

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of - )  
 )  
Ameresco, Inc. ) ASBCA Nos. 63942, 63969  
 )  
Under Contract No. W912QR-21-C-0018 )

APPEARANCE FOR THE APPELLANT: Ron R. Hutchinson, Esq.  
Doyle & Bachman LLP  
McLean, VA

APPEARANCES FOR THE GOVERNMENT: Michael P. Goodman, Esq.  
Engineer Chief Trial Attorney  
James M. Inman, Esq.  
Zachary J. Grader, Esq.  
Sean P. Johnson, Esq.  
Engineer Trial Attorneys  
U.S. Army Engineer District, Louisville

OPINION BY ADMINISTRATIVE JUDGE WILSON  
ON THE GOVERNMENT'S MOTION TO DISMISS

Appellant Ameresco, Inc. (Ameresco) appeals from a contracting officer's final decision denying its claim for unexpected mold remediation costs it incurred pursuant to a design/build contract between it and the United States Army Corps of Engineers (Corps or government). The Corps has moved to dismiss two counts of the complaint filed in ASBCA No. 63942, i.e., Count II (the Corps violated the duty of good faith and fair duty by failing to negotiate in good faith relating to mold remediation) and Count III (violated the duty of good faith and fair dealing regarding water infiltration into Building 200)<sup>1</sup>, alleging that their operative facts were not previously presented to the contracting officer for decision. For the reasons set forth below, we deny the Corps' motion.

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<sup>1</sup> The Corps' motion originally only cited the initial appeal. However, subsequent replies from both parties referenced both docket numbers. For ease of reference, because both complaints of the consolidated appeals contain the same two Counts at issue, we will refer to the earlier filed pleading for purposes of this decision.

## STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On April 26, 2021, the Corps awarded a design/build contract to Ameresco for the full facility restoration of an Army Reserve Center located at Fort Totten, New York (hereinafter Building 200 or building) (R4, tab 3 at 21, tab 5 at 1, 46-47).<sup>2</sup> The fixed-price contract included 14 contract line items (CLINs) that provided for, among other things, replacement of the existing roofing (CLIN 0006) (R4, tab 5 at 49, 52-59). None of the 14 CLINs included any requirement that Ameresco perform work related to mold remediation, including work to identify and resolve water infiltrating the building's walls and foundation.

2. The contract incorporated by reference Federal Acquisition Regulation (FAR) 52.236-2, DIFFERING SITE CONDITIONS (APR 1984), FAR 52.243-4, CHANGES (JUN 2007), and FAR 52.233-1, DISPUTES (MAY 2014) (R4, tab 5 at 66-67).

3. Ameresco's certified claim dated November 28, 2023, documents in exhaustive detail the extra-contractual work it alleges the Corps required it to perform. The claim alleges that the building became infested with mold due to a roof failure that occurred after contract award and an undisclosed defect in the building's foundation. (R4, tab 3 at 21-22) Because its contents bear directly upon whether Counts II and III contain facts not previously presented to the contracting officer, below is a detailed description of the claim's allegations.

4. According to the claim, the solicitation included a Hazardous Materials Investigation Report that indicated there was evidence of water damage and mold in one room of the building, Room 126, but otherwise "no serious mold problem was observed" (R4, tab 3 at 24). After contract award and as part of its final design package, Ameresco arranged for its own hazardous materials investigation. The November 2, 2021, report prepared by the investigating firm, Terracon, also indicated there was no serious mold present in the building. The report further stated that the only evidence of water damage and mold was in Room 126. (R4, tab 3 at 24)

5. On April 19, 2022, after the Corps approved Ameresco's design package, Ameresco discovered existing leaks in the roof of the building that required immediate repair. Ameresco requested permission to perform temporary roof repairs at no cost to the government. The Corps approved that request but required training for personnel, an activity hazard analysis plan, and a schedule for the work to be performed. The Corps prohibited Ameresco from commencing work until it obtained approval for the latter two requirements. (R4, tab 3 at 24-25)

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<sup>2</sup> The parties numbered pages in their Rule 4 submissions with a prefix of letters and/or leading zeros. We have dropped the prefix and cite just the page number.

6. On May 7, 2022, before any of those requirements could be satisfied, a “major rain event” occurred. The roof leaks caused thousands of gallons of water to flood every floor of Building 200. (R4, tab 3 at 25)

*Mold Remediation Activities Leading to the Issuance of RFP-0007*

7. Ameresco’s claim describes the events that occurred throughout the remainder of 2022, relating to the need to investigate a potential mold problem caused by the roof leaks and the major rain event, and, if necessary, arrange for its remediation. On May 9, 2022, Ameresco requested guidance from the Corps on how to proceed with the temporary roof repairs. On May 17, 2022, the Corps notified Ameresco that another contractor had already made roof repairs and that, upon building turnover, Ameresco would need to determine whether mold had developed so that the Corps could decide on further action. (R4, tab 3 at 24-25)

8. On June 6, 2022, the Corps issued RFP-0003 seeking Ameresco’s price proposal to quantify the amount of mold in Building 200. Ameresco responded with its proposal on June 10, 2022, and the Corps issued Modification No. A0001 (Mod 1), effective June 29, 2022, for the required mold assessment. (R4, tab 3 at 26-27)

9. During this same time frame, the parties were engaged in a dispute about whether Ameresco was responsible for additional temporary roof repairs under the contract’s specifications. On June 16, 2022, Ameresco informed the Corps that any work arising from the May 7, 2022, major rain event constituted a change to the contract, entitling Ameresco to an equitable adjustment and schedule extension. (R4, tab 3 at 27-28)

10. Ameresco’s subcontractor, Terracon, conducted the mold assessment required by Mod 1 and produced a report dated July 14, 2022, describing the mold infestation. The report recommended “using an appropriately licensed microbial remediation contractor following abatement of asbestos-containing material that will be impacted by the remediation activities.” (R4, tab 3 at 27)

11. On August 2, 2022, the Corps issued RFP-0007 seeking a price proposal from Ameresco for the removal of the mold identified in Terracon’s July 14, 2022, report (R4, tab 3 at 27). According to Ameresco’s claim, this RFP set forth in detail the areas where the Corps expected Ameresco to conduct mold remediation and provided for a change to the contract’s drawings and specifications (*id.*). It described the work to be performed as “the difference between the work already to be performed as per contract and the work to be performed to remediate mold as found in the Microbial Assessment Report dated 14 July 2022 . . .” (*id.*). It also stated Ameresco was not authorized to proceed until it received a Standard Form 30 or a directive from the contracting officer

(*id.*). Ameresco submitted its proposal in response to RFP-0007 on October 17, 2022, proposing a price of \$1,184,443.14, and a 93-day time extension (*id.* at 27-28).

12. The claim alleges that while the administrative contracting officer (ACO) never issued a Standard Form 30, he nevertheless directed Ameresco to proceed with the mold remediation, and was well aware that Ameresco was complying with that directive:

[T]he [ACO] effectively directed Ameresco to proceed with the mold remediation work specified in RFP-0007 while continuing to purportedly negotiate with Ameresco regarding its price proposal submitted in response to RFP-0007. The [ACO] and two contracting officer representatives . . . were and continue to be directly involved in numerous and ongoing weekly coordination meetings during which the schedule for and progress of Ameresco's mold remediation work was discussed and planned[,] all at the direction and with the approval of the [Corps]. At the same time, the [ACO] continued to negotiate with Ameresco over Ameresco's October 17, 2022[,] proposal submitted in response to RFP-0007. At no point did the [ACO] communicate to Ameresco or indicate to Ameresco in any way that RFP-0007 was to be rescinded or that the mold remediation work that Ameresco was directed to perform in response to RFP-0007 pending negotiation of Ameresco's October 17, 2022[,] proposal was at Ameresco's own risk and expense.

(R4, tab 3 at 28)

#### *Water Infiltration Through Foundation Walls*

13. In addition to water infiltrating the building through roof leaks, Ameresco also identified areas of standing water that it suspected were entering the building through the exterior foundation walls. As early as May 2022, Ameresco notified the Corps that it believed water was coming in through the concrete walls each time it rained. The Corps disagreed, stating that it was due to the de-watering of mechanical piping after the major rain event. On July 28, 2022, Ameresco submitted a request for information (RFI) regarding the perimeter water intrusion and, thereafter, repeatedly informed the Corps of the issue. (R4, tab 3 at 32) The claim asserts that this water infiltration contributed to the mold infestation (R4, tab 3 at 21-22).

14. On January 9, 2023, Ameresco requested that the Corps permit a water intrusion specialist to identify the cause of the water infiltration through the building's exterior foundation walls. The Corps responded that the water infiltration was due to roof leaks and that they would not consider such an investigation until the leaks were repaired. The claim alleges that the Corps eventually admitted water was infiltrating the foundation walls when, on March 7, 2023, it issued RFP-0011, which sought a change proposal for a water intrusion investigation and a report recommending potential solutions. Ameresco submitted its response to RFP-0011 on May 16, 2023, supplemented at the Corps' request on May 23, 2023. The claim notes that it was not until August 17, 2023, that the Army issued Modification No. A00005 (Mod 5), which changed the contract's scope of work to allow for the investigation and report. (R4, tab 3 at 31)

*Discovery of Additional Mold Infestation Allegedly Not Covered by RFP-0007*

15. The claim also contends that as Ameresco proceeded with the mold remediation the ACO ordered it to perform, it "began noticing multiple additional locations within Building 200 where mold spores had begun to grow" (R4, tab 3 at 28). On November 12, 2022, Ameresco notified the Corps that treatment of these additional areas of mold growth exceeded the scope of Ameresco's October 17, 2022 proposal. The claim refers to other communications from Ameresco during November and December 2022 concerning Ameresco's discovery of this additional infestation. (*Id.*)

16. By letter dated April 17, 2023, Ameresco reminded the Corps that it had been informed on numerous occasions about the additional mold infestation. Ameresco requested "immediate direction as to how the [Corps] wants Ameresco to proceed with this out-of-scope work" (R4, tab 3 at 29). When the Corps did not respond, Ameresco, by letter dated April 24, 2023, informed the ACO that it would proceed with the removal of the additional mold and that a detailed work plan would be submitted. Ameresco also informed the Corps that it would consider the lack of response to its April 24, 2023, letter as a direction to proceed. Ameresco subsequently submitted the work plan, and on May 4, 2023, the preparatory meeting for hazardous removal took place. (*Id.*)

*Ameresco's REA and Initial Claim*

17. On May 9, 2023, Ameresco submitted a request for equitable adjustment (REA) for the additional mold remediation work. The ACO denied the request by letter dated June 13, 2023, citing alleged inadequate documentation and lack of merit. Ameresco's claim alleges that the ACO, in his letter, "confirmed his knowledge of and direction to Ameresco to perform mold remediation by referring to 'the continuation of RFP 3 mold remediation' and by stating that '[t]he presence of mold requires removal of mold containing drywall as well as replacement and finish'" (R4, tab 3 at 29).

18. By letter dated August 24, 2023, Ameresco submitted a certified claim seeking approximately \$4.4 million, along with a 200-day extension to cover the mold remediation activities that exceeded the scope of its October 17, 2022 proposal (app. supp R4, tab 82). On September 27, 2023, the CO rescinded RFP-0007 and informed Ameresco that a mold remediation proposal was no longer required. The CO added: “Upon review of Contract No. W912QR21C0018 and the documents provided by Ameresco in response to RFP-0007, you are not entitled to an equitable adjustment under FAR 52.236-2, Differing Site Conditions (APR 1984) because the proposed mold remediation identified in Change Request 00003-2 does not meet the criteria of a Type I or Type II Differing Site Condition.” (R4, tab 44).

#### *Ameresco’s Certified Claim*

19. On November 28, 2023, Ameresco filed a subsequent certified claim seeking damages in the amount of \$10,543,450.43 along with 589 days of delay under both the Changes clause and the Differing Site Conditions clause (R4, tab 3 at 21). The claim described the Corps’ response to its initial August 24, 2023, claim as follows:

[B]y letter dated September 27, 2023, you as the [Corps] contracting officer notified Ameresco that RFP-0007 is rescinded and a proposal from Ameresco is no longer required for this effort. Your letter asserts without explanation that Ameresco is allegedly not entitled to an equitable adjustment under FAR 52.236-2 “Differing Site Conditions (APR 1984)” because the proposed mold remediation identified in RFP-0007 does not meet the criteria of a Type I or Type II differing site condition. Your letter makes no mention of Ameresco’s entitlement to an equitable adjustment under FAR Clause 52.243-4 “Changes.”

Your September 27, 2023[,] letter has no effect on Ameresco’s entitlement to an equitable adjustment as a constructive change under FAR Clause 52.243-4. It has been well over a year after issuance of RFP-0007 on August 2, 2022[,] and much of the mold remediation work has already been performed by Ameresco with the [ACO’s] knowledge and direction. The [ACO’s] actions prior to issuance of your September 27, 2023[,] letter establish that (i) mold remediation throughout Building 200 is not required by the terms and conditions, scope of work or plans and specifications of the Contract as awarded and (ii) Ameresco was directed by the [ACO] to

perform mold remediation throughout Building 200 as a change to the Contract's scope of work.

Notably, your September 27, 2023[,] letter does not direct Ameresco to stop performing mold remediation work but alleges only that Ameresco is somehow not entitled to an equitable adjustment for that work. This is a further tacit admission that the [Corps] has directed Ameresco to perform the mold remediation work throughout Building 200 but now has decided it does not want to pay for that work or provide any time extension associated with that work. The [Corps'] position is unreasonable and contrary to applicable law.

(R4, tab 3 at 30)

20. The Corps denied Ameresco's November 28, 2023 claim on June 14, 2024 (R4, tab 2 at 17-18). Ameresco timely filed its notice of appeal on July 17, 2024, which the Board docketed as ASBCA No. 63942.

21. On August 16, 2024, Ameresco filed an additional certified claim, demanding further relief under the Changes and Differing Site Condition clauses of the contract in the amount of \$352,118 for mold remediation work in specific rooms on the third floor of Building 200. This claim referenced Ameresco's November 28, 2023 mold remediation claim and stated that the amount sought was in addition to the amount previously requested, and specifically stated that the 589-day time extension sought in the earlier claim covered the time needed to perform the additional remediation work in the additional rooms. (R4, tab 49) On September 10, 2024<sup>3</sup>, the CO denied the claim in its entirety (R4, tab 50). By email dated September 12, 2024, Ameresco timely filed a notice of appeal, which the Board docketed as ASBCA No. 63969 and subsequently consolidated the appeal with ASBCA No. 63924. Ameresco previously filed its complaint in ASBCA No. 63942 on July 17, 2024, and later filed a substantially similar pleading in ASBCA No. 63969. Only two of the complaints' five counts are at issue here. Count II alleges that the Corps violated the duty of good faith and fair duty by failing to negotiate in good faith a contract modification for the mold remediation work the Corps directed Ameresco to perform and that Ameresco did in fact perform (compl. ¶¶ 213-30). Count III alleges the Corps violated the duty of good faith and fair dealing by hindering and interfering with Ameresco's contract

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<sup>3</sup> The document in the record is erroneously dated September 10, 2023, as demonstrated by the date stamp of the digital signature on the document which clearly shows that the document was signed on September 10, 2024.

performance when it failed to timely address the ongoing water infiltration into Building 200 (*id.* ¶¶ 231-55).

### DECISION

Ameresco bears the burden of establishing the Board’s jurisdiction by a preponderance of the evidence. *See Tolliver Grp., Inc. v. United States*, 20 F.4th 771, 775 (Fed. Cir. 2021); *Rsch. Analysis & Maint.*, ASBCA No. 63259, 23-1 BCA ¶ 38,450 at 186,871 (citing *Tolliver*). Under the Contract Disputes Act (CDA), “[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 7103(a)(1). “The purpose of the requirement is ‘to create opportunities for informal dispute resolution at the contracting officer level . . . .’” *Tolliver Grp.*, 20 F.4th at 776 (quoting *Raytheon Co. v. United States*, 747 F.3d 1341, 1354 (Fed. Cir. 2014)). The contractor’s claim determines the scope of any subsequent appeal. *Rsch. Analysis & Maint.*, 23-1 BCA ¶ 38,450 at 186,871 (citing *MACH II*, ASBCA No. 56630, 10-1 BCA ¶ 34,357 at 169,673). Thus, unless the claim has been previously presented to the contracting officer, the Board does not possess jurisdiction to hear the appeal. *Id.*

We determine whether a claim is new by considering whether “it derives from the same set of common or related operative facts as the claim presented to the contracting officer and seeks the same or similar relief.” *Parwan Grp. Co.*, ASBCA No. 60657, 18-1 BCA ¶ 37,082 at 180,495 (citing *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003) and *Pub. Warehousing Co.*, ASBCA No. 56022, 11-2 BCA ¶ 34,788 at 171,227). If an allegation presents a new legal theory of recovery or includes additional facts that do not alter the nature of the original claim, the theory will not be considered a new claim provided it relies upon the same operative facts appearing in the original claim. *See Trepte Constr. Co.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385-86. An appellant is “free to change its legal theory as long as it is not materially different from what was presented in the claim.” *Wilwood Eng’g Inc.*, ASBCA Nos. 62773, 62774, 22-1 BCA ¶ 38,116 at 185,144 (citing *Tolliver*, 20 F.4th at 777).

However, a materially different legal theory is a new claim because it “will necessitate a focus on a different or unrelated set of operative facts” over which we do not possess jurisdiction. *Lee’s Ford Dock, Inc. v. Sec’y of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017). “In those circumstances, ‘the essential nature of the claim has been changed and we do not have jurisdiction over the new claim until it is presented to the contracting officer for decision.’” *Rsch. Analysis & Maint.*, 23-1 BCA ¶ 38,450 at 186,872 (quoting *Parwan*, 18-1 BCA ¶ 37,082 at 180,495).



### *The Parties' Positions*

The Corps argues that Counts II and III of Ameresco's complaint rely upon facts that were not previously presented to the contracting officer in Ameresco's claim.<sup>4</sup> According to the Corps, the claim "does not contain any of the allegations that the Government breached the implied duty of good faith and fair dealing and omits these alleged facts supporting such allegations" (gov't mot. at 3). The Corps further argues that the allegations that do appear in the claim "lack[] any connection" with such a breach (*id.* at 6). The Corps contends that it had a contractual right to issue RFPs, and whether it directed Ameresco to perform out-of-scope work and whether a change occurred are ordinary contract disputes covered by the Disputes clause, 52.233-1 (gov't reply at 7-8). According to the Corps, "negotiation failures" do not support an allegation that a party breached the duty of good faith and fair dealing (*id.* at 7).<sup>5</sup>

The Corps also objects to the complaint's reference to RFP-0016 and RFP-0018 in Paragraph 183 of the complaint's factual recitation, as well as in Paragraphs 248 and 249 in Count III (gov't mot. at 3-4; gov't reply at 1-2). The Corps asserts that Ameresco relied upon the latter two paragraphs as support for its allegation that the Corps breached the implied duty of good faith and fair dealing even though the two RFPs were issued after Ameresco submitted its claim (gov't mot. at 3-4). For that reason, the Corps argues, they could not have been presented to the contracting officer (gov't mot. at 8-9; gov't reply at 1-2).

Ameresco counters that Counts II and III merely present new legal theories based upon the same operative facts contained in its claim (app. resp. at 3-4). Ameresco then conducts an exhaustive comparison of the allegations in every

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<sup>4</sup> In addition to its jurisdictional argument, the Corps' reply includes a one-sentence footnote claiming that the complaint "alleges no plausible facts that support Counts II and III and may also be dismissed for failure to state a claim upon which relief may be granted" (gov't reply at 1 n.2). Aside from this footnote, the Corps did not raise this ground for dismissal in either its original motion or in its reply.

<sup>5</sup> The Corps also argues that the claim "did not allege that the Government had acted in bad faith in any respect and included no operative facts that were tantamount to a 'bad faith claim'" (gov't mot. at 5-6 (citing *CCI, Inc.*, ASBCA No. 57316, 14-1 BCA ¶ 35,546); *see also* gov't reply at 2, 5, 8). The Corps subsequently describes the distinction between a bad faith claim and a breach of the duty of good faith as "inconsequential" because "[n]o facts were presented to the Contracting Officer to support either legal theory" (gov't reply at 6). It is unclear why the Corps' submissions discuss bad faith, as Ameresco's complaint does not make any such allegations.

paragraph of each of the two counts to the allegations included in its claim. Thus, with respect to Count II, Ameresco compares Paragraphs 215 through 230 of the complaint to multi-paragraph verbatim quotations taken from the claim (*id.* at 5-18). Ameresco performs the same analysis for Count III, Paragraphs 233 through 255 (*id.* at 19-35).<sup>6</sup> Ameresco contends that this detailed comparison establishes that both Count II and Count III are based upon the same or similar operative facts as those alleged in its claim (*id.* at 36).

Ameresco also points out that to the extent the complaint mentions facts that did not appear in the claim, those facts do not alter the original nature of the claim. For example, Modification A00003 (Mod 3), which was not included in the claim, expanded the scope of work for mold assessment, as did Mod 1, which was included in the claim. (*See app. resp.* at 7-9) Ameresco argues that the same is true of the complaint's passing reference to an earlier version of Ameresco's October 17, 2022, proposal (*see id.* at 10).

Ameresco characterizes the complaint's paragraphs discussing RFP-0016 and RFP-0018, which were issued after Ameresco filed its claim, as additional operative facts consistent with the claim's allegations. According to the complaint, both RFPs sought proposals from Ameresco for work on the perimeter walls and foundation to prevent water infiltration (*id.* at 32 (citing compl. ¶¶ 247-49)). Ameresco contends that the references to RFP-0016 and RFP-0018 "flesh out" and are "directly related" to the claim's allegation that the Corps unreasonably delayed addressing that source of water infiltration (*id.* at 32-33).

### *Analysis*

Every contract contains an implied duty of good faith and fair dealing. *See Metcalf Constr. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014). The duty prohibits one party from interfering with the other party's performance and acting in a manner that "destroy[s] the reasonable expectations of the other party regarding the fruits of the contract." *Dobyns v. United States*, 915 F.3d 733, 739 (Fed. Cir. 2019) (quoting *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005)); *Satterfield & Pontikes Constr., Inc.*, ASBCA Nos. 59980, 62301, 21-1 BCA ¶ 37,873 at 183,909 (quoting *Dobyns*). The duty does not require a showing of bad faith or bad intent to demonstrate a breach. *See SIA Constr., Inc.*, ASBCA No. 57693, 14-1 BCA ¶ 35,762 at 174,986. Instead, the "gravamen" of the duty is "the reasonableness of the Government's action" in light of the circumstances. *Free & Ben, Inc.*, ASBCA

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<sup>6</sup> Paragraphs 214 in Count II and 232 in Count III contain no facts but rather introduce Ameresco's allegations that the Corps violated the duty of good faith and fair dealing.

No. 56129, 09-1 BCA ¶ 34,127 at 168,742 (quoting *Coastal Gov't Servs., Inc.*, ASBCA No. 50283, 99-1 BCA ¶ 30,348 at 150,088). “[T]he proper inquiry . . . often boils down to questions of [the] ‘reasonableness’ of the government’s actions . . . .” *Relyant, LLC*, ASBCA No. 59809, 18-1 BCA ¶ 37,085 at 180,539 (citing *Free & Ben*, 09-1 BCA ¶ 34,127 at 168,742). Lack of diligence or a failure to cooperate can constitute a breach of the duty of good faith and fair dealing. See *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988); *SIA Constr. Inc.*, 14-1 BCA ¶ 35,762 at 174,986 (citing *Malone*).

### *Ameresco’s Claim Supports the Allegations Contained in Counts II and III*

Ameresco’s detailed comparison of the complaint to the claim’s explicit language is persuasive. As illustrated by that comparison and contrary to the Corps’ assertion, the facts contained in Ameresco’s claim do not describe a mere contract dispute or failure of negotiations. Instead, they describe numerous instances of alleged unreasonable contract administration. As such, they support the new legal theory presented in Counts II and III that the Corps’ actions violated the duty of good faith and fair dealing. See *Relyant, LLC*, 18-1 BCA ¶ 37,085 at 180,539 (citing *Free & Ben*, 09-1 BCA ¶ 34,127 at 168,742).

### *Count II*

In Count II, Ameresco alleges the Corps violated the duty by 1) failing to negotiate in good faith contract modifications for the mold remediation work, and 2) by interfering with Ameresco’s performance and destroying its reasonable expectation that it would be entitled to an equitable adjustment for the mold remediation (compl. ¶¶ 214, 225). Count II further alleges that the Corps issued Mod 1 and Mod 3 seeking an assessment of the mold infestation and then issued RFP-0007 seeking a proposal for its remediation. Ameresco alleges that after Ameresco submitted its proposal in response to that RFP, the Corps directed Ameresco to begin performing the mold remediation while continuing to negotiate with Ameresco over the pricing of its proposal and that during this time, the Corps was well aware that Ameresco was performing the mold remediation work and never directed it to stop. (See *id.* ¶¶ 216-21) Ameresco likewise alleges that the Corps knew Ameresco considered that work to be outside the scope of the contract, and that, more than a year after it was issued, the Corps rescinded RFP-0007, informed Ameresco it was not entitled to any additional costs or time extensions for the mold remediation, and effectively received the mold remediation services at Ameresco’s expense (*id.* ¶¶ 223-24, 230).

The allegations in Count II are substantially the same as those contained in Ameresco’s claim (SOF ¶¶ 7-9, 11-13, 15-19). Count II does not introduce any new operative facts that materially change the nature of the claim presented to the contracting officer. See *Trepte Constr. Co.*, 90-1 BCA ¶ 22,595 at 113,385-86.

Moreover, the repeated instances of alleged unreasonable contract administration recounted in the claim support Count II's assertion of a new legal theory, *i.e.*, that the Corps' actions with respect to the mold remediation violated the duty of good faith and fair dealing. *See Shneez Veritas, LLC*, ASBCA No. 62067, 23-1 BCA ¶ 38,322 at 186,101 (even though claim did not "specifically articulate, or use the words, 'breach of the covenant of good faith and fair dealing' . . . the facts set forth in the claim . . . describe the [government's] alleged failure to engage in reasonable contract administration.") (citing *Planate Mgmt. Grp., LLC v. United States*, 139 Fed. Cl. 61, 72 (2018)).

### *Count III*

In Count III, Ameresco alleges that the Corps breached the duty of good faith and fair dealing by failing to timely address ongoing water infiltration into Building 200 via roof leaks and defects in the perimeter walls and foundation (compl. ¶¶ 232, 250). The complaint alleges that Ameresco repeatedly notified the Corps about the water infiltrating the building through its foundation and the additional mold that had not previously been discovered (*id.* ¶¶ 235, 237, 242). Ameresco also alleges that the Corps ignored these warnings and took no action to investigate the water infiltration until September 6, 2023. On that date, the Corps issued Mod 5 to investigate the causes of water entering through the perimeter walls and foundation.<sup>7</sup> According to Ameresco, the resulting report, issued in February 2024, confirmed Ameresco's warnings about the water infiltration. (*See id.* ¶¶ 243-46). In June 2024, the Corps issued two RFPs seeking proposals for repair of the perimeter walls and foundation, which, according to Ameresco, again confirm Ameresco's warnings about the sources of the water infiltration (*see id.* ¶¶ 183, 247-49, 255).

As with Count II, the allegations in Count III are substantially the same as those contained in Ameresco's claim (SOF ¶¶ 3, 13-19). Count III does not introduce any new operative facts materially altering the claim's nature. *See Trepte Constr. Co.*, 90-1 BCA ¶ 22,595 at 113,385-86. The claim's description of the Corps' alleged dilatory responses with respect to the water infiltration and additional mold infestation supports Count III's legal theory that the Corps violated the duty of good faith and fair dealing. *See Malone*, 849 F.2d at 1445 (breach of the duty of good faith and fair dealing can include lack of diligence); *SIA Constr. Inc.*, 14-1 BCA ¶ 35,762 at 174,986 (citing *Malone*).

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<sup>7</sup> We consider the twenty-day difference between this date and the date identified in the claim that Mod 5 was issued immaterial to our analysis (*compare* compl. ¶ 245 *with* SOF ¶ 14).

### *Ameresco's Complaint Does Not Introduce Inconsistent Operative Facts*

We further agree with Ameresco that to the extent that Counts II and III allege facts that did not previously appear in the claim, those new facts are consistent with and do not alter the nature of the original claim. For example, Paragraph 216 of Ameresco's complaint alleges that Mods 1 and 3 increased the scope of work for the mold assessment. Although the claim refers only to Mod 1 (SOF ¶ 8), Mod 3, as described in the complaint, deals with the same subject matter as Mod 1. We also agree that the complaint's reference in Paragraph 217 to an earlier version of Ameresco's October 17, 2022 proposal not mentioned in the claim – a reference that does not even describe the document's contents – does not change the operative facts we would be required to examine. The new facts appearing in Paragraphs 216 and 217 are not materially different from those presented in the claim. They do not alter the nature of the original claim or require us to rely upon an unrelated set of operative facts other than those alleged in the claim. *See Rsch. Analysis & Maint.*, 23-1 BCA ¶ 38,450 at 186,871-72 (citing *Trepte Constr. Co.*, 90-1 BCA ¶ 22,595 at 113,385-86).

The same is true with respect to the reduction in both counts of the alleged damage figure by \$764,080.51 (*compare* compl. ¶¶ 230, 255 *with* SOF ¶ 19). We do not consider this operative fact to be materially different than what was alleged in the claim. *See Modeer v. United States*, 68 Fed. Cl. 131, 137 (2005), *aff'd*, 183 F. App'x 975 (Fed. Cir. 2006) (change in a claim's dollar value is not a new claim if it arises from the same operative facts as the claim, including the same categories of relief).

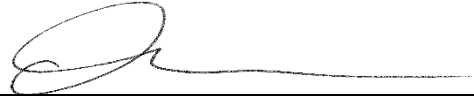
The Corps specifically objects to the complaint's references to RFP-0016 and RFP-0018, which the claim does not mention because they were issued after it was filed (gov't mot. at 8-9). As described in the complaint, those RFPs sought proposals from Ameresco for work on the perimeter walls and foundation to stop the water infiltration (compl. ¶¶ 247-49). We agree with Ameresco that these additional facts are consistent with and flesh out the operative facts alleged in Ameresco's claim – that water was infiltrating Building 200 from these same areas (*id.*). The complaint does not seek compensation related to those two RFPs nor suggest they constituted a change to the contract. They do not require us to examine a "different or unrelated set of operative facts" other than those alleged in the claim. *See Lee's Ford Dock*, 865 F.3d at 1369.

Finally, we note that the complaint references a February 2024 investigation report that confirmed Ameresco's warnings about the water infiltration (compl. ¶ 246). Although this report was not issued until after Ameresco filed its claim and the Corps did not discuss it in its motion, like RFP-0016 and RFP-0018, we determine that the reference to that report is an additional consistent fact not altering the nature of the original claim. *See Trepte Constr. Co.*, 90-1 BCA ¶ 22,595 at 113,385-86.

## CONCLUSION

The Corps' motion to dismiss Counts II and III of Ameresco's complaint for lack of jurisdiction is denied.

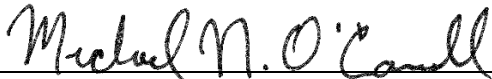
Dated: December 4, 2025



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OWEN C. WILSON  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



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

I concur



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DAVID B. STINSON  
Administrative Judge  
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. 63942, 63969, Appeals of Ameresco, Inc., rendered in conformance with the Board's Charter.

Dated: December 4, 2025



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