ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
Shoreline Foundation, Inc.	)	ASBCA Nos. 62876, 63616
	)	
Under Contract No. W912EP-16-C-0027	)	

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OPINION BY ADMINISTRATIVE JUDGE O'CONNELL ON RESPONDENT'S MOTION TO DISMISS IN PART FOR LACK OF JURISDICTION OR, IN THE ALTERNATIVE, MOTION TO STRIKE

Respondent, the United States Army Corps of Engineers (USACE), moves to dismiss the complaint in ASBCA No. 63616 for lack of jurisdiction because appellant, Shoreline Foundation, Inc. (SFI), never submitted a claim with respect to impacts or delays from a bid protest. The Board grants the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On September 29, 2016, USACE awarded the above-captioned contract to SFI (compl. ¶ 11). The contract required SFI to manufacture, transport, and install articulated concrete mats with coquina rock surfaces to establish a 4.8-acre artificial reef off the coast of Brevard County, Florida (*id.* at ¶ 5). The contract provided 730 days to complete the work and stated that "[i]t is anticipated that the placement season may occur between April 1st and October 1st" in 2017 and 2018 (*id.* at ¶ 8, 33, 47).

2. One week after the award, on October 6, 2016, another contractor filed a bid protest (compl. at ¶ 14). The protest was subsequently resolved and did not change the

award. USACE issued a notice to proceed to SFI, but not until November 29, 2016. (*Id.* at ¶ 15)

3. After the end of the first placement season, on November 15, 2017, SFI submitted a request for equitable adjustment (REA) seeking $237,882.60 and 54 days of delay related to the bid protest. The REA contained the REA certification required by 10 U.S.C. § 3862. (Compl. ¶ 57; R4, tab 17 at 4299-4300) SFI does not contend that this REA was a certified claim under 41 U.S.C. § 7103.

4. Contracting Officer (CO) Paul Cotter denied the REA by letter dated March 9, 2018. The letter stated that it was not a CO's final decision and that if SFI wished to pursue a final decision it must specifically request one. (Compl. ¶ 58; R4, tab 21 at 4330) SFI did not submit a certified claim and did not attempt to appeal the denial of the REA.

5. After the end of the second placement season, on November 8, 2018, CO Cotter wrote to SFI, observing that SFI had finished its work for the 2018 season and did not plan to resume operations until May 2019. CO Cotter stated that the contract completion date was December 1, 2018 and that liquidated damages would begin to accrue on December 2, 2018, at a rate of $1,230 per day. (App. opp'n at 4; R4, tab 35 at 4371-72)

6. SFI responded to CO Cotter on November 21, 2018. At the beginning of the letter, SFI repeated its assertion that the bid protest delayed its work. But SFI's main topic was weather related delays. It requested a time extension of 343 days, consisting of 103 days of unusually severe weather in 2017 and 2018, 180 days for the hiatus between the 2018 and 2019 placement seasons, and 60 days in April and May 2019, for which it expected additional severe weather. (App. opp'n at 3; App. supp. R4, tab 50z at 349, 353, 358)

7. On October 21, 2020, SFI submitted a certified claim seeking $2,838,231 and a 245-day time extension[1] (compl. ¶ 60; app. supp. R4, tab 50 at 21, 30). The 32-page claim cites defective specifications, superior knowledge, and specifically the weather in 2017 and 2018 as the cause of the delays (app. supp. R4, tab 50 at 3-4, 14, 21-22). The defective specifications theory alleged that the contract inaccurately identified the months in which the weather would allow SFI to work at the site (*id.* at 3, 8-12). The superior knowledge theory was that USACE had superior knowledge about weather conditions and the limitations on placement caused by the weather (*id.* at 3-4).

[1] SFI contended that the delay would have been 359 days if it had not accelerated its work (app. supp. R4, tab 50 at 26 and fn.8).

8. SFI sought a total of 113 calendar days in 2017 and 2018 based on weather and a resulting loss of productivity, plus additional time due to the need to work in a third placement season up to August 1, 2019 (*id.* at 25-26 and fn. 8). In this claim, SFI did not seek time for a bid protest delay in 2016, nor did it reference its November 17, 2017, bid protest REA or include it as one of the 30 attachments to the claim. SFI did briefly mention its November 21, 2018 letter (*see* SOF ¶ 6) and attached it to the claim as exhibit 26 (app. supp. R4, tab 50 at 29).

9. On March 26, 2021, CO Griselle Gonzalez-Aquino denied the claim (compl. ¶ 61; R4, tab 49).

10. SFI filed a timely appeal on April 6, 2021 that the Board docketed as ASBCA No. 62876.

11. While litigation of that appeal was ongoing, on February 16, 2023, CO Gonzalez-Aquino issued a second final decision. In this decision she stated that USACE had granted SFI 42 excusable, but non-compensable, weather days that changed the completion date from November 29, 2018 to January 10, 2019. However, she also stated that SFI did not complete physical work on the project until August 1, 2019, which was 203 calendar days beyond the revised completion date. Based on a daily rate of $1,230, the CO assessed liquidated damages in the amount of $249,690. (Compl. ¶¶ 74-75; ASBCA No. 63616, notice of appeal, ex. A at 5, 8)[2]

12. SFI filed a timely notice of appeal on May 12, 2023, that the Board docketed as ASBCA No. 63616.

13. SFI filed a complaint on June 29, 2023. In the complaint, SFI contends that the bid protest delayed its work (¶¶ 12-17, 53) and that the CO's rejection of the November 15, 2017 REA concerning those delays was "incorrectly decided and improper" (¶¶ 57-59). SFI also contends that USACE breached the contract by "assessing liquidated damages to the extent the liquidated damages scheme set forth in the Contract is unenforceable including but not limited to the extent it functions as a penalty by permitting the assessment of damages for delays not caused by SFI" (*id.* at ¶ 82).

DECISION

This appeal is governed by the decision of the Court of Appeals for the Federal Circuit in *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010).

[2] We use pdf page numbers for Exhibit A as it was not paginated.

In *Maropakis*, the Navy assessed liquidated damages for late completion of a contract for the installation of a roof and windows. The contractor had twice requested an extension of time but never submitted a claim under the Contract Disputes Act (CDA), 41 U.S.C. § 7103. *Id.* at 1325-26.

The contractor filed suit in the Court of Federal Claims. After the trial court dismissed its complaint, the Federal Circuit affirmed the dismissal due to the contractor's failure to submit a claim. The Court held that Maropakis did not provide adequate notice to the CO of the basis or amount of the claim. *Id.* at 1328. Maropakis contended, however, that even if it did not comply with the technical requirements of the CDA the government had "actual knowledge of the amount and basis of" its claim. *Id.* The Court disagreed, but held that even if this were so, "there is nothing in the CDA that excuses contractor compliance with the explicit CDA claim requirements." *Id.* at 1329.

The Court explained that the purpose of the claim submission requirement in the CDA "is to encourage the resolution of disagreements at the contracting officer level thereby saving both parties the expense of litigation." *Id.* at 1331. The Court observed that there was no authority providing for an exception to the claim submission requirement when the contractor was defending itself against a government claim and held that there was "no reason to create such an exception." *Id.*

In *Securiforce America, LLC v. United States*, 879 F.3d 1354, 1362 (Fed. Cir. 2018), the Court clarified that affirmative defenses related to a contract, such as fraud or prior material breach, need not be first presented to the CO for a final decision. However, the Court also reiterated that to the extent an affirmative defense seeks a change in the terms of the contract, for example, an extension of time or an equitable adjustment, it must first be presented to the CO. *Id.* at 1363.

SFI has slightly better facts than the contractor in *Maropakis,* but ultimately the cases are very similar. SFI submitted an REA for the bid protest delays, which is more than the letters submitted by Maropakis, but it is not a claim[3] and whatever notice the REA provided to USACE is essentially irrelevant because the Federal Circuit rejected an actual knowledge exception in *Maropakis*, 609 F.3d at 1328-29. To be sure, what is labeled as an REA may sometimes be treated as a claim. *Hejran Hejrat Co.. v. U.S.*

[3] The distinction between an REA and a claim is significant. One key difference is that the contractor may be able to recover its REA preparation costs, which is not possible for a CDA claim. *JAAT Tech. Servs., LLC*, ASBCA No. 61792 *et al*., 21-1 BCA ¶ 37,878 at 183,955 (citing *Bill Strong Enters., Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995), overruled in part on other grounds, *Reflectone, Inc. v. Dalton*, 60 F. 3d 1572 (Fed. Cir. 1995)).

Army Corps of Engineers, 930 F.3d 1354, 1356-59 (Fed. Cir. 2019). But SFI does not request that we conduct such an analysis, presumably because, if the REA were a claim, SFI would be foreclosed from pursuing this appeal because it did not appeal the CO's decision within the 90 days required by 41 U.S.C. § 7104(a).

SFI raises several arguments in opposition to the government's motion. First, citing *Securiforce*, SFI contends that it is relying on the bid protest delay in support of a prior material breach defense and that such a defense need not first be presented to the CO (app. opp'n at 5). We disagree. While the Federal Circuit in *Securiforce* did allow a contractor to raise a prior material breach defense without submitting it to the CO, the Court squarely rejected its application in the circumstances presented here by stating "to the extent the affirmative defense seeks a change in the terms of the contract—for example, an extension of time or an equitable adjustment—it must be presented to the CO, since evaluation of the action by the CO is a necessary predicate to a judicial decision." *Securiforce*, 879 F.3d at 1363.

SFI tries to avoid this holding by contending that even if it did not follow the procedures for obtaining a time extension, it has a separate right to contend that the agency breached its duty not to delay, hinder, or interfere with SFI's work and that such a defense need not be submitted to the CO (app. opp'n at 6). But SFI is just relabeling the time extension to avoid the claim submission requirement. SFI would have us expand the exception to the submission requirement such that a contractor would almost always be able to avoid the *Maropakis* rule by calling a time extension request by another name. The Board is bound by the Federal Circuit's decisions and SFI's arguments with respect to limiting *Maropakis* would be better addressed to the Court.

SFI's next two arguments raise the issue as to whether the bid protest delay can be considered in connection with the 245-day delay claim in ASBCA No. 62876. First, SFI contends that the bid protest delay should be considered part of the same operative facts as those in the earlier appeal (app. opp. at 9-10).

The claim that an appellant litigates at the Board must be the "same claim" as the one presented to the CO. *Tolliver Grp., Inc. v. United States*, 20 F.4th 771, 776 (Fed. Cir. 2021) (quoting *Raytheon Co. v. United States*, 747 F.3d 1341, 1354 (Fed. Cir. 2014)). The bid protest delay is a different claim from the 245-day delay claim submitted to the CO if it "'presents a materially different factual or legal theory' of relief." *Lee's Ford Dock, Inc. v. Sec'y of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017) (quoting *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015)). "Materially different claims 'will necessitate a focus on a different or unrelated set of operative facts.'" *Id.* (quoting *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)). "The focus is on whether the contracting

officer was given 'an ample pre-suit opportunity to rule on a request, knowing at least the relief sought and what substantive issues are raised by the request.'" *Tolliver*, 20 F.4th at 776 (quoting *K-Con*, 778 F.3d at 1006).

SFI did not mention the bid protest delay in the claim that is the subject of ASBCA No. 62876, nor did it attach the bid protest REA to that claim (SOF ¶ 8). SFI's calculation of the time extension is based on weather-related events in 2017 and 2018 and the requirement to extend the work into 2019 (*id.*). In other words, SFI did not include any days for a bid protest delay in the 245 days it requested in its claim.

Accordingly, the board does not agree with SFI that the bid protest delay is based on the same operative facts as the weather-related delays. The bid protest in 2016 was clearly a separate delay from the weather in 2017 and 2018 and is based on different operative facts. The only connection between the two events is that they were on the same contract, but that is not enough for the delays to be based on the same operative facts.

SFI's second argument is based on a citation to a report prepared by two USACE in-house scheduling experts (app. opp'n at 7-8). SFI quotes from a section of their report in which they conclude that 35% of the delays SFI experienced in 2017 were due to weather, but the other 65% was due to SFI's failure to follow the contract with respect to life safety concerns (*id.* at 7-8 and ex. A (to app. opp'n) at 6).[4] This conclusion frames the arguments of the parties: SFI's claim contends that the delays in 2017 were entirely due to weather while USACE contends they were mostly due to poor safety practices. The Board is not deciding at this point who is correct.

In its opposition, SFI contends that it is entitled to rebut USACE's contentions concerning the safety practices by raising the bid protest delays (app. opp'n at 8). But the Board does not see the connection. The way to rebut the contentions of the USACE experts would be to show that SFI complied with the contract's safety requirements or that the experts have misunderstood or mischaracterized the safety requirements. There is no connection between an alleged failure to follow contractual safety requirements and a bid protest delay. Thus, a bid protest delay cannot rebut a failure to follow safety practices. Certainly, it is possible that the bid protest could have been a separate, independent, delay, but as we have already explained, SFI has to comply with *Maropakis* and submit the claim.

Finally, SFI contends that it is entitled to raise the bid protest delay in support of its contention that the liquidated damages clause is an unenforceable penalty (app. opp'n at 10-12). As the Federal Circuit has explained: "[w]hen damages are uncertain or difficult to measure, a liquidated damages clause will be enforced as long as 'the

[4] We use pdf page numbers for Exhibit A as it was not paginated.

amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression.'" *K-Con*, 778 F.3d at 1008 (quoting *DJ Mfg. Corp. v. United States*, 86 F.3d 1130, 1133 (Fed. Cir. 1996)). "With that narrow exception, '[t]here is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced.'" *Id.* '"[T]he test is objective,' and 'regardless of how the liquidated damage figure was arrived at, the liquidated damages clause will be enforced if the amount stipulated is reasonable for the particular agreement at the time it is made.'" *Id.* (quoting *DJ Mfg. Corp.*, 86 F.3d at 1137).

SFI does not cite any precedent holding that a challenge to the enforceability of a liquidated damages clause gives the Board jurisdiction to consider time extension requests not submitted to the CO for a final decision. As the Federal Circuit explained in *K-Con*, 778 F.3d at 1008, the test is whether the amount of liquidated damages was reasonable for the contract at issue at the time it was made, not whether the agency acted reasonably in considering requests for specific delay periods.

CONCLUSION

The government's motion to dismiss ASBCA No. 63616 in part is granted with respect to allegations of impacts and/or delays regarding a 2016 bid protest.

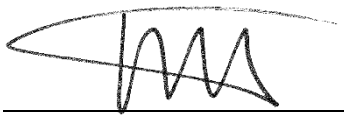
Dated: November 17, 2023

Michael N. O'Connell

MICHAEL N. O'CONNELL
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

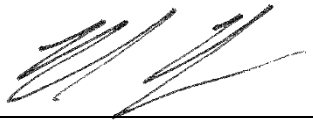
(Signatures continued)

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 Nos. 62876, 63616, Appeals of Shoreline Foundation, Inc., rendered in conformance with the Board's Charter.

Dated:

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