UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM DENIED;
MOTION TO DISMISS FOR LACK OF JURISDICTION DISMISSED AS MOOT:
May 10, 2024

CBCA 7822

PARSONS GOVERNMENT SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Stephen J. McBrady, Robert J. Sneckenberg, Tyler A. O'Connor, Michelle D. Coleman, and Eric K. Herendeen of Crowell & Moring LLP, Washington, DC, counsel for Appellant.

Lucy M. Knowles, John J. Murphy III, Thomas F. England, and Bernice M. Jenkins, Office of Chief Counsel, Department of Energy, Aiken, SC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **RUSSELL**, and **ZISCHKAU**.

ZISCHKAU, Board Judge.

This appeal involves claims by appellant, Parsons Government Services, Inc. (Parsons), seeking from respondent, the Department of Energy (DOE), a $6 million incentive fee and an upward adjustment of its contractor performance assessment report (CPARS) rating. The claims arise out of a contract between Parsons and EPA to design, construct, commission, and operate a salt waste processing facility. DOE has moved to dismiss the portion of the appeal relating to the incentive fee for failure to state a claim upon which relief can be granted, arguing that Parsons has failed to allege facts that would entitle it to a legal

remedy. DOE separately moves to dismiss for lack of jurisdiction the portion of the appeal seeking the upward adjustment of the CPARS ratings. We deny DOE's motion to dismiss for failure to state a claim because Parsons has alleged sufficient facts in its complaint to provide a legal basis for DOE liability if proven. The motion regarding the CPARS ratings is now moot because we have granted Parsons' request to amend its complaint and remove the language asking the Board to adjust the ratings. Our review of the record indicates that we have jurisdiction over these disputes under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018).

Background

According to the complaint, Parsons was awarded a contract by DOE to design, construct, commission, and operate a first-of-its-kind salt waste processing facility (SWPF) at DOE's Savannah River Site. The SWPF was to be designed to treat and reduce liquid radioactivity in nuclear waste from existing storage facilities. The contract required Parsons to perform in four major stages, spread across two contract phases: phase I, consisting of design and construction, and phase II, consisting of hot and cold commissioning (commissioning) and one year of operations (OYO). Parsons performed the phase II tasks under cost-plus-incentive-fee terms. Phase II had no fixed fee. If Parsons did not receive an incentive fee payment, it made no profit. Parsons states that, in accordance with the operative schedule, it completed the phase I facility design by December 2008 and the construction phase in April 2016. Parsons then proceeded to phase II commissioning. Once Parsons completed commissioning and entered the OYO period of phase II, the parties negotiated to reduce to terms, among other things, provisions regarding incentive fees that Parsons could earn during OYO based on the volume of waste that Parsons processed. Contract modification 02461 memorialized the applicable fee provisions for OYO. This dispute involves Parsons' request for compensation related to alleged constructive changes that impeded the quantity of waste that Parsons was able to process during OYO. In addition, Parsons claims that DOE's contracting officer gave Parsons erroneous CPARS ratings for OYO.

On March 1, 2023, Parsons submitted to the contracting officer a certified claim demanding \$6 million—the amount that Parsons claims it should have earned had the simulant (the testing material manufactured to simulate the actual radioactive waste) used during cold commissioning not differed materially from the actual waste that it processed during OYO or, in the alternative, the amount that Parsons should have earned had DOE accepted an engineering change proposal which, according to Parsons, would have allowed it to process sufficient waste to earn the \$6 million fee in OYO. In its claim, Parsons also demanded an upward adjustment to the quality, schedule, and management ratings of Parsons' CPARS report for the period July 1, 2021, through March 27, 2022. On June 28,

2023, the contracting officer issued a final decision denying the incentive fee and CPARS claims in their entirety. On July 8, 2023, Parsons filed its appeal with the Board.

Discussion

DOE's Motion to Dismiss for Failure to State a Claim

To survive a motion to dismiss for failure to state a claim upon which relief may be granted under Board Rule 8(e) (48 CFR 6101.8(e) (2023)), Parsons "must point to factual allegations that, if true, would state a claim to relief that is plausible on its face, when the Board draws all reasonable inferences in favor of the contractor." *UnitedHealthcare Insurance Co. v. Office of Personnel Management*, CBCA 7357, 23-1 BCA ¶ 38,375, at 186,419 (quoting *B.L. Harbert International, LLC v. General Services Administration*, CBCA 6300, et al., 19-1 BCA ¶ 37,335, at 181,569). Parsons' factual allegations need only be sufficient "to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "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. In analyzing a motion to dismiss for failure to state a claim, we need not adopt an appellant's legal conclusions, *Twombly*, 550 U.S. at 555, but we must assume the veracity of well-pleaded factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Parsons alleges three separate counts in its complaint: (1) superior knowledge by DOE; (2) impracticability of performance; and (3) breach by DOE of the duty of good faith and fair dealings. Parsons has alleged facts that, if proven, state a claim upon which relief may be granted.

Parsons alleges in its complaint that Parsons used DOE-approved, non-radioactive simulant as required during commissioning and that the characteristics, qualities, and size of the simulant used would replicate the salt waste that Parsons would process during the OYO performance period. Parsons further alleges that the contract expressed the expectation that the tested simulant would replicate and perform like the actual waste to be processed during OYO. Parsons claims that it achieved a processing quantity during commissioning that was substantially more than the three million gallons per year necessary to entitle Parsons to earn the minimum OYO incentive fee of $6 million. According to Parsons' complaint, once performance began in the OYO stage, unexpected problems that were beyond Parsons' control arose. Parsons alleges that those problems were known to DOE but never disclosed and that they prevented Parsons from earning any fee. The SWPF's filters performed much less effectively in the OYO stage than they did during cold and hot commission testing because the filters clogged and other equipment became fouled. Filter clogging slowed down

production. Parsons claims that it later learned that the filter clogging was caused by the much smaller particle size found in the actual waste being processed compared to the particle size found in the waste simulant used during commissioning. Parsons states that it repeatedly had to shut down the production so it could clean equipment and filters. According to Parsons, these shutdowns caused a significant decrease in waste production volume. In its complaint, Parsons asserts that if the actual waste had replicated the DOE-approved simulant used during commissioning, Parsons would have processed far in excess of three million gallons per year and thus would have earned a $6 million fee. Parsons also alleges that the lack of meaningful information from DOE on the actual waste particle size, and the significance of the particle size impact on processing operations, prevented Parsons from designing and constructing the SWPF to address the specific characteristics of the actual waste.

Parsons' complaint sets forth its additional allegations that its performance was objectively impracticable and that any similarly situated contractor would have encountered the same difficulties due to the particle size of the waste. In its complaint, Parsons states that DOE breached its duty of good faith and fair dealing by, among other things, failing to notify Parsons of the particle size differential between the simulant waste and the actual waste and the effect that the particle size would have on processing operations during OYO. Parsons also alleges that DOE impeded Parsons' ability to implement an engineering change proposal that would have allowed Parsons to increase production of the waste by altering the processing methodology.

DOE responded that the record demonstrates it provided information about particle size to Parsons in 2014, that DOE met its contractual obligation to provide SWPF pre-conceptual design and supporting information to Parsons, and that it did not withhold any information from Parsons. Further, DOE argues that, under the contract, its review of deliverables did not make DOE responsible for the adequacy and completeness of Parsons' work and that Parsons remained solely responsible for the design, construction, commissioning, and performance of the processing facility to meet or exceed all functional and performance specifications and requirements.

Taking Parsons' factual allegations as true, as we must at the pleadings stage, Parsons' claims could entitle it to a remedy under any one of the three counts of the complaint. What the record ultimately shows regarding the anticipated particle size versus actual particle size of the salt waste, whether or not DOE disclosed information on the particle size, and what its effect on the processing capabilities would be must await further factual development. It is not yet possible for us to conclude whether the contract provisions cited by DOE shield it from liability should Parsons prove its allegations on the superior knowledge, impracticability of performance, and good faith and fair dealings claims.

CPARS Challenge

DOE, by separate motion, moved to dismiss the portion of Parsons' claim dealing with the CPARS ratings given by the contracting officer. Parsons initially asked, as part of the remedy sought, that the Board increase the ratings. However, Parsons subsequently amended its complaint to remove that language. Accordingly, the issue is now moot.

Decision

We **DENY** DOE's motion to dismiss for failure to state a claim because Parsons has alleged facts that, if proven, state a claim upon which relief may be granted. We **DISMISS AS MOOT** DOE's motion to dismiss the CPARS ratings claim for lack of jurisdiction as Parsons has amended its complaint to remove its request that the Board change the ratings.

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge