ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
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CDM Constructors Inc.	)	ASBCA Nos. 62026, 62088, 62089
	)	
Under Contract No. W912PL-12-C-0022	)	

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OPINION BY ADMINISTRATIVE JUDGE SWEET

The Army Corps of Engineers (Corps) has moved to dismiss ASBCA No. 62026[1] on the grounds that appellant CDM Constructors, Inc. (CDM) has failed to state a claim, and that collateral estoppel precludes litigation of a crucial issue. For the reasons discussed below, we deny the motion.

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

1. These appeals concern Contract No. W912PL-12-C-0022 (0022 contract), to design and construct a water treatment plant (WTP) at Fort Irwin, California. *CDM Constructors, Inc.*, ASBCA Nos. 62026, 62088, 62089, 18-1 BCA ¶ 37,190 at 181,005 (*CDM I*).

[1] ASBCA No. 62026 is a quantum appeal regarding the evaporation ponds. ASBCA Nos. 62088 and 62089 are the quantum appeals regarding the standby generator. The Corps' motion for partial dismissal only addresses the evaporation ponds. Therefore, we treat the motion as a motion to dismiss ASBCA No. 62026. As a result, we do not address the standby generators, or ASBCA Nos. 62088 and 62089.

2. Following a hearing, we issued a decision on the merits on October 24, 2018. *CDM I*.[2]

3. In *CDM I*, we found that CDM submitted several designs for evaporation ponds (EPs) for the WTP, including a 10 percent design, a 65 percent design, and a 100 percent design. *CDM I*, 18-1 BCA ¶ 37,190 at 181,008. The Corps rejected those designs on the grounds that the designs purportedly used an improper evaporation coefficient relative to the water depth, and lacked a backup EP—*i.e.*, an EP that is operational, but not in use except in an emergency. *CDM I*, 18-1 BCA ¶ 37,190 at 181,008, 181,017 n.12.

4. In *CDM I*, we found that CDM then submitted a revised 100 percent design and a May 17, 2013 design memorandum (collectively, revised 100 percent design). *CDM I*, 18-1 BCA ¶ 37,190 at 181,009. The revised 100 percent design reduced the average daily flow (ADF) from 3.0 million gallons per day (mgd) to 2.25 mgd, and used a 0.8 evaporation coefficient for water depths greater than three feet. (*Id.*) In *CDM I*, we found that the revised 100 percent design "proposed three EPs—with one being rotated out of service every year[.]" (*Id.* at 181,009) We did not address whether the one EP being rotated out of service every year constituted a backup EP that was operational but not in use except in an emergency. (*Id.*)

5. In *CDM I*, we also found that the Corps rejected the revised 100 percent design on the grounds that the ADF was too low, the evaporation coefficient relative to the water depth was improper, and the design purportedly did not include a backup EP. *CDM I*, 18-1 BCA ¶ 37,190 at 181,009. We made no finding regarding whether the Corps' assessment that the revised 100 percent design lacked a backup EP was correct. *CDM I*, 18-1 BCA ¶ 37,190 at 181,008-09.

6. Eventually, CDM designed EPs acceptable to the government. The final design included a 3.0 mgd ADF, a 0.8 evaporation coefficient for a maximum water depth of three feet or less, and a backup EP. *CDM I*, 18-1 BCA ¶ 37,190 at 181,009.

7. In *CDM I*, we held that the Corps constructively changed the 0022 contract by compelling CDM to use a 3.0 mgd ADF, and a 0.8 evaporation coefficient only if the maximum water depth was three feet or less. *CDM I*, 18-1 BCA ¶ 37,190 at 181,013-14. However, we held that "[t]here was not a constructive change when the Corps compelled CDM to provide a backup EP that was operational, but not in use except in an emergency." *CDM I*, 18-1 BCA ¶ 37,190 at 181,012. That holding did not address the revised 100 percent design in particular, or decide that the revised 100 percent design lacked a backup EP. *CDM I*, 18-1 BCA ¶ 37,190 at 181,012-13.

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[2] *CDM I* presents the facts in greater detail, and we presume familiarity with *CDM I*. In this decision, we only discuss the facts necessary to resolve the Corps' motion.

8. In *CDM I*, we returned the appeals to the parties for a determination of quantum consistent with the decision. *CDM I,* 18-1 BCA ¶ 37,190 at 181,016. *CDM I*, 18-1 BCA ¶ 37,190 at 181,018 n.20.

9. After the parties were unable to reach an agreement regarding quantum, CDM filed the captioned quantum appeals, including ASBCA No. 62026 (*CDM II*). The *CDM II* complaint alleges that using the revised 100 percent design as a baseline, allows CDM to segregate the ADF/coefficient costs from the backup EP costs because the revised 100 percent design allegedly included a backup EP (*CDM II)* compl. ¶¶ 59, 64. Therefore, according to the *CDM II* complaint, the ADF/coefficient changes—and not any addition of a backup EP—caused all of the increased costs CDM incurred after the revised 100 percent design (*id.* at ¶¶ 63-65).

DECISION

I. Legal Standard

Dismissal for failure to state a claim upon which relief can be granted is appropriate only where the facts asserted in the complaint do not entitle the claimant to a legal remedy. *Matcon Diamond, Inc.*, ASBCA No. 59637, 15-1 BCA ¶ 36,144 at 176,407. Such motions are disfavored in quantum appeals, after the Board has held the contractor is entitled to an equitable adjustment, such as these appeals. *Anderson Constr. Co.*, ASBCA No. 53452, 02-1 BCA ¶ 31,715 at 156,702 (citing *Robert D. Carpenter*, ASBCA Nos. 25742, 25743, 81-2 BCA ¶ 15,263 at 75,581). "To survive a motion to dismiss, a complaint must contain sufficient factual matter[s], accepted as true, to 'state a claim to relief that is plausible on its face'." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotations omitted). While we do not need to accept legal conclusions in the complaint as true, we must accept all factual pleadings as true, and draw all reasonable inferences in favor of the non-moving party. (*Id.*)

The doctrine of collateral estoppel bars a party from raising issues that have been litigated and decided in a prior proceeding. *ADT Constr. Group, Inc.*, ASBCA No. 57322, 15-1 BCA ¶ 35,893 at 175,470. In order to establish that collateral estoppel bars the non-moving party from raising an issue, a moving party must show that (1) the issue is identical to the one decided in the prior proceeding; (2) the issue was actually litigated; (3) the determination of the issue was necessary to the resulting judgment; and (4) the non-moving party had a full and fair opportunity to litigate the issue. *Id.* at 175,471 (citing *Laguna Hermosa Corp. v. United States*, 671 F.3d 1284, 1288 (Fed. Cir. 2012); *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1366 (Fed. Cir. 2000)).

II. CDM Plausibly Alleges a Quantum Claim

The Corps' argument that the *CDM II* complaint fails to state a quantum claim because it purportedly does not plausibly segregate the ADF/coefficient costs from the backup EP costs is meritless (gov't mot. at 7). The *CDM II* complaint plausibly segregates the ADF/coefficient costs from the backup EP costs by using the revised 100 percent design as a baseline (SOF ¶ 9). Assuming—as we must—that the factual allegations that the 100 percent design included a backup EP, then using the revised 100 percent design as a baseline is a plausible basis for segregating ADF/coefficient costs from backup EP costs because that plausibly establishes that any increased costs incurred after the revised 100 percent design were due to the ADF/coefficient changes—and not to the addition of a backup EP (*id.*).

Contrary to the Corps' argument, collateral estoppel does not preclude CDM from raising the present issue of whether the revised 100 percent design included a backup EP (present issue) because the present issue is not identical to any issue we decided in *CDM I* (gov't mot. at 5). First, *CDM I*'s holding that the 0022 contract required CDM to provide a backup EP is not identical to the present issue because that *CDM I* holding addressed what the contract required, and not whether the 100 percent design satisfied that requirement (SOF ¶ 7). Second, *CDM I*'s holding that the revised 100 percent design proposed three EPs—with one being rotated out of service every year—is not identical to the present issue because *CDM I* did not decide whether an EP being rotated out of service every year constituted a backup EP—*i.e.*, an EP that was operational, but not in use except in an emergency (SOF ¶ 4). Third, *CDM I*'s holding that the Corps rejected the revised 100 percent design in part because it purportedly lacked a backup EP is not identical to the present issue because *CDM I* did not decide whether the Corps' assessment was correct (SOF ¶ 5). Thus, because *CDM I* did not decide that the 100 percent design lacked a backup EP, it does not preclude CDM from raising that issue in these quantum appeals (SOF ¶ 7).

CONCLUSION

For the foregoing reasons, the Corps' motion to dismiss is denied.

Dated: December 10, 2019

James R. Sweet

JAMES R. SWEET
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

OWEN C. WILSON
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. 62026, 62088, 62089, Appeal of CDM Constructors Inc., rendered in conformance with the Board's Charter.

Dated:

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