ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
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Chugach Federal Solutions, Inc.	)	ASBCA No. 61320
	)	
Under Contract No. N44255-14-D-9000	)	

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OPINION BY ADMINISTRATIVE JUDGE D'ALESSANDRIS
ON THE GOVERNMENT'S MOTION TO DISMISS COUNTS I, III, IV, V &VI
OF THE COMPLAINT

Respondent, the Department of the Navy (government or Navy) moves to dismiss counts I (negligent negotiations), III (mutual mistake), and IV (constructive change), as well as portions of counts V (good faith and fair dealing) and VI (improper withholding of payment), of the complaint filed by appellant, Chugach Federal Solutions, Inc. (Chugach or CFSI). Specifically, the Navy asserts that the Board is without jurisdiction to entertain count I (negligent negotiations) and that Chugach fails to state a claim upon which relief may be granted in count III (mutual mistake). The Navy asserts that the Board lacks jurisdiction to entertain count IV (constructive change) because Chugach did not present the claim to the contracting officer. With regard to counts V (good faith and fair dealing) and VI (improper withholding of payment), the Navy asserts that they should be dismissed to the extent they rely upon counts I, III, and IV. For the reasons stated below, we deny the Navy's motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION[1]

On November 21, 2011, the Navy Facilities Engineering Command, Northwest Contracting Office (NAVFAC) released Solicitation No. N44255-10-R-5016, a Request for Proposals (RFP) seeking facility support services (compl. ¶ 10). The RFP contemplated a five-year contract covering a broad range of base operations services detailed in a Performance Work Statement (PWS) (compl. ¶ 11). The Navy developed an Independent Government Estimate (IGE) of the cost and staffing levels necessary to perform the requirements of the RFP (compl. ¶ 7).

The RFP required that offerors "clearly demonstrate...understanding of current industry standards, policies, procedures, and processes utilized in accomplishing the complexity and magnitude of the RFP requirements." The specific "Basis of Evaluation" for this factor included the adequacy of offerors' proposed staffing levels. (Compl. ¶ 19) In addition, offerors were required to propose specific "Direct Labor Hours" and "Direct [full time equivalent] FTEs" for each contract line item number (CLIN) and subCLIN of each separate annex, set forth in Attachment J.M-5 (compl. ¶ 20). In its initial proposal, Chugach proposed a total of 604,063 hours, which it translated to 322.85 FTEs (compl. ¶ 37). On August 7, 2012, Chugach submitted an updated proposal that included 619,820 hours, which it translated to 329.04 FTEs (compl. ¶ 40).

Pursuant to Federal Acquisition Regulation (FAR) 15.306(d), "Exchanges with offerors after establishment of the competitive range:"

> Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal.... When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions.
>
> ....
>
> (3) At a minimum, the contracting officer must, subject to paragraphs (d)(5) and (e) of this section and 15.307(a), indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse

[1] For purposes of resolving this motion to dismiss only, we treat properly-pled facts as true. We also note facts alleged and theories advanced by appellant's claim herein because they aid in our understanding the contents of the complaint.

> past performance information to which the offeror has not yet had an opportunity to respond.

FAR 15.306(d).

In its initial evaluation, the Navy's Technical Team determined that Chugach's staffing levels were "significantly low" for "Annexes 02000, 1500000, 160000, and 180000"[2] and that this was a "significant weakness" (Compl. ¶¶ 41, 102). Around this same time, the Navy's Source Selection Advisory Council (SSAC) documented certain aspects of the proposal evaluation prior to the initiation of discussions under FAR 15.306(d). The SSAC noted a variance between offerors' staffing levels (represented by FTE headcounts) and the IGE. (Compl. ¶ 42) The SSAC concluded that because this effort is "traditionally labor intensive," the wide variation in proposed staffing levels is an "indicator" that the offerors may not have fully understood the level of effort required (compl. ¶ 43).

Around this time, the Navy amended the PWS, "clarif[ying] trouble call quantities are unlimited" and updating the Integrated Maintenance Plan "performance standard" (compl. ¶ 109). During discussions, the Navy issued an evaluation notification to Chugach stating:

> After reviewing the Performance Work Statement for Annexes 020000, 150000, and 180000, please ensure your work hour estimates and FTE staffing for these annexes [have] adequately addressed no limitation to trouble call quantities, the increased requirements of the RFP (over historical) maintenance program IMP, and environmental services, specifically hazardous waste management.

(Compl. ¶ 105 9 (citing R4, tab 140 at 6)) When CFSI did not substantially revise its proposal, NAVFAC concluded that "CFSI's response [to this statement] did not adequately address the government's concern and the significant weakness remained" (compl. ¶ 111).

On November 19, 2012, Chugach submitted a proposal revision that reduced its overall staffing levels to 597,516 hours, which it translated to 317.87 FTEs (compl. ¶ 55). In another proposal revision submitted on February 1, 2013, Chugach decreased its overall staffing level to 314.71 FTEs (compl. ¶ 73). Another prospective bidder challenged its exclusion from the competitive range before the Government Accountability Office (GAO). The GAO sustained the protest holding that the Navy

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[2] There are discrepancies in the Annex Numbers throughout the record (missing or additional zeros). As the exact numbering is immaterial to this decision, the Annex Numbers in quotations may differ.

failed to conduct "meaningful discussions. (Compl. ¶¶ 65-67) After reopening discussions, the Navy again failed to identify any "significant concerns" to Chugach (compl. ¶ 114). Instead, NAVFAC informed CFSI that its "overall recurring work FTEs are within an acceptable range" (compl. ¶ 115).

By letter dated November 15, 2013, the Navy announced that it had "concluded discussions for the subject solicitation." The Navy further stated that Chugach "may now submit written final revisions to either your non-price related factors or price proposal, or both" on November 26, 2013. (Compl. ¶ 74) The Navy's letter did not identify any specific concerns with CFSI's proposal, and the Navy never informed Chugach that it considered its staffing levels for the annexes to be significantly low or a significant weakness (compl. ¶¶ 75, 104). In its November 26, 2013 proposal revision, Chugach reduced its staffing levels to 311.18 FTEs (compl. ¶ 76). On March 21, 2014, the Navy awarded the contract, sometimes referred to as the West Sound Base Operating Services Contract (WSBOSC) to Chugach (compl. ¶ 80).

Since the early days of performance, Chugach has struggled to satisfy the Navy's demands under the contract (compl. ¶ 83). Chugach took significant steps to address the manning shortfall, hiring additional staff and working significant overtime hours at substantial costs to maintain adequate quality and stay close to schedule (compl. ¶¶ 90, 96).

Chugach alleges that the Navy's actions caused it to negotiate staffing levels (and, as a direct result, firm-fixed pricing) for this contract that were materially inadequate and that caused significant losses under the contract (compl. ¶ 119). Chugach asserts that it relied on the Navy's negotiation statements and would have made substantial changes in staffing—significantly increasing its staffing levels—had NAVFAC communicated its concerns (compl. ¶ 120). Chugach asserts that it is entitled to an adjustment in the contract price to compensate for the significant loss it allegedly has incurred because of the Navy's actions during contract formation (compl. ¶ 121). Chugach additionally asserts that the parties mistakenly believed that the scope of the requirement for the new WSBOSC, notwithstanding significant changes to the terms and conditions, was commensurate with the previous contract and could therefore, if the conditions did not change, be performed by a workforce of a similar size (compl. ¶ 143). While the Navy had the information necessary to realize that the WSBOSC would require greater staffing than the previous base service contract, the evaluation process demonstrates that the Government shared the same mistaken belief about the scope of the requirement as Chugach (compl. ¶ 144). The mutual mistake shared by the parties—namely that a work force of 311 could do the work of 421 as estimated by the Navy (adjusted for a blended rate of 1,882 productive hours per year)—led to the defective formation of a contract under which Chugach simply could not get the job done (compl. ¶ 152). As a result, in reliance on the Navy's resulting mistaken statements in negotiations, Chugach failed to appreciate that its staffing was at least a significant weakness and increased staffing accordingly (compl. ¶ 158).

Chugach's claim asserts mutual mistake of factual issues such as a mistake that "the historical data provided in the Solicitation mapped to the current requirements" and the fact that the Navy changed the requirements from "service calls" to "trouble calls" and the parties' understanding of permissible cross-utilization and productive hours under the collective-bargaining agreement (R4, tab 238 at 29274-75, 29277-78).

Chugach also asserts that, by requiring it to provide services requiring staffing levels over and above the staffing levels negotiated by the parties during contract formation, the Navy changed the contract (compl. ¶ 170). For example, even though the parties negotiated a contract under which Chugach would begin performing with a staff of 311 FTEs, by the end of the first year, the Navy had pushed it to expand its staff to 458 personnel (compl. ¶ 171). Because of this change, Chugach asserts that it has incurred damages in the form of excess costs of performance (compl. ¶ 172). Chugach alleged in its claim that the Navy had "whether consciously or not, arbitrarily established enhanced performance requirements" (R4, tab 238 at 29235), and required Chugach to "perform trouble calls on certain pieces of equipment...within two days of receipt of the work order" which was not part of its proposal (*id.* at 29271). Moreover, Chugach's claim detailed discussions with the Navy regarding its performance problems, including an August 26, 2015 meeting where the contracting officer invited Chugach to "show that it was performing in accordance with its proposal and making a reasonable and efficient use of the resources and staffing proposed" and then would consider financing increased staffing levels (*id.* at 29261). Moreover, the claim discussed pressure from the Navy to increase its staffing, noting that Chugach's "customer service is great, but you don't have enough manpower" (*id.* at 29258), and further stating that "[t]he overall effort I feel was more than they were prepared for and staffing is on the increase as a result" (*id.* at 29260).

Chugach also alleges that the Navy breached the implied duty of good faith and fair dealing when it, among other things, misled Chugach during the negotiation process, withheld its superior knowledge, and required Chugach to perform additional work beyond what either of the parties intended to be covered by the contract (compl. ¶ 176). Finally, Chugach asserts that the Navy withheld amounts based on its conclusion that CFSI failed to perform according to the standards set forth in the contract (compl. ¶ 179).

DECISION

I. Standard of Review

Chugach bears the burden of proving the Board's subject matter jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988); *United Healthcare Partners, Inc.*, ASBCA No. 58123, 13 BCA ¶ 35,277 at 173,156. The Board possesses jurisdiction pursuant to the Contract Disputes Act (CDA) when a claim has "some relationship to the terms *or*

performance of a government contract." *Todd Construction, L.P. v. United States*, 656 F.3d 1306, 1314 (Fed. Cir. 2011) (quoting *Applied Companies v. United States*, 144 F.3d 1470, 1478 (Fed. Cir. 1998)). In addition, the Board will grant a motion to dismiss for failure to state a claim when the complaint fails to allege facts "'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)); *American General Trading & Contracting, WLL*, ASBCA No. 56758, 12-1 BCA ¶ 34,905 at 171,640. The allegation "must be enough to raise a right to relief above the speculative level." *Cary*, 552 F.3d at 1376. In addition, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

II. Count I, Negligent Negotiations

In count I, Chugach asserts that it was harmed by the Navy's negligent negotiations, specifically, the Navy's purported violation of FAR 15.306(d). According to Chugach, the Navy's source selection panel determined that Chugach's proposal had "significantly low" staffing in four annexes of the bid, but informed Chugach that its overall staffing was "within an acceptable range" which Chugach contends was a violation of the requirement in FAR 15.306(d) that the Navy indicate or discuss with each offeror "deficiencies" and "significant weaknesses." (Compl. ¶¶ 97-121) According to the Navy, the Board lacks jurisdiction to entertain count I because it is in reality a pre-award bid protest (gov't mot. at 17-21). The Navy characterizes Chugach's claim as a challenge to the Navy's evaluation of Chugach's bid during the procurement process, rather than a claim related to Chugach's performance of the contact (*id.*). It is beyond dispute that bid protest challenges by disappointed bidders, do not state claims within the CDA. *See, e.g., Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983) (holding that the implied contract to treat bids honestly and fairly is not a contract covered by the CDA). Thus, the Board would lack jurisdiction to entertain such a claim. *See, e.g., Amaratek*, ASBCA No. 60503, 16-1 BCA ¶ 36,491 at 177,831-32. However, here, Chugach is not a disappointed bidder, but instead was awarded the contract.

Chugach alleges that its claim "relates" to the contract, and thus, is a CDA claim within the jurisdiction of the Board (app. opp'n at 3-6). Chugach relies on the Federal Circuit's holding in *LaBarge Products, Inc. v. West*, 46 F.3d 1547 (Fed. Cir. 1995). *LaBarge* concerned an Army procurement for aluminum pipe sections and couplings that involved bidding irregularities, including the Army's disclosure of information about LaBarge's initial bid and the Army's procurement discussions with LaBarge to another bidder prior to the submission of best and final offers. *Id.* at 1548-50. After performing the contract, LaBarge filed a claim seeking reformation of the contract by repricing the contract using its initial bid price. LaBarge asserted that reformation was necessary to compensate it for the Army's improper actions. LaBarge asserted a breach of the duty of good faith and fair dealing, and

violations during the bidding process of FAR 15.610(d), prohibiting the use of auction techniques. *Id.* at 1550-52.

