ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Hartchrom, Inc.	)	ASBCA No. 59726
	)	
Under Contract No. W911PT-14-D-0001	)	

APPEARANCE FOR THE APPELLANT: Philip H. Dixon, Esq.
Whiteman Osterman & Hanna LLP
Albany, NY

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Adam Kama, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE OSTERHOUT ON THE GOVERNMENT'S MOTION TO DISMISS AND FAILURE TO STATE A CLAIM

This is an appeal of a contracting officer's denial of a claim by Hartchrom, Inc. (Hartchrom), alleging that it is owed $92,130.84 for removal of hazardous waste that Hartchrom discharged into the industrial wastewater treatment plant (IWTP) at the Watervliet Arsenal (the Arsenal or WVA) while performing under Contract No. W911PT-14-D-0001, a services contract for chrome-plating cannons (the Chrome Contract). In its complaint, Hartchrom includes two issues. First, Hartchrom claims that the decision to require the removal of hazardous waste was arbitrary and contrary to law because the waste could have been treated on site in a less expensive manner. Second, Hartchrom claims that the waste was not out of conformance with applicable requirements.

Throughout its complaint, Hartchrom references both a License and Use Agreement (the lease) between Hartchrom and the Arsenal Business and Technology Partnership (the Partnership) and the Chrome Contract between Hartchrom and the government. Hartchrom also references a third agreement between the Partnership and the Arsenal called the site manager agreement.

The Army (government) filed its motion to dismiss, alleging that the dispute is outside of the Board's jurisdiction because the dispute is between two private entities and not governed by the Contract Disputes Act (CDA). In the alternative, the government moves to dismiss because, it alleges, Hartchrom fails to state a claim upon which relief can be granted because Hartchrom does not allege that the government violated any terms of the Chrome Contract.

For the reasons stated below, we deny the government's motion to dismiss for lack of jurisdiction but grant the government's motion to dismiss for failure to state a claim upon which relief can be granted.

FINDINGS OF FACT

1. The Arsenal is a 143-acre U.S. Army manufacturing facility located in Watervliet, New York. The Partnership was created in 1999. The Arsenal Website Homepage, www.arsenalpartnership.com (last visited July 24, 2018). The Partnership is a not-for-profit organization that strives to transform the site into a technology and business center. The Arsenal Website Partnership Opportunities Section, www.arsenalpartnership.com/the-partnership/partnership-opportunities (last visited July 24, 2018). The contractual agreement between the government and the Partnership included a scope of work as follows:

> a. Market the WVA site for commercial or industrial use (for use of any facilities or equipment on the site which have been identified by the government as made available to the [Partnership]) during the term of this agreement. WVA retains the right to additionally market the site and partnering opportunities to all interested commercial and government sources. WVA will not market space made available to the [Partnership].
>
> b. Execute tenant agreements for up to 25 years with commercial entities and natural persons for use of any facilities or equipment on the site.
>
> c. To provide WVA with long and short-term site planning assistance.
>
> d. To foster cooperation between the Department of the Army, property managers, commercial interest and state and local agencies in the implementation of sustainable development strategies and investment in WVA.
>
> e. To make efforts to assist WVA in providing for the reemployment and retraining of WVA skilled workers in conjunction with commercial concerns on site and to introduce new technologies and skills and maintain core mission technologies and skills at the site that is critical to the government and to the national defense and security.

> f. To support WVA and the U.S. Army by securing commercial use of underutilized and unutilized government assets on the site.
>
> g. To obtain payments from commercial users of such underutilized and unused facilities and capacity on site and to make those payments to the government in cash and in-kind services for the benefit of the site.
>
> h. WVA is the United States Army's only fully integrated cannon manufacturing facility. As such, our vision is to be DoD's manufacturer of choice specializing in cannons, mortars, associated materiel and any other complex machined items for the U.S. Armed Forces, allied countries and commercial industry. The arsenal provides manufacturing, engineering, procurement, and quality assurance for cannons, mortars and associated materiel throughout the acquisition life cycle.

(R4, tab 9 at 31-32 of 67) Further, the agreement stated that the Partnership would be responsible for keeping all tenants in compliance with local, state, and federal laws and regulations. Even if the government determined that a tenant was non-compliant, it would contact the Partnership and have the Partnership ensure compliance. (*Id.* at 32 of 67)

2. The agreement between the government and the Partnership is a no cost, firm-fixed-price, facility use contract. The Partnership establishes lease agreements with tenants and charges the tenants for the lease. (R4, tab 9 at 32 of 67) For example, Hartchrom pays $46,387.91 per month pursuant to amendment 5 of its agreement (R4, tab 3 at 53). That amount changes based on the amount of space being leased (*id.* at 50). The Partnership collects the lease amount, which includes reasonable cost recovery to the Partnership and a not to exceed fee of ten percent for project support and overhead (R4, tab 9 at 51 of 67). The Partnership is "billed for basic rent 30 days in advance for all commercial tenants" (*id.* at 50 of 67). The Partnership agreement also tasked the Partnership with charging the tenants for discharges to the IWTP. Specifically, the agreement stated that the Arsenal would continue to operate the IWTP and directed the Partnership to include certain information in the tenant leases:

> 1.3.4.18. ...Charges for discharges to the IWTP shall be negotiated relative to a specific tenant as appropriate. Conditions upon discharges to the IWTP by a tenant shall be specified in the tenant license and use agreement and

> such conditions shall be satisfactory to the WVA. Tenant agreements shall provide that the tenant is responsible for discharges to the IWTP which are not in conformity with the conditions for such discharge as specified in the tenant license and use agreement....

(R4, tab 9 at 42-43 of 67)

3. On June 21, 2002, Hartchrom entered into a lease with the Partnership and extended the lease and terms through at least five amendments covering years 2007 through 2012. Pursuant to the lease, Hartchrom is permitted "to use certain space at the Arsenal for chrome plating of military equipment and certain non-military items." The lease was signed by Peter Gannon, the president of the Partnership, and Michael Flaherty, the general manager for Hartchrom. The government was not a party or signatory to this lease. (Compl. at 3; R4, tab 3)

4. The lease contained a Disputes clause: "All disputes, including matters relating to eviction, arising out of or in connection with this Agreement shall be governed by the laws of the State of New York and shall be brought in the New York Supreme Court for Albany County or the City Court of the City of Watervliet" (R4, tab 3 at 28, ¶ 33).

5. Schedule E of the lease specified that the IWTP was designed to treat industrial rinse waters within certain limitations. It specifically included limitations of pH between 2 and 10; concentrations of less than or equal to 750 PPM for chrome rinse waters; and maximum flow rates for "two systems @120 GPM when staffed." Schedule E also stated:

> Should contamination of waste that is in storage at the IWTP occur, all efforts will be taken to treat the waste at the IWTP. A complete "shut down" of rinse water discharge by Hartchrom to the IWTP may be required under these conditions. If "untreatable", the waste will be removed by a hazardous waste contractor.

(R4, tab 3 at 36) Schedule E also required that should a discharge occur, Hartchrom would remove the discharge "when necessary through the use of a hazardous waste contract" (*id.*).

6. In October 2013, Hartchrom entered into Contract No. W911PT-14-D-0001 (the Chrome Contract) with the Army Contracting Command for chrome electroplating services. The Chrome Contract contained Attachment E which stated:

> The IWTP is designed to treat contaminated industrial rinse waters. Chrome contamination averages between 0 ppm to 100 ppm. Any contamination above 100 ppm will require a written explanation.
> Concentrations above 750 ppm will be isolated by the IWTP and removal will be the Tenants' responsibility.

(R4, tab 1 at 55 of 62) There is no mention of pH levels in the Chrome Contract.

7. On June 20, 2014, while performing the Chrome Contract, Hartchrom discharged a sodium hydroxide solution into the Arsenal's IWTP. Hartchrom shut down its operations once it completed the chrome project it was working on at the time of the discharge. By June 21, 2014, Hartchrom's processes were completely shut down. That day, an IWTP representative tested the material in the holding tank where the discharge was being stored and informed the Partnership, who then informed Hartchrom, that the waste could not be treated because it had a pH of 10.5. The contracting officer's representative (COR) also notified the Partnership, by email dated June 23, 2014, the following:

> Under the contract, Hartchrom isn't allowed to discharge wastewater above 10 pH. Hartchrom must have this nonconforming wastewater removed via a hazardous waste contractor. Request you take appropriate actions to have Hartchrom remove this wastewater....

(R4, tab 18 at 5) Thus, the government, through the Partnership, required Hartchrom to remove the material in the tank and treat it as a hazardous material. (Compl. at 3-4)

8. Hartchrom arranged for the removal and disposal of 33,963 gallons of waste material from the holding tank. Hartchrom complained to Bob Mahoney, Hartchrom's point of contact with the Partnership, that removing the waste was more costly than other methods to reduce the pH levels to an acceptable range. Mr. Mahoney coordinated with William J. O'Brien, who worked at the Arsenal. Mr. O'Brien stated that other options were not available and insisted that removal was the only option. (Compl. at 4-5)

9. Hartchrom stated that its costs for the waste removal were $56,953.16 to remove the waste, $2,267.20 to dispose of the waste, and $32,910.48 for losing 172 hours of use in its plating facility while the waste was being removed. This totaled $92,130.84, the amount of the claim. (Compl. at 5-6)

10. On July 17, 2014, Hartchrom filed a claim with Christine Campbell, the contracting officer (CO) for the Chrome Contract, requesting $92,130.84 for the waste

removal, disposal fee, and lost availability to perform plating services. Similar to its complaint, Hartchrom requested reimbursement because it believed confusion existed between the lease and the Chrome Contract due to the Chrome Contract not mentioning pH limitations. (R4, tab 24) In fact, Hartchrom stated:

> The fact these major elements of coordination between the company and the IWTP are in direct conflict make clear that it was the intent of WVA to substitute the [Attachment] E in the production contract for the Schedule E in the Lease & Use Agreement. Therefore since the [Attachment] E contained in the production contract has no mention of pH, WVA should not have directed Hartchrom to remove the waste offsite.

(*Id.* at 2)

11. On September 10, 2014, CO Campbell issued her contracting officer's final decision denying the claim. She stated that the two contracts were distinct contracts and that neither one superseded the other. Further, she pointed out that all directions regarding the waste removal came from the Partnership's management. She informed Hartchrom that if it disagreed with the waste cleanup, it should have notified the Partnership of its concern prior to proceeding with the removal efforts. CO Campbell also explained that the waste had to be removed because it exceeded the pH limit of 10 and explained what actions the IWTP took that led the Partnership to the decision that the waste was untreatable and needed to be removed. The decision also included appeal language. (R4, tab 26 at 2-3)

12. On December 5, 2014, Hartchrom timely filed a notice of appeal and complaint with the Board. It was docketed as ASBCA No. 59726. Hartchrom raised two "points" in its complaint. Under point I, appellant alleged that the decision to require removal of waste material as hazardous waste was arbitrary and contrary to law. Specifically, appellant contends that the government did not make all efforts to treat the released material on site, i.e., neutralize the waste on site as allowed under applicable EPA regulations. Therefore, Hartchrom argues that the government required off-site disposal of material as hazardous waste when there were legal means to treat it on site and, as a result, it incurred additional costs under the contract. With regard to point II, Hartchrom alleges that the wastewater was not out of compliance with the applicable requirements of the contract. The Chrome Contract was silent with regard to pH level restrictions of waste materials. Attachment E of the contract also contained conditions and limitations regarding the IWTP and waste removal. Hartchrom avers that the conditions in the most recent document, the Chrome Contract with the government, and not the lease agreement, were applicable and the pH level restrictions in the lease no longer applied.

13. On February 6, 2015, the government filed its answer.

14. The government subsequently filed a motion to dismiss alleging that the dispute is based upon a lease agreement between two private entities and, thus, the Board lacks jurisdiction. In the alternative, the government contends if the Chrome Contract governs, the government moved to dismiss for failure to state a claim upon which relief can be granted because Hartchrom does not allege that the government violated the terms of the Chrome Contract.

DECISION

I. Jurisdiction

The Board "has jurisdiction to decide any appeal from a final decision of a contracting officer, pursuant to the Contract Disputes Act, 41 U.S.C. 7101-7109, or its Charter, 48 CFR Chap. 2, App. A, Pt. 1, relative to a contract made by the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration or any other department or agency, as permitted by law." ASBCA Rules, Preface. "Appellant, as the proponent of the Board's jurisdiction, bears the burden of establishing jurisdiction by a preponderance of the evidence." *CCIE & Co.*, ASBCA Nos. 58355, 59008, 14-1 BCA ¶ 35,700 at 174,816 (citations omitted). "When the government challenges the factual basis for our jurisdiction, as it does here, the allegations in the complaint are not controlling." *Green Dream Group*, ASBCA No. 57413 *et al.*, 12-2 BCA ¶ 35,145 at 172,520. "We accept as true only uncontroverted factual allegations; disputed jurisdictional facts are subject to fact-finding by the Board." *Lobar, Inc.*, ASBCA No. 59178, 14-1 BCA ¶ 35,584 at 174,366 (citations omitted).

"The CDA was enacted to 'provide[] a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving government contract claims.'" *Winter v. FloorPro, Inc.*, 570 F.3d 1367, 1369 (Fed. Cir. 2009) (quoting *Contract Disputes Act of 1978*, S. Rep. No. 95-1118, at 1 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5235, 5235). CDA "jurisdiction extends only to appeals by contractors." *CBI Services, Inc.*, ASBCA No. 34983, 88-1 BCA ¶ 20,430 at 103,337. The CDA defines the term "contractor" as "a party to a Federal Government contract other than the Federal Government." 41 U.S.C. § 7101(7). Further, the CDA "applies to any express or implied contract...made by an executive agency." 41 U.S.C. § 7102(a).

Here, Hartchrom appeals the CO's final decision under Contract No. W911PT-14-D-0001. In this appeal, Hartchrom has the burden of establishing that the Board has jurisdiction over this matter, which means that it must demonstrate that the CDA applies to the contract in question. Hartchrom relied upon the Chrome

Contract, Contract No. W911PT-14-D-0001 to file its claim. Hartchrom was the contractor on the Chrome Contract, which was a contract with the federal government (findings 6-7). Moreover, Hartchrom filed a claim with the CO, received a denial, and subsequently filed a timely appeal with the Board (findings 10, 12). As a result, we have jurisdiction to hear this appeal.

II. Hartchrom Failed to State a Claim upon Which Relief May be Granted

In the event that we determined that we could exercise jurisdiction over the claim, the government alternatively filed a motion to dismiss for failure to state a claim upon which relief can be granted. "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." *K2 Solutions, Inc.*, ASBCA No. 60907, 17-1 BCA ¶ 36,801 at 179,374 (citing *Matcon Diamond, Inc.*, ASBCA No. 59637, 15-1 BCA ¶ 36,144 at 176,407). "In deciding a motion to dismiss for failure to state a claim, we 'must accept well-pleaded factual allegations as true and must draw all reasonable inferences in favor of the claimant.'" *Matcon Diamond*, 15-1 BCA ¶ 36,144 at 176,407 (citing *Kellogg Brown & Root Services, Inc. v. United States*, 728 F.3d 1348, 1365 (Fed. Cir. 2013)). "To survive a motion to dismiss, a complaint must contain sufficient factual matters, accepted as true, to state a claim to relief that is plausible on its fact." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotations omitted); *see also K2 Solutions*, 17-1 BCA ¶ 36,801, at 179,374. While we must draw all reasonable inferences in favor of the appellant and accept factual pleadings as true, we are not required to accept legal conclusions contained in the complaint as true. *K2 Solutions*, 17-1 BCA ¶ 36,801 at 179,374 (citations omitted).

The scope of our review is limited to considering the sufficiency of the 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." *Matcon Diamond*, 15-1 BCA ¶ 36,144 at 176,407 (quoting *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014)). 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 claim submitted to the CO. *Parsons Government Services, Inc.*, ASBCA No. 60663, 17-1 BCA ¶ 36,743 at 179,100 (citing *Lockheed Martin Integrated Systems, Inc.*, ASBCA Nos. 59508, 59509, 17-1 BCA ¶ 36,597 at 178,281). Here, the contentions asserted in the complaint and the claim do not entitle the claimant to a legal remedy; therefore, we must grant the motion to dismiss.

Hartchrom alleges that Schedule E of the lease agreement as read into the Chrome Contract controls what happens when waste is discharged to the IWTP. Although Hartchrom was performing the Chrome Contract when it discharged waste to the IWTP, the Chrome Contract does not control how the waste is disposed. The lease,

not the Chrome Contract, governs the IWTP's involvement and what happens in the event of a discharge with high pH levels (R4, tab 3). While the lease is an agreement between Hartchrom and the Partnership that outlines all of the responsibilities of both parties to each other concerning the lease and what services will be provided, the Chrome Contract is a services contract between the government and Hartchrom merely to complete chrome-plating on cannons (findings 3-6). Indeed, Hartchrom attempts to read in, or import, the specific language of the lease into its contract with the government. Specifically, the main clause through which Hartchrom attempts to obtain relief stated, "Under the applicable agreement with Hartchrom, the Arsenal was obligated, if non-conforming waste was received from Hartchrom, to 'use all efforts' to treat the waste at the IWTP." (Compl. at 1) In fact, Hartchrom admitted in its complaint that this language was contained in the lease (compl. at 3). This language to "use all efforts" does not appear in the Chrome Contract and only appears in the lease (findings 5-6). *Parsons*, 17-1 BCA ¶ 36,743 at 179,100. We are not sure if discharge was out of conformance with the Chrome Contract (because attachment E only addressed chromium levels); however the record shows that at a pH level of 10.5, the waste was out of conformance with Schedule E of the lease. Appellant's attempts to read the aforementioned requirements into the Chrome Contract are not persuasive. Therefore, Hartchrom has failed to state a claim on which a relief can be granted.

The fact that Hartchrom was performing services under the Chrome Contract when it discharged waste with high pH levels does not change the analysis that the terms of the lease governed the situation. Hartchrom greatly emphasized the Chrome Contract's impact (*see* compl. and app. opp'n). Specifically, Hartchrom asserted that the pH level limitations ceased to exist after the Chrome Contract was awarded because the Chrome Contract did not contain any instructions on pH levels, resulting in the removal of the restriction (app. opp'n at 4, 9). Although the Chrome Contract contained an Attachment E that describes waste limitations, it is not as complete as the lease agreement (findings 4-6). Indeed, as stated above, the language that Hartchrom relies upon, that the government would "use all efforts" to treat waste at the IWTP, is contained in the more detailed lease but not the Chrome Contract (finding 5).

At the same time that it argues that the pH level limitations ceased to exist because pH limits were not included the Chrome Contract, Hartchrom insists that the phrase "all efforts will be taken to treat the waste at the IWTP" must remain enforceable even though this phrase does not exist anywhere in the Chrome Contract. However, the lease is the agreement that determines how and when hazardous waste clean-up will occur (finding 2). Even if the Chrome Contract did somehow apply to this situation, the Chrome Contract is silent on the issue of pH levels and does not conflict with the lease (findings 6, 12). As a result, the lease governs and pH limitations remain in effect. Thus, because Hartchrom cites to a clause in the lease, an agreement that does not provide any way for us to grant relief, we must grant the motion to dismiss.

CONCLUSION

The government's motion to dismiss for lack of jurisdiction is denied. However, the government's motion to dismiss, in the alternative, for failure to state a claim is granted.

Dated: July 26, 2018

HEIDI L. OSTERHOUT
Administrative Judge
Armed Services Board
of Contract Appeals

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 No. 59726, Appeal of Hartchrom, Inc., rendered in conformance with the Board's Charter.

Dated:

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