ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
KOO Construction, Inc.	)	ASBCA Nos. 61389, 61487
	)	
Under Contract No. N62473-09-D-1655	)	

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OPINION BY ADMINISTRATIVE JUDGE MCNULTY
ON THE GOVERNMENT'S PARTIAL MOTION TO DISMISS,
TO STRIKE AND FOR A MORE DEFINITE STATEMENT

Before us is the government's motion requesting the Board to dismiss or strike appellant's defective specification cause of action for failure to state a claim. Alternatively, the government moves for a more definite statement regarding the legal and factual basis of the cause of action. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. Appellant was awarded Task Order 0004, under a multiple awardee, multi-year indefinite-delivery/indefinite-quantity contract, Contract No. N62473-09-D-1655 (the Base Contract)[1] for the design and construction of a Child Development Center (CDC) at the Murphy Canyon Naval Base in San Diego, California (R4, tab 9 at 3365[2]).

2. Appellant submitted a certified claim dated 11 April 2017, seeking additional compensation for differing site conditions, defects in the specifications, additional work and delays resulting therefrom, all alleged to be the responsibility of the government.

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[1] The Base Contract is not currently in the record despite the requirement set forth in Board Rule 4 that it include a copy of the contract.

[2] The Rule 4 file includes several pagination formats. To avoid possible confusion, for page number citation we cite to the consecutively-numbered pages that have been added to the lower right-hand corner of the documents.

The claim narrative was 15 pages in length and was delineated into 5 separate claim items. The basis for each claim item was described in detail. (R4, tab 14)

3. With regard to defective specifications, the claim in its entirety, stated:

(1) Navy's Defective HVAC Design

> The original RFP, with regard to the HVAC system, required "occupant comfort" and "energy efficiency" along with reliable operation and ease of maintenance. The RFP also required that the HVAC system should meet or exceed the goal of a "30% energy reduction" using ASHRAE 90.1 for energy performance and consumption calculations. Most important, Amendment 0006, dated September 20, 2012, specifically also required the HVAC system to be provided based on "lowest life cycle cost," as well as achieving a "LEED Silver certification."
>
> As noted above, Amendment 0006 (the last amendment to the RFP) issued before award, specifically amended the RFP to unequivocally state that the HVAC system to be provided on the CDC project was to be based on the "lowest life cycle cost." This specific performance requirement left the contractor with no discretion but to use the only system whose calculations produced the lowest life cycle cost. This turned out to be a roof-top packaged DX VAV system.
>
> It is believed that the original RFP prohibited the use of DX VAV systems and originally discouraged the use of roof-top equipment, based on an apparent outdated NAVFAC Southwest boilerplate specification, which thought that this type of packaged roof-top unit would be unsuitable for southwest California climate conditions. This outdated specification, however, failed to recognize the advances over the last decade, which has overcome the fundamental problem of capacity control, which can regulate a direct expansion (DX) variable volume system and is now recognized as substantially improving the energy efficiency of low-rise commercial buildings (including schools, child care centers, etc.)[.]

According to the Department of Energy, a DX packaged roof-top HVAC system now consumes merely one-third of the total heating and cooling energy as the previous units and are regularly used for heating and cooling light commercial, low-rise buildings, such as schools, and are recognized as high-energy efficient with significant energy-saving potential, even in relatively dry climate conditions.

Since January 1, 2012, ASHRE standard 90.1 has recognized that such packaged roof-top units save energy by automatically adjusting the indoor fan motor speed in sequence with the unit's heating, cooling, and ventilation, and now represents the largest segment of HVAC equipment for small commercial applications in North America.

With the new technology and optimized controls, these packaged DX roof-top units can deliver thirty percent more energy efficiency than a traditional chiller system. This new technology, utilizing a DX variable air volume system, for the last decade, has a proven track record of reliable, efficient performance and is the only HVAC system that produced the "lowest life cycle cost," pursuant to our A/E's computerized energy analysis.

The original design concept submitted by the contractor's design team utilized a direct expansion (DX) VAV system, but the Navy's mechanical design reviewer disallowed this roof-top system as being prohibited by the RFP. The contractor's mechanical design team subsequently demonstrated that the packaged roof-top DX VAV HVAC system produced the "lowest life cycle cost," as well as meeting a 30% reduction in energy efficiency, as well as allowing the contractor to obtain additional points to obtain a LEED Silver certification.

Unfortunately, it took over four-and-a-half months for the Navy design review team to finally agree that the originally submitted DX VAV packaged roof-top system would produce the "lowest life cycle cost" and allowed its use in mid-May 2014.

> KOO submits that this four-and-a-half month delay in the mechanical design was the responsibility of [the] Navy due to its breach of its implied warranty of the adequacy of the original RFP specifications as producing the desired result for the HVAC performance criteria.

(R4, tab 14 at 3445-47)

4. The claim totaled $2,356,314. Appellant also sought the remission of liquidated damages, assessed by the government in the amount of $1,017,929. (R4, tab 14 at 3458)

5. Appellant's claim was essentially denied in a contracting officer's decision dated 9 August 2017. The contracting officer found entitlement in the amount of $2,808. (R4, tab 17 at 4270)

DECISION

We begin by first addressing the alternative motion for a more definitive statement. Motions for a more definite statement are generally not favored. Pleadings are construed liberally to do substantial justice. *See Honeywell, Inc.,* ASBCA No. 47103, 95-2 BCA ¶ 27,835 ("motion for more definite statement...is generally limited to such definiteness as will be sufficient for the moving party to prepare a responsive pleading"). When proper, but general, allegations are made by the complaint, the motion will be denied on the grounds that discovery should be used to obtain information the defending party feels is needed. *See LGT Corporation,* ASBCA No. 44066, 94-2 BCA ¶ 26,607; *Environmental Safety Consultants, Inc.*, ASBCA No. 53485, 02-2 BCA ¶ 31,904 (allegations in answer were sufficient to fairly notify Board and appellant of the facts and issues). We note that the government has filed an answer without waiting for our decision on its motion. Generally, a party files a motion for a more definite statement, instead of its answer, when it asserts the complaint is too ambiguous to answer. *St. Paul Fire and Marine Insurance Co.*, ASBCA No. 53228, 02-2 BCA ¶ 32,025; *Laureano Bros. Co.,* ASBCA No. 8700, 65-2 BCA ¶ 4884. The government's answer includes multiple assertions that the complaint is too vague or ambiguous to answer with respect to various words and phrases in the complaint. The government repeatedly asserts in its answer that appellant's pleading is vague and ambiguous, rendering the allegation incapable of being answered accurately (*e.g.*, answer ¶¶ 9-10, 15 ("erroneously discouraged," "apparent outdated NAVFAC Southwest Division boilerplate specification" and "the advances over the last decade"), ¶ 18 ("present technology" and "optimized controls")). In every instance that the government asserts the pleading is vague and ambiguous the government has in fact answered the complaint by denying the allegation.

We have reviewed the complaint and the claim and find that they include allegations that are sufficient to notify defendant of the nature of the defective

specification claim appellant makes.[3] Appellant generally alleges that the specifications were defective causing it to perform additional work, which in turn caused it to incur additional costs as well as delaying its performance. The nature of the defect is alleged to be a conflict between the requirement for the lowest life cycle cost heating and ventilation air conditioning system (HVAC), which appellant asserts was a rooftop direct expansion (DX) variable air volume (VAV) system, and the specification's express prohibition against DX VAV HVAC systems and the preference for other than roof-mounted systems. Appellant also asserts that the government is responsible for these additional costs and the delay to its performance. To the extent the government requires additional information to properly defend against appellant's assertions, it may obtain same through discovery.

We also find that appellant has properly stated a claim of defective specifications. In *Parsons Government Services, Inc.*, ASBCA No. 60663, 17-1 BCA ¶ 36,743 at 179,099-100, we said the following with regard to the standards relating to motions to dismiss for failure to state a claim:

> Dismissal for failure to state a claim upon which relief can be granted is appropriate where the facts asserted in the complaint do not entitle the claimant to a legal remedy. *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). 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

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[3] Although a complaint was filed in these consolidated appeals, our rules contemplate the possibility that a complaint may not be necessary at all if the issues are sufficiently defined in the claim. In this regard Board Rule 6 states:

> (a) Appellant—Within 30 days after receipt of notice of docketing of the appeal, the appellant shall file with the Board a complaint setting forth simple, concise, and direct statements of each of its claims. The complaint shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, if any. This pleading shall fulfill the generally recognized requirements of a complaint, *although no particular form is required.* Should the complaint not be timely received, *the appellant's claim and notice of appeal may be deemed to set forth its complaint* if, in the opinion of the Board, the issues before the Board are sufficiently defined, and the parties will be notified. [Emphasis added]

> with) a showing of entitlement to relief. *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). In deciding a motion to dismiss for failure to state a claim, "the court must accept well-pleaded factual allegations as true and must draw all reasonable inferences in favor of the claimant." *Kellogg Brown & Root Services, Inc. v. United States*, 728 F.3d 1348, 1365 (Fed. Cir. 2013). In this review, "[w]e decide only whether the claimant is entitled to offer evidence in support of its claims, not whether the claimant will ultimately prevail." *Matcon Diamond, Inc.*, ASBCA No. 59637, 15-1 BCA ¶ 36,144 at 176,407. The scope of our review is limited to considering the sufficiency of allegations set forth in the complaint, "matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record." *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014) (citing 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2004)). For purposes of assessing whether an appeal before us states a claim upon which relief can be granted, the primary document setting forth the claim is not the complaint, *per se*, but the contractor's claim submitted to the contracting officer. *Lockheed Martin Integrated Systems, Inc.*, ASBCA Nos. 59508, 59509, 17-1 BCA ¶ 36,597 at 178,281. [Footnote omitted]

The elements of proof for a defective specification claim are as follows:

> [W]here a contractor-claimant seeks to recover an equitable adjustment for additional work performed on account of a defective specification, the contractor-claimant must show that it was misled by the defect. To demonstrate that it was misled, the contractor-claimant must show both that it relied on the defect and that the defect was not an obvious omission, inconsistency or discrepancy of significance—in other words, a patent defect—that would have made such reliance unreasonable.

E.L. Hamm & Assocs., Inc. v. England, 379 F.3d 1334, 1339 (Fed. Cir. 2004). The overall rationale for an equitable adjustment of this type is that the contractor experienced

additional costs in completing the project which were caused by its reasonable reliance on defective specifications or plans. *See, e.g.*, *Cable and Computer Technology, Inc.*, ASBCA No. 47420, 03-1 BCA ¶ 32,237 (deficiencies in draft interim standards did not become apparent until after contract performance began, parties had assumed required systems could be designed based on the standards).

Mindful that our goal at this stage is to determine if we should allow appellant to offer evidence in support of its claim and not whether appellant will ultimately prevail, and applying the above stated law to the facts of this case we find that appellant has set forth sufficient allegations in its complaint and claim to plausibly suggest a showing of entitlement to relief. Accordingly, the government's motion is denied.

Dated: July 26, 2018

CHRISTOPHER M. MCNULTY
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 Nos. 61389, 61487, Appeals of KOO Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals