ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
McCarthy HITT - Next NGA West JV	)	ASBCA Nos. 63571, 63572, 63573
	)	
Under Contract No. W912DQ-19-C-7001	)	

APPEARANCES FOR THE APPELLANT: Martin R. Salzman, Esq.
Jason A. Kamp, Esq.
John T. Gallagher, Esq.
Hendrick, Phillips, Salzman & Flatt, P.C.
Atlanta, GA

Eric L. Nelson, Esq.
Smith, Currie and Hancock LLP
Atlanta, GA

APPEARANCES FOR THE GOVERNMENT: Michael P. Goodman, Esq.
Engineer Chief Trial Attorney
Virginia Murray, Esq.
Kristine R. Hoffman, Esq.
Engineer Trial Attorneys
U.S. Army Engineer District, Kansas City

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

These appeals arise out of a contract for the construction of a new building to house the National Geospatial-Intelligence Agency (NGA) in St. Louis, Missouri. The contract is between the United States Army Corps of Engineers (USACE) and appellant McCarthy HITT – Next NGA West JV (McCarthy-HITT). McCarthy-HITT appeals from USACE's denial of claims it submitted to the contracting officer on behalf of three of its subcontractors, icon Mechanical Construction and Engineering, LLC (icon), Sachs Electric Company (Sachs), and W. James Taylor, Inc. (Taylor Roofing) (collectively, Subcontractors). The Subcontractors claimed that their work on the project was hindered, disrupted, impacted, and delayed by actions taken by the government in response to the COVID-19 pandemic; government-required changes to the method and manner of performance of the work; government-imposed restrictions that were unanticipated at the time of bid and award; changed conditions impacting the project; and unprecedented inflationary price increases.

We consolidated McCarthy-HITT's appeals on behalf of the Subcontractors and McCarthy-HITT filed a consolidated complaint. Prior to answering, the government moves for dismissal on the grounds that the consolidated complaint fails to state any claims upon which relief may be granted. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

For purposes of deciding the motion to dismiss, we assume the truth of the appellant's allegations as set forth in the consolidated complaint and the underlying claims. The claims comprised 100 pages in total, and the consolidated complaint is 33 pages in length and contains 173 numbered paragraphs. We limit our factual recitation to those allegations necessary to understand the nature of the claims and resolve the present motion.

On or about March 19, 2019, McCarthy-HITT was awarded a design-build contract, Contract No. W912DQ19C7001 (Contract), by USACE, under which McCarthy-HITT agreed to perform certain design-build services as prime contractor for the design and construction of the NGA's Next NGA West Campus Project in St. Louis, Missouri (Project). The Contract is a DO-C2 rated order certified for national defense pursuant to the Defense Priorities and Allocation System, requiring that contractors prioritize the materials, equipment, and services to be performed on the Project over all non-rated orders.[*] (Consolidated Complaint (Compl.) ¶¶ 6-8))

McCarthy-HITT entered into subcontracts with icon, Sachs and Taylor Roofing. Under the icon subcontract, icon would perform design-assist and construction services associated with Project EERO Work Category #141 HVAC Systems (*id.* ¶ 16). Sachs was to perform design-assist and construction services associated with Work Package #142 Electrical and Low Voltage Systems (*id.* ¶ 25). Taylor Roofing was subcontracted to install the roofing membrane system (*id.* ¶ 30).

The prices for these subcontracts were based upon certain assumptions. Among them was that material and equipment costs would not escalate beyond what was reasonably expected at the time (*id.* ¶¶ 17, 26, 31). The prices were also based in part on the assumption that the Subcontractors' work could be performed using means, methods, and procedures that were normal and customary for work of this nature and consistent with their plans at the time of the subcontracts (*id.* ¶¶ 18, 27, 33). The Sachs and icon subcontract prices also assumed that Sachs and icon would be able to perform their work under workplace conditions and safety and health requirements

[*] A DPAS DO-C2 rating requires the contractor to prioritize the materials, equipment and services to be performed on the rated project over all non-rated orders. *See* 15 CFR 700.3(a).

reasonably similar to those in existence at the time of the subcontracts (*id.* ¶¶ 19, 28). Taylor Roofing's subcontract price assumed that roofing materials would be available for purchase when required for installation on the Project (*id.* ¶ 32).

By no later than March 20, 2020, McCarthy-HITT had determined that the COVID-19 pandemic would significantly impact its and its subcontractors' performance on the Project. McCarthy-HITT notified USACE of potential impacts to the supply chain, labor availability, and the productivity of McCarthy-HITT and its subcontractors, among other issues, and requested that USACE participate collaboratively to manage and mitigate the impacts and delays. USACE, however, failed to recognize that the COVID-19 pandemic was and would continue to impact and delay the performance of the work on the Project. Although McCarthy-HITT and the Subcontractors continued to assert that they were being impacted and delayed, USACE failed to timely provide McCarthy-HITT with a reasonable extension of time or adjustment to the contract price to address the impacts caused by the COVID-19 pandemic as they occurred. (*Id.* ¶¶ 34-37)

USACE failed to work with McCarthy-HITT in good faith to develop a collaborative and cooperative approach to manage and mitigate the impacts and delays arising from the COVID-19 pandemic (*id.* ¶ 38). Although the government said it would consider a time extension request, it failed to give meaningful relief. USACE essentially directed McCarthy-HITT to proceed with the Project as if the Project were immune to the pandemic's impacts, while also requiring that McCarthy-HITT and the Subcontractors comply with different and changing safety and health guidance and restrictions. (*Id.* ¶ 40)

Throughout the course of performance, McCarthy-HITT and the Subcontractors were "disrupted, hindered, impacted, and delayed by: the actions and inactions of the USACE and the Government at-large in relation to the COVID-19 pandemic; required changes to the method and manner of performance of the work; work, workplace, and site access restrictions that were unanticipated at the time of bid and award; and by other changed conditions impacting the Project and the Project's supply chain" (*id.* ¶ 41).

Examples of the USACE-imposed changes in the methods and manner of performance of the work and unanticipated restrictions include:

> the closure of the Collaboration Center, the required compliance with constantly changing OSHA and the CDC guidance on COVID-19; implementation of COVID-19 exposure control procedures; additional job safety analyses and task-specific analyses; creating new health and safety signage; additional training; developing contact tracing,

> testing, and quarantine programs; imposing quarantines and enforcing return-to-work protocols; imposing tool and shared surface disinfection and cleaning requirements; requiring compliance with social distancing requirements; providing and utilizing additional PPE; adding air filtration systems; requiring temperatures checks and daily health checks; permitting additional breaks; providing for additional break areas; changed office, break, and trailer spaces and configurations; changed site logistics; two-man work rules; changing crew compositions and work plans; and, altering supervision and management requirements.

(*Id.* ¶ 42)

By June of 2021, McCarthy-HITT and the Subcontractors had begun encountering excessive material and equipment pricing escalations on the Project, and McCarthy-HITT repeatedly notified the USACE of the same (*id.* ¶ 44-45). USACE failed to meaningfully respond to the concerns raised by McCarthy-HITT and the Subcontractors regarding the material price increases. Instead, USACE reminded the parties that the Contract was a DO-C2 rated order, requiring that McCarthy-HITT and its subcontractors prioritize the materials, equipment, and services to be performed on the Project. (*Id.* ¶ 46)

On October 5, 2022, McCarthy-HITT submitted certified claims to the USACE contracting officer on behalf of icon, Sachs and Taylor Roofing, seeking equitable adjustments of $5,880,758.75, $17,021,532.26 and $611,289.56, respectively. USACE's contracting officer denied the claims in their entirety on January 4, 2023. (*Id.* ¶¶ 56-57, 97-98, 141-42)

McCarthy-HITT filed timely appeals with the Board.

DECISION

I. Motion to Dismiss Standard

We entertain motions to dismiss appeals on the ground that the appellant has failed to state a claim upon which relief may be granted, along the lines of a motion pursuant to FED. R. CIV. P. 12(b)(6). *Flatiron/Dragados/Sukut Joint Venture*, ASBCA Nos. 63019, 63020, 23-1 BCA ¶ 38,332 at 186,142; *Kamaludin Slyman CSC*, ASBCA No. 62006 *et al.*, 21-1 BCA ¶ 37,849 at 183,789. Dismissal for failure to state a claim is appropriate only where the non-conclusory facts asserted by the claimant do not plausibly suggest a showing of entitlement to a legal remedy. *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009); *Kandahar Mahali Transit & Forwarding Ltd.*,

ASBCA No. 62319, 20-1 BCA ¶37,635 at 182,725; *Parsons Gov't Servs., Inc.*, ASBCA No. 60663, 17-1 BCA ¶ 36,743 at 179,100. The alleged facts "must be enough to raise a right to relief above the speculative level." *Cary*, 552 F.3d at 1376 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

When considering a motion to dismiss for failure to state a claim, we "accept well-pleaded factual allegations as true and must draw all reasonable inferences in favor of the claimant." *Lockheed Martin Integrated Sys., Inc.*, ASBCA Nos. 59508, 59509, 17-1 BCA ¶ 36,597 at 178,281 (quoting *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1365 (Fed. Cir. 2013)). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Rack Room Shoes v. United States*, 718 F.3d 1370, 1376 (Fed. Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). We decide "only whether the claimant is entitled to offer evidence in support of its claims, not whether the claimant will ultimately prevail." *Parsons Gov't Servs., Inc.*, 17-1 BCA ¶ 36,743 at 179,101 (quoting *Matcon Diamond, Inc.*, ASBCA No. 59637, 15-1 BCA ¶ 36,144 at 176,407). Our review is not restricted to the complaint; we also consider the underlying claim. *Fluor Intercontinental, Inc.*, ASBCA No. 62550, 62672, 22-1 BCA ¶ 38,105 at 185,096. *See also Kamaludin*, 21-1 BCA ¶ 37,849 at 183,789 (for purposes of assessing whether the claim states a claim upon which relief can be granted, "the primary document setting forth the claim is not the complaint, per se, but is either the contractor's claim or the government's claim . . . .") (quoting *Lockheed Martin*, 17-1 BCA ¶ 36,597 at 178,281)). We may also consider information incorporated by reference into the claim, that is subject to judicial notice, are matters of public record, or are exhibits attached to the complaint or claim over which there is no dispute as to authenticity. *Fluor,* 22-1 BCA ¶ 38,105 at 185,096.

II. The Complaint Adequately States Claims for Relief

The Subcontractors each assert the same three grounds for relief: the government's actions and inactions amounted to (1) constructive changes to the contract work, entitling the subcontractor to an equitable adjustment to the contract price or an extension of time pursuant to the "Changes" clause, Federal Acquisition Regulation (FAR) 52.243-4 (Compl. ¶¶ 60-74, 101-16, 145-56); (2) constructive suspensions of work entitling the subcontractor to relief under the "Suspension of Work" clause, FAR 52.242-14 (*id.* ¶¶ 75-87, 117-30, 157-66); and (3) breaches of the government's implied duties under the Contract (*id.* ¶¶ 88-94, 131-37, 167-73).

The government argues that McCarthy-HITT has failed to allege sufficient facts to adequately state a claim for relief, and that the allegations establish that the claims are barred by the government's affirmative defense of "sovereign acts."

a. Constructive Change Claims

To prevail upon a constructive change theory, a contractor must show (1) that it performed work beyond the contract requirements, and (2) that the added work was ordered, expressly or impliedly, by the government. *Bell/Heery v. U.S.*, 739 F.3d 1324, 1335 (Fed. Cir. 2014).

While the complaint contains many conclusory allegations of the type that need not be taken as true on a motion to dismiss (*see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)), McCarthy-HITT has alleged sufficient factual matter to state a constructive change claim. For example, it alleges that USACE required it to comply with government guidance on COVID-19 and implement COVID-19 exposure control procedures; perform additional job safety analyses and task-specific analyses; create new health and safety signage; provide additional training; develop contact tracing, testing, and quarantine programs; impose quarantines and enforce return-to-work protocols; impose tool and shared surface disinfection and cleaning requirements; comply with social distancing requirements; provide and utilize additional personal protection equipment; add air filtration systems; require temperature checks and daily health checks; permit additional breaks; provide for additional break areas; change office, break, and trailer spaces and configurations; change site logistics; and change crew compositions and work plans (Compl. ¶ 42). Thus, the complaint alleges facts plausibly suggesting that USACE required it and the Subcontractors to perform differently than set forth in the Contract.

The government argues that "[t]here was no express or implied directive by Respondent for Appellant to perform work beyond the scope of the Contract" (gov't mot. at 15). It contends that "[a]ppellant and its subcontractors were never directed by Respondent to do anything but perform their obligations as set forth in the Contract, and that does not amount to a change" (*id.*). On a motion to dismiss for failure to state a claim, however, we cannot resolve the parties' factual disputes. We assume the truth of the complaint's factual allegations, which here allege that USACE did direct McCarthy-HITT to perform work beyond the scope of the Contract. Accordingly, we conclude that the complaint contains sufficient allegations to plausibly suggest entitlement to a remedy under the Changes clause for one or more USACE-dictated changes to the Contract's requirements.

Having found that the complaint alleges at least one constructive change, we need not address at this stage the government's arguments as to each of the legal theories that McCarthy-HITT advances in opposition to the government's motion. To succeed on its motion to dismiss, the government must demonstrate McCarthy-HITT's complaint fails adequately to state any such claim. It has not done so. Accordingly, we do not need to address whether McCarthy-HITT has alleged facts adequate to sustain recovery under other constructive change theories, such as constructive

acceleration or commercial impracticability. *See Zafer Taahhut Insaat ve Ticaret A.S. v. United States*, 833 F.3d 1356, 1362 (Fed. Cir. 2016) (constructive acceleration is remediable as a constructive change); *Raytheon Co. v. White*, 305 F.3d 1354, 1367 (Fed. Cir. 2002) ("In government contracting, impracticability has also been treated as a type of constructive change to the contract"). Likewise, while the government makes a facially strong argument that McCarthy-HITT has no remedy under this fixed-price contract for unexpected cost escalations and other market conditions (*see Ace Elect. Def. Sys.*, ASBCA No. 63224, 22-1 BCA ¶ 38,213 at 185,569 ("That the government continued to expect the contract's prescribed performance from [the contractor] at the agreed upon price is not an order to perform additional work.")), we decline to address that question at this stage of these appeals, where the only question is whether the case may go forward. The viability of any one of the constructive change claims is a sufficient basis upon which to deny the government's motion to dismiss McCarthy-HITT's constructive change claims in their entirety.

b. Suspension of Work Claims

To recover under the Suspension of Work clause, the contractor must show (1) that the contracting officer suspended the work; and (2) that the resulting delay was unreasonable. A constructive suspension occurs when, absent an express order by the contracting officer, the work is stopped for an unreasonable amount of time and the government is found to be responsible for the work stoppage. *P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1359 (Fed. Cir. 2002); *CATH-dr/Balti Joint Venture*, ASBCA, Nos. 53581, 54239, 05-2 BCA ¶ 33,046 at 163,793. "A constructive suspension has the same effect and consequences as an actual suspension, and relief should be granted as if an actual suspension order had been issued." *Phylway Constr., LLC*, ASBCA No. 62961, 22-1 BCA ¶ 38,218 at 185,620 (quoting *Merritt-Chapman & Scott Corp. v. United States*, 528 F.2d 1392, 1400 (Ct. Cl. 1976)).

The complaint alleges sufficient facts to give rise to a claim for constructive suspension. Viewing the allegations in the light most favorable to McCarthy-HITT and drawing all inferences in its favor, the complaint alleges sufficient non-conclusory factual matter to plausibly suggest that USACE's actions and inactions in administering the Contract once the pandemic struck had the effect of unreasonably disrupting, delaying or hindering the work on the Project. For example, the complaint alleges that the government refused to work with McCarthy-HITT to develop a collaborative and cooperative approach to manage the impacts caused by the pandemic, instead simply insisting that the work proceed on schedule, which had the effect of hindering and delaying the work unreasonably (Compl. ¶¶ 34-43). The complaint also alleges that McCarthy-HITT informed USACE of the impacts of its action and inactions, but that USACE refused to acknowledge that the work was being delayed, and that the Subcontractors incurred additional expense as a result (*e.g.*,

Compl. ¶¶ 81, 123, 164). We hold that the complaint adequately alleges a constructive suspension to overcome the government's motion to dismiss.

The government focuses on McCarthy-HITT's allegations that the contracting officer should have stopped the work when the pandemic struck in March 2020 in order to coordinate on a plan to address the expected impacts but failed to do so. The government sees a contradiction in faulting the government for both failing to stop the work and constructively suspending the work. The Board's rules do not prohibit alternative pleading, however. *See Gap Instrument Corp.*, ASBCA No. 55041, 07-1 BCA ¶ 33,567 at 166,280. In any event, the two contentions are not necessarily inconsistent. It can be true that the government should have stopped the work and also that, when it failed to do so, its subsequent actions and inactions unreasonably delayed the work. For example, Taylor Roofing asserts in its claim that, after USACE directed Taylor Roofing to proceed with ordering materials in order to comply with the schedule despite the pandemic, it was then forced to store the materials at considerable expense because the government was not ready for their installation (R4, tab 48 at 14-15). Similarly, Sachs claims that USACE's failure to timely approve certain design packages caused delays that resulted in increased costs (compl. ¶¶ 113, 125). If proved, these scenarios plausibly suggest that the Subcontractors may be entitled to relief under the Suspension of Work clause even if the government improperly failed to suspend the work at the outset of the pandemic as the complaint alleges.

c. Implied Duty Claims

Like every contract, the Contract here contained an implied duty on each party to perform with good faith and fair dealing. *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005); *Metcalf Const. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014). The implied duty "prevents a party's acts or omissions that, though not proscribed by the contract expressly, are inconsistent with the contract's purpose and deprive the other party of the contemplated value." *Metcalf*, 742 F.3d at 991. A breach occurs when a party violates its obligation "'not to interfere with the other party's performance and not to act so as to destroy 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*, 395 F.3d at 1304). The implied duty "'cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions.'" *Id.* (quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010)).

The complaint alleges sufficient facts to plausibly suggest that the government violated its duty of good faith and fair dealing. McCarthy-HITT alleges that, after the pandemic struck, the government declined to cooperate with it in managing or addressing the impacts, which were severe and unexpected. Rather, it is alleged, the government insisted that McCarthy-HITT and the Subcontractors continue to perform

as though nothing of consequence was occurring, used the DO-C2 rating as a means of exerting pressure to maintain the schedule at all costs, and was non-responsive to requests for help in complying with all the new and changing requirements placed upon McCarthy-HITT and the Subcontractors. (Compl. ¶¶ 8-9, 34-40, 45-46) These allegations suggest that the government essentially left McCarthy-HITT "twisting in the wind" by insisting on uninterrupted performance in the face of extraordinary circumstances and are sufficient to make out a plausible claim for a breach of the duty of good faith and fair dealing. *See Relyant, LLC*, ASBCA No. 59809, 18-1 BCA ¶ 37,085 at 180,539 (government allowing contractor to "twist in the wind" for several months while considering request to modify statement of work was actionable as a breach of the duty of good faith and fair dealing).

Again, having found at least one adequately alleged breach of the implied duty, we need not and do not address whether the complaint states claim for other breaches of that duty. We hold only that the complaint is sufficient to survive the government's motion to dismiss the implied duty claims in their entirety.

III. The Government Has Not Shown that All of the Claims are Barred by the Sovereign Acts Doctrine

The government also argues that the complaint must be dismissed because the claims are all barred by the "sovereign acts" doctrine.

The sovereign acts defense "is an affirmative defense that is an inherent part of every government contract." *Conner Bros. Constr. Co., v. Geren*, 550 F.3d 1368, 1371 (Fed. Cir. 2008)). Under the sovereign acts doctrine, the government acting as a contractor cannot be held liable for its general and public acts as a sovereign. *Id.*; *StructSure Projects, Inc.*, ASBCA No. 62927, 23-1 BCA ¶ 38,416 at 186,680. The defense is rooted in the principle that "private contractors who deal with the United States should not be treated any more favorably than if they had contracted with a private party." *Conner Bros.*, 550 F.3d at1373 (citing *Horowitz v. United States,* 267 U.S. 458, 461 (1925)). "[T]he object of the sovereign acts defense is to place the Government as contractor on par with a private contractor in the same circumstances . . . ." *United States v. Winstar Corp.*, 518 U.S. 839, 904 (1996).

The sovereign acts defense is an affirmative one, on which the government bears the burden. *Aptim Fed'l Servs., LLC*, ASBCA No. 62982, 22-1 BCA ¶ 38,127 at 185,218. The government must prove that (1) the governmental action was public and general; and (2) the act rendered performance of the contract impossible. *Id.*; *see also Conner Bros.*, 550 F.3d at 1379. While a claim may be dismissed at the pleading stage when its allegations demonstrate the existence of an affirmative defense that will bar any remedy, the applicability of the defense must be clearly indicated on the face of the pleading. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL

PRACTICE AND PROCEDURE § 1357 (3d ed. 2004). The claimant is not required to plead facts that negate an affirmative defense. *Id.*

The government relies heavily on our decisions in *Aptim*, 22-1 BCA ¶ 38,127, and *J.E. Dunn Constr. Co.*, ASBCA No. 62936, 22-1 BCA ¶ 38,123, both of which denied claims arising out of the government's responses to the COVID-19 pandemic on the grounds that they were barred by the sovereign acts doctrine. Those appeals, however, were decided on a full record, not at the pleading stage. They did not address whether the applicability of the sovereign acts defense was plain from the face of the pleadings, which is our task here.

McCarthy-HITT's allegations do not demonstrate conclusively that the claims are barred in their entirety by the sovereign acts doctrine. Certainly, many of the governmental actions cited as giving rise to the government's liability appear to be public and general. The icon and Sachs claims submitted to the contracting officer, for example, cite the federal government's COVID-19 relief efforts, such as the Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020), and the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020), as contributing to the extra costs they seek from USACE (R4, tabs 49 at 7-13, 44 (Sachs claim attributing unanticipated additional costs, in part, to "the wide-ranging measures implemented by the Government" in response to the pandemic); 50 at 11-14, 35 (icon claim, same); *see also* compl. ¶ 43 (citing "actions and inactions of the USACE and *the Government at-large*") (emphasis added)).

We cannot conclude, however, that the claims arise entirely from public and general governmental acts. It is not clear from the face of the complaint, for example, that all the various extracontractual requirements and restrictions USACE allegedly imposed on the Project work were dictated by public and general governmental acts rather than by USACE acting in its contracting capacity (*see* compl. ¶ 42). In addition, the complaint alleges that the government's liability arises, at least in part, from Project-specific actions and inactions, such as the way in which USCACE's contracting personnel allegedly responded to McCarthy-HITT's efforts to obtain the government's cooperation in dealing with the pandemic's impacts on the Project and allegedly wielded the DO-C2 rating in an abusive manner (*e.g.,* compl. ¶¶ 34-40, 46). The government ultimately may be able to demonstrate that all of the government's alleged conduct was required by public and general acts over which USACE in its contracting capacity had no control, but doing so will require more facts than are provided on the face of the complaint.

It is also not clear from the allegations that the government will be able to establish the second element, impossibility. This element requires the government to show that the government's public and general acts precluded it from performing the contract in the manner that the claimant alleges was required. *See Aptim*, 22-1 BCA

¶ 38,127 at 185,218. It is not clear from the face of the complaint, for example, that USACE was required by law to impose the allegedly new requirements on the Project work. If it was within the contracting officer's discretion to impose those requirements, then arguably the impossibility element is not established. Again, information beyond what is in the complaint is required to determine whether this element of the sovereign acts defense is present.

IV. The Complaint Does Not Fail to State a Claim for Relief Due to the Lack of a "Sum Certain"

Finally, the government argues that the complaint's contention that Sachs incurred increased costs because of USACE's failure to timely approve certain design packages (compl. ¶¶ 113, 125) must be dismissed because Sachs' claim to the contracting officer did not demand a sum certain for this aspect of its claim. "[I]t is mandatory for a party submitting a claim under the CDA seeking monetary relief to include a sum certain indicating for each distinct claim the specific amount sought as relief." *See ECC Int'l Constructors v. Sec'y of the Army*, 79 F.4th 1364, 1380 (Fed. Cir. 2023). A contractor's monetary claim that fails to state a sum certain "has not sufficiently pleaded the elements of a claim under the CDA and may be denied by the contracting officer and dismissed . . . for failure to state a claim." *Id.*

The government acknowledges that Sachs' overall claim stated a sum certain but contends that the alleged design approval delay is a separate claim that requires a separate sum certain. McCarthy-HITT argues that the design approval delay is not a separate claim, but rather "was one of the many acts that constituted constructive changes, constructive suspensions, or unreasonably uncooperative government evasiveness under the Contract, in breach of the Changes and Suspensions provisions as well as the implied duties in the Contract" (app. opp'n at 28). It contends that the allegations regarding design approval delay "are common and related operative facts in support of Sachs' claim for increased material and equipment costs, which is a separate and distinct quantified claim of $9,586,062.45" (app. resp. to gov't resp. to Board's October 3, 2023, Order at 10). The government responds by arguing that the sub-category McCarthy-HITT refers to should be sub-divided further so that the contracting officer can discern the amount attributable only to the design approval delay component of that sub-category, which it contends is qualitatively different than the other components of that sub-category (gov't reply in resp. to Bd. Order dtd. October 3, 2023 at 3).

We lack sufficient information at this stage to resolve the parties' dispute over whether the design approval delay claim is a separate claim requiring a separate sum certain. A disagreement over whether a claim comprises one or multiple claims, each requiring a sum certain, is a factual dispute for the Board to resolve on the merits. *ECC Int'l,* 79 F.4th at 1377-78. Accordingly, we deny the government's motion to

dismiss the design approval delay aspect of McCarthy-HITT's complaint on the grounds that no sum certain was provided.

CONCLUSION

The motion to dismiss is denied.

Dated: December 20, 2023

THOMAS P. MCLISH
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

MICHAEL N. O'CONNELL
Administrative Judge
Acting 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. 63571, 63572, 63573, Appeals of McCarthy HITT - Next NGA West JV, rendered in conformance with the Board's Charter.

Dated: December 20, 2023

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