The Federal Circuit held that LaBarge had stated a valid CDA claim "related" to the contract because it was a government contractor, rather than a disappointed bidder, and because it alleged a violation of FAR 15.610(d) during formation of the contract. 46 F.3d at 1552. The court held that FAR 15.610(d) was "plainly for the benefit of the contractor" and that the violation of the FAR provision provided an independent basis for its reformation claim such that it was not solely asserting jurisdiction on an implied contract to treat bids honestly and fairly. *Id.* In its reply brief the Navy argues that *LaBarge* is limited to claims pertaining to contract reformation, and, thus, cannot support Chugach's claim for an adjustment in contract price (gov't reply at 1-4).

In this appeal, Chugach is an actual government contractor asserting a claim relating to its contract. As noted above, the Federal Circuit has held that FAR 15.610(d) existed for the benefit of the contractor. Based upon the Federal Circuit's determination, the same should be true for FAR 15.306(d), "Exchanges with offerors after establishment of the competitive range" requiring the contracting officer to discuss with each offeror "deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond." Moreover, we do not see a jurisdictional distinction between the request for contract reformation in *LaBarge* and Chugach's request for an adjustment to the contract price. In *LaBarge* the contractor was able to point to its initial bid as the "original intent" of the parties, while here Chugach merely alleges in its complaint that it would have increased its proposed staffing had it known of the Navy's concerns. However, the difference between *LaBarge's* reformation claim and Chugach's claim for an adjustment to the contract amount goes to the proof of the "original intent" factual scenario and not jurisdiction. Additionally, we note that Chugach's claim, but not its complaint, seeks "an adjustment in the contract price *or reformation of the contract*" (R4, tab 238 at 29265) (emphasis added). Here, in deciding a motion to dismiss, Chugach's jurisdictional allegations are sufficient to prevent the entry of summary judgement. Moreover, Chugach's negligent negotiations claim is actually, for all intents and purposes, really just an element of its superior knowledge claims that is not subject to the Navy's motion to dismiss.

The Navy additionally contends that a failure to dismiss count I of Chugach's complaint would be problematic because every future contractor losing money on the performance of a CDA contract will seek discovery of source selection documents in search of procedural violations that the contractor will allege to be the source of its losses (gov't reply at 3-4). That is not the case with this appeal. Moreover, we are applying nearly 25 year-old binding precedent to Chugach's appeal, and are not making new law. The flood of claims predicted by the Navy did not materialize after the *LaBarge* decision was issued, so we see no reason why it would follow our decision in this appeal.

III. Count III, Mutual Mistake

In its complaint, Chugach states that it and the Navy were mutually mistaken that "the scope of the requirement for the new WSBOSC notwithstanding significant changes to the terms and conditions, was commensurate with the previous contract and could therefore, if the conditions did not change, be performed by a workforce of similar size" (compl. ¶ 143). Based upon this sentence, the Navy asserts that Chugach is alleging mutual mistake regarding a prediction or judgment regarding future events, and thus, that Chugach cannot be asserting a claim for mutual mistake (gov't mot. at 21-25).

In opposition, Chugach asserts that its mutual mistake claim does not depend on predictions of future events, but is based on facts and circumstances in existence at the time of contract formation (app. opp'n at 6-8). Chugach cites, not to its complaint, but to its claim for examples of mutual mistake of factual issues such as a mistake that "the historical data provided in the Solicitation mapped to the current requirements" and the fact that the Navy changed the requirements from "service calls" to "trouble calls" and the parties' understanding of "permissible cross-utilization and productive hours under the collective-bargaining agreement" (*id.* at 7-8 (citing R4, tab 238 at 29274-75, 29277-78)). Chugach additionally asserts that the Navy's motion applies the wrong standard of review by citing to cases decided on the merits rather than appeals decided using the appropriate plausible claim for relief standard. *See Iqbal*, 556 U.S. at 678. Under the appropriate standard of review, assuming all facts in favor of Chugach, we find that Chugach has properly asserted that there were mutual mistakes regarding an existing fact sufficient to support a claim upon which relief could be granted.[3]

IV. Count IV, Constructive Change

The Navy asserts that the Board is without jurisdiction to entertain Chugach's claim for constructive change because this claim was not presented first to the contracting officer for a final decision (gov't mot. at 25-29). Chugach opposes the Navy's motion asserting that its constructive change count is a new legal theory based upon the same operative facts asserted in its claim, and thus it is the same claim for jurisdictional purposes (app. opp'n at 8-12).

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[3] To the extent Chugach's complaint is ambiguous, any ambiguity in the words of the complaint can be resolved in favor of the interpretation that Chugach is alleging mistakes involving existing facts. Moreover, to the extent Chugach cites to its claim, the document that provides the Board with its jurisdiction, rather than its complaint, a dismissal here would serve no purpose as Chugach could simply move to amend its complaint, a request that would be readily granted under the Board's practice.

Pursuant to the Contract Disputes Act, a contractor may, "within 90 days from the date of receipt of a contracting officer's decision" under 41 U.S.C. § 7103 "appeal the decision to an agency board as provided in" section 7105. 41 U.S.C. § 7104(a). Our reviewing court, the Federal Circuit, has held that CDA jurisdiction requires both a valid claim and a contracting officer's final decision on that claim. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (citing *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996)). The CDA does not define the term "claim" so we look to the FAR to implement the CDA. *See Maropakis*, 609 F.3d at 1327 (citing *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc)). Pursuant to the FAR, a claim must be "(1) a written demand or assertion, (2) seeking as a matter of right, (3) the payment of money in a sum certain." *Ellett Constr.*, 93 F.3d at 1542 (citing 48 C.F.R. § 33.201 (1995); and *Reflectone*, 60 F.3d at 1576).

The Board has recognized that "[t]he test for what constitutes a 'new' claim is whether 'claims are based on a common or related set of operative facts."[4] *Unconventional Concepts, Inc.*, ASBCA No. 56065 *et al.*, 10-1 BCA ¶ 34,340 at 169,591 (quoting *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)).

Here, Chugach alleged in its claim that the Navy had "whether consciously or not, arbitrarily established enhanced performance requirements" (R4, tab 238 at 29235), and required Chugach to "perform trouble calls on certain pieces of equipment...within two days of receipt of the work order" which was not part of its proposal" (*id.* at 29271). Moreover, Chugach's claim detailed discussions with the Navy regarding its performance problems, including an August 25, 2015 meeting where the contracting officer invited Chugach to "show that it was performing in accordance with its proposal and making a reasonable and efficient use of the resources and staffing proposed" and then would consider financing increased staffing levels (*id.* at 29261). Chugach's claim also discussed pressure from the Navy to increase its staffing, noting that Chugach's "customer service is great, but you don't have enough manpower" (*id.* at 29258), and further stating that "[t]he overall effort I feel was more than they were prepared for and staffing is on the increase as a result" (*id.* at 29260). These allegations are sufficient to support the Board's jurisdiction regarding Chugach's constructive change claim. To the extent the Navy argues that these facts were not "operative facts" in the context of the claim (gov't reply at 7), we find that the facts were relevant to Chugach's mutual mistake claim where Chugach alleges that the Navy intentionally or unintentionally created enhanced performance requirements (R4, tab 238 at 29235). A constructive change occurs when "a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault of the

[4] Another requirement not material here, is that the claim seeks "essentially the same relief." *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003).

Government." *Agility Public Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370, 1385 (Fed. Cir. 2017) (quoting *Int'l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007)). Under the motion to dismiss standard of review, we find that Chugach has alleged that the government, either intentionally or unintentionally, required Chugach to comply with enhanced performance requirements that constitute a constructive change.

V. Counts V (Breach of Duty of Good Faith and Fair Dealing) and VI (Improper Withholding of Payment)

The Navy seeks dismissal of counts V (breach of duty of good faith and fair dealing) and VI (improper withholding of payment) to the extent these counts are premised upon counts I (negligent negotiations), III (mutual mistake), or IV (constructive change) (gov't mot. at 30). As we have denied the Navy's motion to dismiss with regard to counts I, III, and IV, we find no basis for dismissing counts V and VI.

CONCLUSION

For the reasons stated above, we deny the government's motion to dismiss.

Dated: May 16, 2019

DAVID D'ALESSANDRIS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 61320, Appeal of Chugach Federal Solutions, Inc., rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals