



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: May 23, 2025

CBCA 7771, 7830

COMP ENVIRONMENTAL, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Caroline Wang, President of Comp Environmental, Inc., Winter Haven, FL, appearing for Appellant.

Brian A. Quint, Office of the Solicitor, Department of the Interior, Washington, DC, counsel for Respondent.

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

ZISCHKAU, Board Judge.

Respondent, the Department of the Interior, United States Fish and Wildlife Services (FWS), has moved to dismiss Comp Environmental, Inc.'s (CEI) appeals for failure to state a claim upon which relief may be granted. FWS argues that CEI is not entitled as a matter of law to increased costs that CEI claims were incurred due to added backfill required by government permitting requirements, permitting delays, and material price escalation. CEI, however, has presented factual allegations that plausibly suggest entitlement to relief. Accordingly, we deny FWS's motion.

Background

On September 5, 2019, FWS issued a statement of work (SOW) for design-build services to rehabilitate two existing parking areas and add a new graveled parking area at the Arthur R. Marshall Loxahatchee National Wildlife Refuge in Boynton Beach, Florida. Exhibit 1 at 1, 19-20.¹ On May 20, 2020, FWS issued amendment 1 to the SOW which (1) increased the length of Lee Road to be rehabilitated; (2) added restriping of existing parking lots; and, relevant to the dispute here, (3) increased from 24,000 square feet (sq. ft.) to 54,222 sq. ft. the area of the Hillsboro parking lot that need to be rehabilitated. Exhibits 3, A010 at 69. On June 25, 2020, CEI submitted its bid schedule to FWS. Exhibit 4. CEI's bid schedule included, "Design-Build Rehabilitate Hillsboro Parking Area" for "up to 8 [inches] DOT Certified Limerock base. Limited subbase repairs. Regrading limerock base." *Id.* In July 2020, FWS awarded the contract to CEI, accepting CEI's bid schedule for a total price of \$389,630. The design and construction services for rehabilitating the Hillsboro parking area were priced at \$164,630. Exhibit 5.

SOW section 6, entitled "Specific Project Requirements," contains a subsection c., entitled "Permit Application Assistance." Exhibit 1 at 19, 21. This subsection required CEI to "[a]ssist the Manager of Arthur R. Marshall Loxahatchee National Wildlife Refuge in the permit application process for state and local permits, Corps of Engineers approvals and other required permits by providing permittable drawings, engineering data and other technical information required by the permitting authority." *Id.* at 21.

On September 23, 2020, FWS and CEI entered into bilateral modification P00001 (mod 1) to include construction services costs for rehabilitating the boat access ramp area. Exhibit 6. Attached to and made a part of mod 1 was CEI's revised bid schedule dated September 9, 2020, which included the same note as in the original bid schedule indicating that the Hillsboro parking area work item is for "up to 8 [inches] DOT Certified Limerock base. Limited subbase repairs. Regrading limerock base." *Id.* at 3.

In a letter dated March 16, 2021, FWS first applied for a permit to the South Florida Water Management District (SFWMD). Exhibit A001. At the end of the letter, FWS appointed CEI as the "agent to assist with this permit application." *Id.* at 2. On April 7, 2021, SFWMD inspected the project site. Exhibit A010 at 147. On April 14, 2021, SFWMD stated, "It appears that the L-39 levee does not meet the minimum design cross section requirements at this location." Exhibit A010 at 152. On May 10, 2021, modification P00002 (mod 2), valued at \$64,648.20, was created for "construct[ing] Hillsboro drain pipe & curb" and "Lee Road centerline paint striping." Exhibit 7 at 2, 4. Mod 2 states that "[a]ll other

¹ All exhibits are found in the appeal file, unless otherwise noted.

terms and conditions remain unchanged” and thus left unchanged CEI’s quantity limitation of “up to 8 [inches] subbase” which was incorporated into the contract. CEI was onsite between contract award and mod 2, but construction had not commenced because of permitting delays.

On May 16 and July 15, 2021, SFWMD exchanged internal emails about the levee needing to “be brought to minimum with select fill then the gravel be added on top of that.” Exhibit A010 at 127-30, 136-37. On June 4, 2021, SFWMD directed CEI to revise the drawings, which caused an increase of the overall levee elevations. *Id.* at 131-32. On July 22, 2021, modification P00003 (mod 3) added “construction services to repave the remainder of Lee Road to the refuge’s eastern boundary,” “install 3 speed tables along Lee Road,” and “accept contractor proposal.” Exhibit 8 at 2. Mod 3 also extended the performance end date from August 1, 2021, to December 31, 2021. *Id.*

On August 11, 2021, SFWMD issued the permit to FWS. Exhibit A010 at 112-16, 125. On August 20, 2021, SFWMD, on behalf of FWS, submitted a section 408 permit application to the United States Army Corps of Engineers (USACE). *Id.* at 154-56. In a November 1, 2021, letter, the engineering division of USACE advised SFWMD that it had completed its technical review and that the FWS request was approved. Exhibit A006 at 3-4. The letter noted that FWS had proposed additional improvements to better maintain the condition of the facilities: “[t]he levee road will be restored and resurfaced to the required design grade, . . . an exfiltration drainage system will be installed in the parking area to manage runoff [, and] [t]he elevation of the parking areas will also be raised, and concrete curb barriers will be installed at the water edge to limit erosion.” *Id.* It appears that the regulatory division of USACE took another eight months to complete other additional regulatory reviews. In a July 29, 2022, letter, USACE’s regulatory division advised FWS that it was granting permit approval in response to FWS’s August 2021 application. Exhibit A005 at 6-12. In modification P00004, signed by CEI on August 25, 2021, FWS extended the project’s completion date to December 31, 2021, due to SFWMD’s delays in conducting permitting authority reviews for permit approval. Exhibit 9 at 1-2. In undated modifications P00005 and P00006, FWS unilaterally further extended the completion date to September 30, 2022, and then to December 31, 2022, due to extensive permit application delays of SFWMD and USACE. Exhibits 10 at 2, 11 at 2.

On August 3, 2022, SFWMD advised FWS that the USACE permit had been approved and directed an onsite preconstruction meeting. Exhibits A006 at 1-2, A007. On August 17, 2022, the preconstruction meeting was conducted onsite. Exhibit A008. CEI’s work on the project was performed from August 2022 to January 2023. Exhibit A010 at 82.

On January 23, 2023, CEI submitted a change order request for the additional work and associated costs caused by the scope of work changes required by the SFWMD permit.

Exhibit A010 at 82-85. CEI claims that instead of its originally anticipated quantity of approximately 1863 tons of road base material required for the project, it actually placed 3370 tons of material. *Id.* at 83; Exhibit A012 at 1. This increase was due to SFWMD requiring, as part of its permit to FWS, that the levee elevation be increased. CEI states that no bidder could anticipate this new requirement and its bid, which was incorporated into the contract, required CEI to install only “up to 8 [inches] DOT Certified Limerock base.” Exhibit A010 at 2. CEI also states that it is entitled to material, labor, and equipment escalation costs totaling approximately \$7000. *Id.* On March 6, 2023, FWS denied CEI’s change order request. *Id.* at 86-87. On March 16, 2023, CEI submitted its certified claim for \$106,060.78 to FWS. *Id.* at 1-6. On April 28, 2023, before FWS rendered any decision on the claim, CEI submitted a revised damages calculation of \$137,736.03. Exhibit A011 at 4. On July 12, 2023, FWS denied the claim. Exhibit 17. On May 17, 2023, CEI filed a notice of appeal.

Discussion

FWS has moved to dismiss the appeals for failure to state a claim. FWS claims that CEI was responsible for all federal, state, and local permits and bore the risk under this firm-fixed-price (FFP) contract for additional costs arising from permitting requirements. FWS also alleges that a diligent bidder would have anticipated the levee changes required by SFWMD. Finally, FWS states that the permitting delays were caused by SFWMD and USACE, not FWS.

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) (2024)), CEI “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 [non-moving party].” *United Healthcare 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); *see also United Pacific Insurance Co. v. United States*, 464 F.3d 1325, 1327 (Fed. Cir. 2006). CEI’s 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). 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, 678-79 (2009). In considering a motion to dismiss for failure to state a claim, the complaint and materials attached to or incorporated by reference in the complaint may be considered for determining the sufficiency of the pleadings. *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334, 1342 n.4 (Fed. Cir. 2006). Even where a document is not attached or incorporated by reference, the tribunal may nevertheless consider it where the complaint relies heavily upon its terms and effect, rendering the document

integral to the complaint. *Systems Management and Research Technologies Corp.*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789. Here, we have considered the complaint, CEI's claim, the solicitation, CEI's bid, the contract, modifications, and the other exhibits in the record which are referenced by or integral to the complaint.

CEI states that its contract with FWS was to rehabilitate the Hillsboro parking area, and its bid sheet that was incorporated into the contract provided that it would install "up to 8 [inches] DOT Certified Limerock base. Limited subbase repairs. Regrading limerock base." CEI contends that the contract required it to comply with the requirements of the permits obtained by FWS and that the SFWMD permit required CEI to raise the elevation of the entire levee upon which the Hillsboro parking lot rested. According to CEI, based on the solicitation's SOW, drawings, and specifications, neither it nor any other bidder reasonably could have anticipated this additional scope of work being required at the time of bidding.

CEI alleges that its actual work to elevate the entire levee was substantially beyond the contractually agreed upon scope of work. To fulfill the SFWMD conditions in FWS's permit—namely, to elevate the entire levee which supported the parking lot and road—CEI placed a total of 3370 tons of base road material. CEI's bid, which specified installing "up to 8 [inches] DOT Certified Limerock base" with "[l]imited subbase repairs" and "[r]egrading limerock base," anticipated placing only approximately 1863 tons of material.

The contract sets forth the scope of work for the Hillsboro parking area, and we see no evident basis for shifting to CEI responsibility for restoring or improving the levee. We also do not agree with FWS's argument that the contract's permit clauses, including Federal Acquisition Regulation (FAR) 52.236-7, Permits and Responsibilities Clause (NOV 1991) (48 CFR 52.236-7 (2019)), shifted permitting responsibility or liability for permit conditions to CEI. FWS was at all times the party responsible for obtaining the SFWMD and USACE permits while CEI's responsibility under the contract was to assist FWS in obtaining the permits. *See Bell/Heery v. United States*, 739 F.3d 1324, 1331 (Fed. Cir. 2014).

CEI also plausibly alleges that it is entitled to recover approximately \$7000 in escalated material, labor, and equipment costs caused by extensive permitting delays. Generally, unless there is an economic price adjustment clause in a FFP contract, the fact of increased costs due to monetary inflation does not provide grounds for an equitable adjustment. A government-caused delay that drives a contractor into a time of increased prices, however, can constitute a compensable change. *ADT Construction Group, Inc.*, ASBCA 57322, 15-1 BCA ¶ 35,893, at 175,470; *George Hyman Construction Co.*, ENG BCA 4541, 85-1 BCA ¶ 17,847, at 89,353.

Finally, with regard to CEI's claim for interest, we note that under FAR 52.233-1(h), the "Government shall pay interest on the amount found due and unpaid from (1) the date that the Contracting Officer receives the claim . . . or (2) the date that payment otherwise would be due, if that date is later, until the date of payment." On March 16, 2023, CEI submitted its certified claim to FWS. Thus, we see no basis for dismissing CEI's claim for interest as it would be entitled to interest for amounts the Board might find due to CEI.

Decision

Respondent's motion to dismiss for failure to state a claim is **DENIED**.

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge