

Background

We deem the following facts to be undisputed based on VA's statement of undisputed material facts, Caring Hearts's statement of genuine issues, and evidence cited therein. *See* Board Rule 8(f)(1), (2) (48 CFR 6101.8(f)(1), (2) (2023)).

VA awarded Caring Hearts the contract, which was for commercial services, in March 2022.[1] The contract included a base year and four option years. It required Caring Hearts to "provide" five buses of a specified capacity in order to shuttle passengers from 6:00 a.m. to 5:30 p.m. on business days between a "parking deck" at the Birmingham (Alabama) VA Medical Facility and the main facility. Buses were to depart the parking area at fifteen-minute intervals on a schedule to be agreed upon "prior to the implementation of the service." We review the contract requirements in greater detail below.

VA exercised the option for the first option year but not for the second. In January 2024, VA formally advised Caring Hearts "that the Government does not intend to exercise option year 2" and the contract would conclude at the end of March 2024.

In February 2024, Caring Hearts submitted a certified claim signed by its proprietor. The claim sought "the completion of" a previously discussed contract modification to add "an additional bus," "repayment of monies deducted from our pay, payment of our invoice for the supplemental use of our shuttle bus, and extension of the remaining option years."[2] According to the claim, the parties disagreed about whether the contract required five shuttle buses to run continuously or if, instead, Caring Hearts could operate four buses and hold one out of service for contingencies such as breakdowns. Caring Hearts alleged that it had "never been able to perform with operational autonomy as the service line has always required the use of all 5 shuttle buses for in service runs which contradicts the implementation meeting understanding, as well as the approved [course of action]." Caring Hearts also complained of late payments. The amount demanded in the claim (along with an exercise of the option

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[1] The contract incorporated the commercial Changes clause, 48 CFR 52.212-4(c) (2021), *discussed in MPG West, LLC*, ASBCA 61100, et al., 20-1 BCA ¶ 37,739, at 183,151 (noting lack of precedent as to whether the clause permits constructive changes), *aff'd in non-relevant part, vacated in non-relevant part, and remanded sub nom. MPG West, LLC v. Secretary of Defense*, 2024 WL 2239021 (Fed. Cir. May 17, 2024).

[2] The claim set out four "requests" in section headings: (1) "Contract Modification"; (2) "Under what authority were the actions taken to reduce our payments granted?"; (3) "Payment of invoice for the supplemental use of our shuttle bus"; and (4) "Contract Extension of Option Year 2."

to extend the now-expired contract) was "a rate of $10,024.80 per month" from the start of the contract through the claim date.

The VA contracting officer granted the claim in part but mostly denied it. He tentatively agreed, "pending verification," that VA could owe Caring Hearts interest on delayed payments on three invoices. He otherwise denied the claim on the grounds that (1) "[t]he need for a contingency/back-up plan referenced in" the contract "is a separate requirement and unrelated to the need for five shuttle buses" and (2) the standard option clause at 48 CFR 52.217-9 (2021), incorporated in the contract, gave the agency "sole discretion to determine whether to exercise any option period."

Caring Hearts timely filed this appeal and, subsequently, the complaint. *See* Rule 6(a). The complaint is lengthy (111 paragraphs), includes more factual allegations than did the certified claim, and presents new legal theories. The complaint has two counts. Count one alleges that VA "wrongfully changed the contract" in various respects in breach of the duty of good faith and fair dealing. Count two alleges that VA "abused its discretion" by not exercising the next option year. Caring Hearts alleges in the complaint that "VA is liable . . . for the additional costs (plus reasonable profit) stemming from the changes" as well as for "damages for the unexercised option periods [sic], including . . . lost profits." The complaint does not allege any presently overdue payments or seek interest on late payments.[3]

VA filed a dispositive motion in lieu of an answer. VA seeks dismissal of the complaint in part for lack of jurisdiction, dismissal in part for failure to state a claim on which the Board could grant relief, and partial summary judgment. Caring Hearts opposes "each and every part" of the motion.

Discussion

The Board Lacks Jurisdiction to Address New Theories of Relief in Count One

VA argues that we lack jurisdiction to address the first count of the complaint, which invokes the duty of good faith and fair dealing, because that count contains "new allegations" that "were never presented . . . in a claim." We agree in part.

Under the Contract Disputes Act, 41 U.S.C. § 7105(e)(1)(B) (2018), the jurisdictional issue is not whether Caring Hearts makes new "allegations" but whether the appeal is "limit[ed] . . . to the same claim or claims" that the contracting officer received. *Quality*

[3] VA states and Caring Hearts admits that VA corrected underpayments on three invoices, with interest, by the end of April 2024.

Control International v. General Services Administration, CBCA 5008, 17-1 BCA ¶ 36,675, at 178,588. "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)). Consequently, a claimant may add details to a claim on appeal but may pursue only theories of relief that materially resemble ones that were discernable in its claim. *E.g.*, *Active Construction, Inc. v. Department of Transportation*, CBCA 6597, 21-1 BCA ¶ 37,905, at 184,097–98 ("Simply because both [a new] claim and [an earlier] claim can be described as involving good faith and fair dealing duty breaches does not mean that they are one and the same," where "discovery necessary for the new claim [would be materially] different."); *A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,203–04 (finding no "jurisdictional basis" to address a new theory of relief where "the contracting officer would have [had] to review different . . . files" to address it), *clarified on reconsideration*, 15-1 BCA ¶ 36,184.

VA lists five "allegations" that it sees in count one of the complaint and that it argues impermissibly appear in the complaint "for the first time": "(1) . . . this Contract was a personal services contract . . . ; (2) . . . changes [were made] to the Contract regarding back-up vans vs. buses; (3) . . . there was no permanent schedule for the shuttle buses; (4) . . . joint employer liability [arose] between Caring Hearts and the VA; and (5) . . . [the] requirement change[d] to 6 or 7 shuttle buses."

Caring Hearts disavows pursuing the first, fourth, and fifth allegations, which would be new legal theories. Accordingly, we do not consider those theories part of the appeal and need not address them further. This leaves for consideration the second and third allegations, involving "back-up vans" and "no permanent schedule." Such allegations do appear in count one.[4] We agree with VA that they raise jurisdictional concerns.

The certified claim sought compensation for the daily use of a fifth shuttle bus that Caring Hearts does not think the contract required to be in active rotation. The claim, unlike the complaint, sought no relief relating to vans or a fluctuating schedule. Caring Hearts admits as much but relies on evidence of prior correspondence—"with citations . . . so numerous that they must be . . . [in] footnotes"—to show that the contracting officer was "aware of" disagreements about van use and the schedule before he received the claim. "[E]ven if the claim lacks details," Caring Hearts argues, "adequate notice to the Contracting Officer" of the two issues "was achieved in the communications leading to the claim."

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[4] Caring Hearts alleges in count one, among other things, that (1) "[n]othing in the contract stated that the [required] back-up [service] could not be vans," (2) VA "violated the contract by refusing to agree to a permanent schedule," and (3) "Caring Hearts is not limited to the quantum sought in the [certified] claim."

We disagree. Caring Hearts relies on decisions that teach that "[t]o determine the basis of [a] claim, the Board may consider the correspondence between the parties." *Quality Trust, Inc. v. Department of the Interior*, CBCA 7451, 24-1 BCA ¶ 38,548, at 187,362 (citing *French Construction LLC v. Department of Veterans Affairs*, CBCA 6490, 22-1 BCA ¶ 38,164, at 185,340; *SRA International, Inc. v. Department of State*, CBCA 6563, et al., 20-1 BCA ¶ 37,543, at 182,312); *see also L-3 Communications Integrated Systems, L.P.*, ASBCA 60713, et al., 17-1 BCA ¶ 36,865, at 179,626 ("The minimal amount of information sufficient to provide adequate notice [of a claim] is quite low."). As such cases show, we may examine contemporaneous writings to interpret or illuminate the content of a presented claim. *See, e.g.*, *French Construction*, 22-1 BCA at 185,340 (holding "the Board possessed jurisdiction over . . . claims . . . [that] were . . . mentioned in the document that became the claim"); *SRA International*, 20-1 BCA at 182,312 ("[A]ttached to, if not incorporated into, the two contracting officers' decisions was the . . . audit report that formed the basis of the Government's claims.").

We may not, however, impute material into a claim that is not there. *E.g.*, *Lee's Ford Dock*, 865 F.3d at 1370 (the "certified claim did not allege that the Corps had knowingly misrepresented" a fact and so "did not set forth operative facts supporting [a] later claim of misrepresentation"); *CB&I AREVA MOX Services, LLC v. Department of Energy*, CBCA 5395, 17-1 BCA ¶ 36,591, at 178,217 (2016) ("The operative facts supporting the claim as presented require only an analysis of the contractual language . . . . [Other] actions, regarding implementation . . . , are an entirely separate matter from the [claim]."). We cannot disregard the "elementary" requirements that "the claim must be in writing and submitted to the contracting officer for a decision. If for more than [the small claims limit], the claim must also be certified." *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987) (citation omitted); *see* 41 U.S.C. § 7103(a), (b). Grounds for relief that are not presented in a written claim are neither part of it nor covered by the certification. Even if we rely on background information to construe it, a claim must "give[] the contracting officer adequate notice of [its] basis and amount." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987).

The certified claim here did not notify VA that Caring Hearts sought any money relating to van use or an unsettled schedule. Evidence that the parties had discussed those matters does not alter the claim—and, if anything, tends to undermine Caring Hearts's notice argument, as one might have expected Caring Hearts to raise the issues again in a claim had it intended to assign dollar values to them. Thus, we lack jurisdiction in part with regard to count one. *E.g.*, *ELA Group, Inc. v. Department of Labor*, CBCA 8235, slip op. at 7 (Nov. 22, 2024) ("[The] claim does not address liquidated damages. We lack jurisdiction to entertain that issue in this appeal."). Caring Hearts fails to show that we may consider its

new allegations about van use and scheduling as being among the ways that VA allegedly breached the duty of good faith and fair dealing.[5]

We do not lack jurisdiction as to count one as a whole. Count one also alleges, among other things, that VA breached the contract by requiring five shuttle buses in daily service. The operative facts of that dispute were presented in the claim without the legal label. *Cf. NoMuda, Inc. v. Department of Homeland Security,* CBCA 7999, 24-1 BCA ¶ 38,662, at 187,945; *Quality Control International*, 17-1 BCA at 178,588–89.

The Required Number of Buses in Active Service Is Ambiguous

VA also challenges count one on the merits, albeit obliquely. The agency cites the certified claim and asks us to "dismiss th[e] portion of the *claim*" in which Caring Hearts argued that the contract did not require five continuously active buses "for failure to state a claim on which relief can be granted." (emphasis added). The claim is not something the Board would "dismiss," however, because it is not a pleading. *Mission Support Alliance, LLC v. Department of Energy*, CBCA 6477, 22-1 BCA ¶ 38,033, at 184,711 (2021) (limiting "motions to dismiss [to] claims that are asserted, or at least incorporated, in pleadings. . . . [W]e would not entertain a motion to 'dismiss' the contracting officer's decision [on a government claim]."); *see also Akal Security, Inc. v. Department of Homeland Security*, CBCA 3389, 14-1 BCA ¶ 35,532, at 174,132 ("A motion to dismiss is appropriate if the Board can decide the appeal *on the pleadings*." (emphasis added)).

Caring Hearts's pleading is its complaint. Count one of the complaint alleges breach of the duty of good faith and fair dealing. This breach theory *involves* the dispute about the required number of buses in operation but may involve more than that. To advance the case, we treat VA's motion to "dismiss" some of the certified claim as a motion for partial summary judgment on a contract interpretation issue relevant to count one. This conversion results in no prejudice to Caring Hearts because we deny VA's motion as we construe it. *Cf. 1000-1100 Wilson Owner, LLC v. General Services Administration*, CBCA 6506, 20-1 BCA ¶ 37,642, at 182,764 (converting a motion to dismiss to a motion for summary judgment, which the Board denied after considering evidence "about which [non-movant] had notice and the review of which benefits [non-movant]").

"[S]ummary judgment on . . . part of" a case is warranted if the movant "is entitled to judgment" on that part "as a matter of law based on undisputed material facts." Rule 8(f); *e.g.*, *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 824 F. Supp. 2d 524, 533 (S.D.N.Y. 2011) ("Summary judgment is not an all-or-nothing proposition."). The

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[5] References to vans in the contract could, nonetheless, be relevant to the legal theory that VA required too many active shuttle buses.

Board's agreement with a party's contract interpretation can render "any facts in dispute . . . immaterial." *Mission Support Alliance, LLC v. Department of Energy*, CBCA 6476, et al., 22-1 BCA ¶ 37,998, at 184,529 (2020). We may not, however, weigh evidence on summary judgment to determine the meaning of an ambiguous contract. *E.g.*, *CFP FBI-Knoxville, LLC v. General Services Administration*, CBCA 5210, 17-1 BCA ¶ 36,648, at 178,475 (citing *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988)).

"We consistently apply the 'plain meaning' of contracts" to the extent we can. *Inter-Con Security Systems, Inc. v. Department of Justice*, CBCA 6995, 23-1 BCA ¶ 38,438, at 186,824 (quoting *P.K. Management Group, Inc. v. Secretary of Housing & Urban Development*, 987 F.3d 1030, 1033 (Fed. Cir. 2021)); *see generally McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1434–35 (Fed. Cir. 1996). Both parties say the language at issue here is plain. VA writes, "The Contract required Appellant to provide 5 shuttle buses operating in a continuous loop. The language is unambiguous." (Citations omitted.) Caring Hearts cites the same words and argues that the contract required only "a shuttle service with five buses operating according to an agreed-upon and permanent schedule, and at a frequency of not more than 15 minutes per run." Caring Hearts emphasizes that the contract does not use the word "continuous."

Although the parties insist it is plain, the requirement is ambiguous. The operative provisions of the performance work statement (PWS) are as follows:

> 2.1.2 Shuttle Services from 6:00 am – 5:30 pm: The Contractor shall begin the first runs at the parking deck weekdays at 6:00 am. The shuttles shall run alternately and concurrently to provide pick-up times every 15 minutes at the parking deck. Shuttle services shall continue until the last pick-ups at 5:30 pm.
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> 2.1.3 Number of Shuttle Buses/Van: The Contractor shall provide five shuttle buses with the capacity for approximately 20 passengers with lifts to assist with 2 wheelchair bound passengers. Shuttle buses shall operate on an alternating schedule, back and forth, . . . at intervals of approximately 15 minute[s] per run.
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> . . . .
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> 2.1.4.1 Should schedules need to be modified, any modifications must be coordinated with the [contracting officer's representative (COR)] and approved by the Contracting Officer prior to implementation. Any changes to the designated pick-up and drop-off zones will be coordinated and identified by the COR.

. . . .

3.1.1 A shuttle service schedule will be created and agreed upon by the Contractor and COR prior to the implementation of the service.

Section 7.1 further required the contractor to "have a contingency/back-up plan" to remedy a service interruption "as quickly as possible."

The requirement in PWS section 2.1.3 to "provide" five buses is subject to two reasonable interpretations. *See Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 (Fed. Cir. 1993) (defining ambiguity). It could mean, as VA argues, that five buses must "provide" *all* of the daily services required. But it could mean, as Caring Hearts contends, that the contractor must stand ready to "provide" five buses *as necessary* to meet the schedule of "approximately 15 minute[s] per run" to be agreed upon. VA's gloss of the terms as requiring "5 shuttle buses operating in a continuous loop" simply underscores the ambiguity of the contract, which could have employed that wording but did not.

VA argues in the alternative that "even if" the contract was ambiguous, the ambiguity was patent, such that Caring Hearts should have "br[ought] this alleged . . . ambiguity to the VA prior to submitting a quote, which Appellant failed to do." VA does not assert as a fact in its statement of undisputed material facts, however, that Caring Hearts never inquired about the ambiguity. VA only lists some questions and answers from the contract solicitation and states that Caring Hearts "did not take exception to the requirement to *provide* 5 shuttle buses" (emphasis added). Additionally, both the claim and the complaint refer to understandings about plans of operations that the parties allegedly reached in meetings, which could be relevant to interpreting the contract. *See, e.g.*, *Macke Co. v. United States*, 467 F.2d 1323, 1325 (Ct. Cl. 1972) ("[H]ow the parties act under the arrangement, before the advent of controversy, is often more revealing than the dry language of the written agreement by itself."). The ambiguous contract terms are not ripe for interpretation on the current record.

Count Two States a Claim for Relief

VA seeks dismissal of count two, which challenges the non-exercise of the option as an abuse of discretion, for failure to state a claim. To survive the motion, count two must allege "factual content" that could support a "reasonable inference that [VA] is liable," making "a claim to relief . . . plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (internal quotation marks omitted). VA argues, "The Contract is clear on its face. The VA has a unilateral right to exercise or decline to exercise the option periods." VA acknowledges that the Board stated in *Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 08-1 BCA ¶ 33,770, at 167,160–61, that a decision "not to

exercise an option" may breach an option clause if it "was a product of bad faith or so arbitrary and capricious as to be an abuse of discretion." (citing *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514 at 166,062; *Nova Express*, PSBCA 5102, 2008 WL 103951 (Jan. 10, 2008), *appeal dismissed*, No. 08-1388, 2008 WL 5691050 (Fed. Cir. Aug. 5, 2008); *IMS-Engineers-Architects, PC*, ASBCA 53471, 06-1 BCA ¶ 33,231 at 164,674), *aff'd*, 274 Fed. App'x. 898 (Fed. Cir. 2008)). VA attempts to distinguish *Blackstone Consulting* on the basis that Caring Hearts's certified claim did "not allege bad faith," so "there is no jurisdiction o[f] such an assertion."

VA is unpersuasive. Whether the claim described "bad faith" is immaterial, given that, consistent with *Blackstone Consulting*, count two alleges that the non-exercise of the option was an abuse of discretion. *See also Plum Run, Inc.*, ASBCA 46091, et al., 97-2 BCA ¶ 29,193, at 145,230 (Government has an "implied obligation . . . not to abuse its discretion or act arbitrarily or capriciously" concerning an option (citing *Monarch Enterprises, Inc.*, ASBCA 31375, 86-3 BCA ¶ 19,227)).[6] VA does not address count two on its terms.[7] Furthermore, comparing the allegations of the certified claim to those of count two raises no doubt as to our jurisdiction to resolve that count. Caring Hearts alleged in the claim, among other things, that VA "was . . . pleased with [the contractor's] services" but began to assert "embellished claims" seeking "immediate responses" from Caring Hearts and made "deliberate false claims and attacks against us." Caring Hearts asserted later in the same paragraph of the claim that VA's "denial" of "the remaining option years should not be executed based on the above facts." Caring Hearts relies on substantially similar operative facts in count two. We need not decide, based on VA's motion, whether all of the allegations of count two lie within our jurisdiction. Count two states a claim and is not dismissed.

VA's Motion as to Overdue Payments Is Moot

Finally, VA asserts that Caring Hearts "alleges that it is owed additional payment because of the delayed payments," which VA calls an attempt at "double recovery." Again, however, VA cites the claim and not the complaint. The complaint seeks no such relief. We deny VA's motion for partial summary judgment on this issue as moot.

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[6] The reference in *Blackstone Consulting* to an abuse of discretion standard arguably could be considered dictum because the issue was not presented in that case (or in our earlier *Greenlee Construction* case, which also involved a claim of bad faith). We agree, nevertheless, with *Blackstone Consulting* and with *Plum Run* that the Government has a duty not to abuse the discretion it possesses under an option clause.

[7] VA relies on *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 44, et al., 08-1 BCA ¶ 33,854, in which the Board denied a "bad faith claim" after a hearing. That case is inapposite to whether count two states a claim.

Decision

VA's motion is **GRANTED IN PART**. We dismiss for lack of jurisdiction the aspects of count one concerning van use and "no permanent schedule." We deny VA's motion to dismiss part of the claim and all of count two for failure to state claims for relief, having converted the motion as to the claim to a motion for partial summary judgment on count one. We deny VA's motion concerning overdue payments, which is not linked to a count of the complaint, as moot.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge