

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Public Warehousing Company) ASBCA No. 56022
)
Under Contract No. SPO300-03-D-3061)

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OPINION BY ADMINISTRATIVE JUDGE TING

The Public Warehousing Company (PWC) appeals the denial of its claim dated 21 December 2006 for additional fees allegedly due for government-caused delays in the return of its trucks from supply missions in Iraq. The stated legal basis of the claim is “unjust enrichment.” The government moves to dismiss the appeal for lack of Board jurisdiction over claims for unjust enrichment. PWC responds by moving to amend the complaint to assert breach of contract, constructive change, and breach of the implied duty to cooperate and not hinder, as grounds for the same relief on the same operative facts. The government opposes the motion to amend contending that the new legal theories are not based on the same operative facts as those in the claim submitted to the contracting officer. We agree with PWC, grant the motion to amend and deny the motion to dismiss.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. PWC, now known as Agility, is a public company organized under the laws of Kuwait (compl. ¶ 1). According to its website, it is “one of the world’s leading providers of integrated logistics with more than 25,000 employees in over 550 offices and 100

countries.”¹ DSCP, now known as DLA Troop Support, is a sub-agency of the Defense Logistics Agency (DLA), an agency within the Department of Defense (DoD) (compl. ¶ 2). DSCP supports U.S. military personnel by providing them with food, clothing, textiles, medicines, medical equipment, and general industrial supplies (Motion Papers No. 1² at 3, ¶ 1).

2. On 30 May 2003, DSCP awarded Contract No. SPO300-03-D-3061 (Contract 3061) to PWC. The contract, known as a “Prime Vendor” (PV) contract, was for delivery of subsistence items – food, beverages and related items – to U.S. and allied forces in Kuwait and Qatar. (R4, tab 10) The base contract was for the estimated amount of \$22 million (*id.*). It allowed DLA to add “authorized customers” (*id.* at 3). It included FAR 52.212-4, CONTRACT TERMS AND CONDITIONS -- COMMERCIAL ITEMS (FEB 2002) which in turn included provisions relating to (c) Changes and (d) Disputes. (R4, tab 1 at 84 of 329)

3. Under the contract, PWC was reimbursed for the cost of food it purchased for the military and was also paid a distribution price (including profit) that covered its costs other than the food price³ (R4, tab 10 at 3, 4).

4. Bilateral Modification No. P00001 (MOD 1), effective 27 June 2003, added the “Iraq Deployment Zone” (IZ) to the contract requiring PWC to make deliveries to additional Authorized Customers in active combat zones (R4, tab 11). Paragraph 2 of MOD 1 stated “PWC delivery trucks will travel as part of a U.S. military escorted convoy.” This paragraph also stated that “[t]he round trip from the PWC distribution platform in Safat, Kuwait could vary from one (1) day for the closet proximity customers to seven (7) days for the farthest proximity customers” (*id.* at 3). Paragraph 4 of the modification stated “Trucks will return to PWC upon completion of unloading, and trucks will not be used at the sites for storage purposes” (*id.* at 4).

¹ See http://www.agilitylogistics.com/EN/Pages/Agility_About_Us.aspx.

² For ease of reference, the parties’ motion papers are referred to in this opinion in the shorthand form indicated in the parenthesis: Government’s Motion to Dismiss and in the Alternative For Summary Judgment dated 8 October 2010 (Motion Papers No. 1); Appellant’s Motion to Amend Complaint and First Amended Complaint dated 28 October 2010 (Motion Papers No. 2); Government’s Response to Appellant’s Motion to Amend Complaint dated 7 December 2010 (Motion Papers No. 3); PWC’s Reply in Support of Appellant’s Motion to Amend with exhibits 1-27 dated 22 December 2010 (Motion Papers No. 4); Government’s Sur-Reply to Appellant’s Reply to Government’s Response to PWC’s Motion to Amend Complaint dated 14 January 2011 (Motion Papers No. 5).

³ This pricing formula - Unit Price = Delivered Price + Fixed Distribution Price (or Fee)—is shown in the solicitation (R4, tab 1 at 11 of 329).

5. Paragraph 6 of MOD 1 required PWC to comply with the following provisions, among others:

(a) The Prime Vendor must comply with the transportation, logistics, and support requirements contained in the Prime Vendor annex of the operation plan issued by the combatant commander. The combatant commander is the commander of a unified or specified combatant command...or any subordinate commander given authority by that combatant commander to issue direction in a specified geographical or functional area.

(b) Government Direction: Normally, the Contracting Officer or the Contracting Officer's Representative (COR) provides direction to the Prime Vendor; and the Prime Vendor provides direction to its employees. However, in the event a Contracting Officer is not available and emergency action [is] required because of enemy or terrorist activity or natural disaster which causes an immediate possibility of death or serious injury to Prime Vendor personnel or military personnel, the ranking military commander in the immediate area of operations may direct the Prime Vendor or Prime Vendor employees to undertake any action as long as those actions do not conflict with the Prime Vendor personnel's status as noncombatants. The Prime Vendor may submit a request for equitable adjustment for any additional effort required or any loss of equipment which was beyond the scope of the established contract requirements occasioned by such direction.

....

Except as provided herein, the Government does not assume any liability for any loss incurred by the Prime Vendor in the performance of this Iraq Deployment Zone, including but not limited to, loss of vehicles, personnel or product. Furthermore, the Government is not liable for any loss resulting from any delays in assembling or deploying the aforementioned military escorted convoy provided to the Prime Vendor by the Government.

(R4, tab 11 at 4-6)

6. As provided in MOD 1, due to uncertainties as to when stabilization in the IZ delivery areas might occur, the additional transport fees—those over and above the contract distribution price—are subject to negotiation and renegotiation:

7. If additional deployment zone fees are warranted above those distribution prices awarded, these fees will be negotiated at a later date.

8. The Government reserves the right to re-negotiate trucking transport fees, once stabilization and transition has occurred in Iraq, resulting in U.S. military convoys to be no longer necessary.

(R4, tab 11 at 7)

7. Pursuant to Paragraph 7 above, the parties entered into Modification No. P00002 (MOD 2), effective 1 July 2003, establishing a pricing structure for additional transport fees for IZ deliveries. This bilateral modification said that the additional transport fees are those not included as a part of the original contract's distribution price. For refrigerated trucks, MOD 2 provided for \$2,050.00 per truck for a "3 day round trip minimum" and for "\$645.00 per truck per day" for "[a]dditional days over (3)." For dry trucks, MOD 2 provided for \$1,600.00 per truck for a "3 day round trip minimum" and for "\$475.00 per truck per day" for "[a]dditional days over (3)." For both additional transport fee categories, the number of days charged would be from "time of reporting of loading until truck(s) return(s) to PWC distribution facility in Kuwait." (R4, tab 12 at 2, 3)

8. By e-mail on 8 September 2004, contracting officer Linda Ford (CO Ford) sought comments from PWC's General Manager Toby Switzer (GM Switzer) on her proposal to restructure the transportation fees by placing a cap on the fees to better reflect the conditions of operations in Iraq at that time (Motion Papers No. 4, ex. 1). GM Switzer's 14 September 2004 e-mail expressed concern of the 29-day cap proposed because of the lack of convoy discipline in the combat zone:

4. We have real reservations about the maximum cap being unqualified. We are all working towards not having a need for billing for more than 29 days but this is a combat zone and does not yet have good discipline over the convoys even with the TO Program.... We would prefer to have the ability to submit exceptions to the 29 day rule

if the situation is unavoidable despite our best efforts to prevent it.

5. As a reciprocal to this change, will DSCP pay the maximum if the military convoy commander burns and destroys a disabled truck or enemy attack causes a loss?

(Motion Papers No. 4, ex. 1) CO Ford's 15 September 2004 e-mail to GM Switzer said "exceptions to the 29 day rule will only be considered in the form of a claim" (Motion Papers No. 4, ex. 1). It is unclear what situations CO Ford considered "exceptions" that would qualify for a claim.

9. Despite his concerns, GM Switzer signed Modification No. P00027 (MOD 27). This bilateral modification, effective 16 September 2004, increased from 25 to 94 the number of Transportation Liaison Officers (TLOs) previously added to the contract through Modification No. P00019. It "restructures the transportation fees for the Iraq Deployment Zone...without modifying the fee and establishes a maximum number of days applicable" for "all PWC trucks that depart from Kuwait to Iraq on or after September 16, 2004." Paragraph 2 and 3 of MOD 27 set out the particulars of the restructured additional transport fees as follows:

- a. Truck Transport to Iraq "South" (South of Scania) from PWC Kuwait:
 - 4 day round trip minimum
 - \$2,695.00 per refrigerated truck
 - \$2,075.00 per dry truck
- b. Truck Transport to Iraq "Central" (between Scania & Anaconda) from PWC Kuwait:
 - 5 day round trip minimum
 - \$3,340.00 per refrigerated truck
 - \$2,550.00 per dry truck
- c. Truck Transport to Iraq "North" (North of Anaconda) from PWC Kuwait:
 - 10 day round trip minimum
 - \$6,565.00 per refrigerated truck
 - \$4,925.00 per dry truck
- d. Additional days beyond the established minimum:
 - \$645.00 per refrigerated truck per day
 - \$475.00 per dry truck per day
- e. The maximum number of allowable trip days is 29. The Government will not pay transportation fees beyond this established maximum. The maximum number of days shall

apply to all PWC trucks that depart from Kuwait to Iraq on or after September 16, 2004.

3. The “additional days beyond the established minimum” fees are only applicable if the delay is customer caused; i.e., Hub, DFAC or MKT not having the capability to off load and return the truck.^[4]

(R4, tab 13)

10. Shortly after MOD 27 became effective, PWC’s Senior Transport Manager advised CO Ford and other government officials by e-mail on 23 October 2004 that “many vehicles remain at DFACs. Most of those at the hubs are returning. Storage issues continue to hamper the turn around [sic] time at some locations.” (Motion Papers No. 4, ex. 3) GM Switzer’s 24 October 2004 e-mail to CO Ford said that most of the issues “driving” the over 29-day return time were beyond its control and “We need action up in Iraq to expedite the movement from the customer side” (*id.*, ex. 2).

11. On 24 October 2004, David Zimmerman at U.S. Army Headquarters in Iraq asked Gary Shifton (Shifton) of DSCP, CO Ford’s supervisor, to “prep” him on MOD 27 before his meeting with PWC because he did not know about “the discussions that took place prior to this mod” (Motion Papers No. 4, ex. 3). Shifton advised “We have to identify the specific problem areas. Are the trucks at specific dfacs, specific mkt sites or at hubs in a hold status.” He instructed Zimmerman: “Do not speak to claims as pwc is smart enough to think this on their own.” (*Id.*)

12. In December 2004, DSCP was interested in having PWC extend Contract 3061 for 6 months. DSCP’s 3 December 2004 e-mail to PWC said that the extension modification “will incorporate all current and modified actions in effect at time of signing.” Aware that PWC was concerned about MOD 27, the DSCP e-mail requested that “the contract extension not be held up due to PWC’s concern on the recent TO mod that limited the transport to 29 days” and said “An alternate proposal may be submitted separately at any time.” (Motion Papers No. 4, ex. 4)

13. By January 2005, the parties still had not agreed on extending Contract 3061. In response to CO Ford’s inquiry if PWC would extend the contract for 8 months, GM Switzer asked that “the 29 day transport limitation rule for Iraq be rescinded.” His 13 January 2005 e-mail to CO Ford said PWC had done as much as it could with the TO

⁴ The government tells us “DFAC” means “dining facility,” and “MKT” means “Mobile Kitchen Trailer” (Motion Papers No. 1 at 8, ¶ 13).

and Squad Leader Programs but truck delays driven by “military mission, situation, or other controlling parties’ inefficiencies” continued to penalize PWC. He gave the following reasons for his request:

However, making us go through the claims process that will either be rejected or cause us significant delays in receiving compensation places us in an inappropriate situation of either ignoring (even if we can) the military request and situation or absorbing costs that are not under our control. Unfortunately this has not been isolated incidents but occur on a regular and frequent case. Additionally with the projected road closures and new DFACs opening, the situation will likely get worse than get better.

(Motion Papers No. 4, ex. 5 at 3)

14. CO Ford’s 13 January 2005 reply declined to rescind the 29-day rule and suggested consideration of a PWC proposal based on actual costs or expanding the 29-day limit rule for specific troubled areas:

When mod 27 was written, it was my understanding that we were in agreement that a transport limitation rule was absolutely necessary given the history of delayed truck movement and the establishment of a transportation officer program.... Furthermore, it was not reasonable that PWC transportation costs continued at the rate of \$645 per day for an infinite number of days. Therefore, we can not simply rescind mod 27 without doing some additional analysis.

We are in agreement that the claims process is undesired. My suggestion at this point would be for PWC to submit an alternate proposal for the transportation fees in mod 27 based on actual cost and historical truck turn around time frames. Perhaps it will make sense to expand the transport limit rule for specifically troubled areas.

(Motion Papers No. 4, ex. 5 at 2-3)

15. GM Switzer notified CO Ford by e-mail on 20 January 2005 that “PWC accepts this new procurement with the same distribution fees, terms and conditions.” His e-mail said PWC appreciated DSCP’s offer to reevaluate MOD 27 and PWC would send documentation for the reevaluation. (Motion Papers No. 4, ex. 5 at 1) The parties signed

Modification No. P00036, effective 16 February 2005, extending Contract 3061 to 15 December 2005 (*see* Advance Copy of PWC's claim transmitted by its e-mail of 24 February 2005) (Motion Papers No. 4, ex. 6).

16. On 18 February 2005, PWC e-mailed to the government (CENTCOM) its spreadsheet analysis "showing the average transit from PWC out to destination, the standtime [sic] at that destination, and the average transit time back to PWC." PWC identified two issues: "The first is escorts, the second is storage." The e-mail went on to say "Once arrived, storage comes into play. As there is not sufficient (or any) storage capacity, trucks will stand 11 to 13 days at destination prior to proceeding back to PWC. MEF transit back to PWC is roughly another 9 days." PWC e-mailed the analysis to Shifton at DSCP on 3 March 2005. Shifton forwarded the e-mail to CO Ford on 4 March 2005. (Motion Papers No. 4, ex. 8).

17. PWC sent CO Ford by e-mail on 24 February 2005 "an advance copy of PWC's claim for additional costs associated with transportation charges for trucks which have returned from Iraq to PWC facilities in Kuwait after 29 days." The claim contended that "[t]hese trucks were detained in Iraq due to customer caused delays." In addition to the spreadsheet attached, PWC's e-mail said it had dispatched "supporting documentation for each truck...including MicroTransport reports, delivery notes and convoy reports." As reflected in the advance copy of PWC's claim, it sought \$2,951,335.00 for 467 truck trips that took place from 16 September through 31 December 2004. (Motion Papers No. 4, ex. 6)

18. In his internal e-mail of 25 February 2005 to CO Ford and others, Shifton acknowledged, "in the grand scheme of things, PWC...has a case when the Army is just getting around to correcting their storage problem...now after months, close to a year, of knowing they did not have the right amount of storage." Shifton suggested that DSCP "get the schedule from the Army as to where the 148 storage units are going, then match that up against where PWC trucks were sitting." He added, "Not that we were the cause, but let's face it, the lack of storage from the Army has crushed a lot of our efforts and has added significant cost." (Motion Papers No. 4, ex. 7)

19. PWC notified CO Ford by e-mail on 8 March 2005 that it had decided to change its invoicing procedures in not waiting for the over 29-day assets to return before submitting its initial invoice. CO Ford's 9 March 2005 e-mail rejected the idea, stating "DSCP will not accept invoices for trucks that have not returned to Kuwait as part of the normal invoicing procedure." She said however, that DSCP "[w]ill consider reviewing these invoices separately on a once per month basis if they can be supported with appropriate documentation for the COR to verify and sign." (Motion Paper No. 4, ex. 9)

20. PWC accepted the CO's "compromise of billing once each month." On the \$2,951,335 mentioned in the advance copy of its claim, PWC's 28 March 2005 e-mail expanded on its position:

The true conditions in Iraq which we are all aware of and which has been a constant source of frustration for our operation, is that the customer IS holding our trucks as storage. This is in direct violation of the terms of P00001, paragraph 4, which states, "Trucks will return to PWC upon completion of unloading, and trucks will not be used at the sites for storage purposes." Anything you can do to help elevate and alleviate this issue would be appreciated. The Army and KBR personnel^[5] on the ground in Iraq feel they have authority to hold our trucks. As the Army personnel are armed we must comply.

(Motion Papers No. 4, ex. 9)

21. In mid-March 2005, PWC submitted to CO Ford a proposal for "a demurrage fee of \$500 per day per reefer"⁶ to "account for the additional costs involved in maintaining a larger fleet" made necessary by the late return of its trucks. Because actual data showed "a considerable number of trucks that exceed the currently imposed limit of 29 days," PWC proposed that the 29-day maximum turnaround time be lifted. The proposal said there were:

[D]elays caused by Hub, DFAC and/or Mobile Kitchens (MKT's) inability to offload and release PWC's assets within the required timeframe, and Military use of PWC Prime Vendor trucks as storage facilities. These factors are completely outside PWC's control, yet PWC is penalized by the 29 day constraint placed upon them.

The proposal went on to say that the "issue of storage limitation in these sites has been brought to the attention of DSCP on numerous occasions by PWC, the Military and other supporting organizations without resolution." PWC said that it "will be submitting a claim for trucks remaining at the DFAC sites due to delays caused by Hub, DFAC and/or

⁵ The reference to "KBR" was probably to Kellogg Brown & Root Services, Inc., a government contractor.

⁶ Demurrage is a maritime term. It means "Liquidated damages owed by a charterer to a shipowner for the charterer's failure to load or unload cargo by the agreed time." BLACK'S LAW DICTIONARY, 465 (8th ed. 1999).

MKT's inability to offload and release PWC's assets within the required timeframe, Military use of truck for storage purposes, and other factors beyond PWC's control." (See PWC's Alternative Proposal, Motion Papers No. 4, ex. 10)

22. In evaluating PWC's proposal, a DSCP contract specialist reported to CO Ford by e-mail on 16 March 2005: "The real problem is the Service use of PWC's units for storage and making extra deliveries. The Services' operational requirements is [sic] playing havoc with our contract issues and language. When are the MEF sites getting additional storage so that PWC's units get returned to them?" (Motion Papers No. 4, ex. 10)

23. In his 16 March 2005 e-mail to Shifton at DSCP, Paul Burkett, ACO, explained why he was forwarding the Army's Chief of Theater Food Advisor's e-mail:

I was only trying to show that the Army is on a continuing basis asking PWC to divert food from one location to another to fix their mistakes. While if this was a one time deal it probably would not be worth bringing up. But I have been seeing this on going problem for some time.

...I believe it is part of the reason why some trucks go over their allocated time on the round trips to Iraq and back thus causing extra dollars to be spent.

Chief Peleti and others seem to think that they can re-divert trucks from their original destination anytime they need to as if they were their trucks.

(Motion Papers No. 4, ex. 11)

24. ACO Burkett's 30 March 2005 e-mail forwarded to Shifton, CO Ford and others "More allegations of...unauthorized PWC truck rerouting" (Motion Papers No. 4, ex. 12). ACO Burkett forwarded to Shifton and CO Ford on 27 May 2005 an e-mail he received from PWC reporting that recent "Air Lift" to DFAC B6 was "unnecessary and unsolicited by the end user," and "Empty PWC reefers were utilized for the storage of this unsolicited and unnecessary cargo" (Motion Papers No. 4, ex. 14).

25. As reflected in PWC's slides, CO Ford and her team was briefed in July 2005 at DSCP headquarters on the following challenges PWC faced in Iraq from June 2004 to May 2005:

- Deviation in Military handling of convoys & assets in IZ from contract (affect [sic] on MT)
- Identification of delivery locations
- Expansion of delivery locations to MKTs & FOBs
- Recovery of assets from IZ
 - Includes return from KBR in Arifjan
 - Sale of assets by 3rd Parties in Iraq
 - Utilization of assets for medium-term storage at MKTs
- Re-direction of assets
- Necessity to “prove” storage for invoicing

(Motion Papers No. 4, ex. 15 at 6)

26. In August 2005, PWC asked CO Ford how should the “MOD27 Claims” be submitted. In reply, CO Ford’s 17 August 2005 e-mail said “Send me the mountains of paperwork. Claims must be fully supportable.... You must show that each delay was in fact customer caused.” She went on to say “If we can agree that there was a delay and the delay was customer caused, we will still need to negotiate an amount due, if any.” (Motion Papers No. 4, ex. 16)

27. CO Ford notified PWC by e-mail on 18 November 2005 that “it is our intent to deny the ‘over 29 day’ claims for inadequate support documentation.”⁷ PWC was told, however, that it could submit additional information prior to the anticipated decision date of 9 December 2005. CO Ford listed six categories of information she would be looking for in reviewing PWC’s “demurrage claims.” In response, PWC asked if it could treat the “issue as a REA rather than a claim.” CO Ford’s 30 November 2005 e-mail advised that she agreed “it is more appropriate to initially treat these issues as REAs rather than claims.” Her e-mail added “There’s no mention of a REA or claim process in mod 27 because they were not anticipated. The 29-day cap was intended to prevail even if the truck returned at a later date.” (Motion Papers No. 4, ex. 21)

28. After Contract 3061 expired, PWC reminded DSCP by letter dated 18 December 2005 “there is an additional \$13.1 [million] outstanding from the trucks that returned after 29 days, being pursued as an REA.” PWC’s letter said it would be

⁷ In February 2005, PWC submitted an “advance copy” of its over 29-day truck charges (SOF ¶ 17). No CDA claim had been filed at this point. In August 2005, PWC began to inquire how “MOD 27Claims” should be filed (SOF ¶ 26). CO Ford used the word “claims” because she believed from the inception what PWC was asking for was “exceptions to the 29 day rule,” which would only be considered in the form of “claim[s]” (SOF ¶ 8).

submitting a REA on a portion of the MOD 27 amounts with supporting documents later that month. (Motion Papers No. 4, ex. 22 at 3)

29. On 20 December 2005, PWC submitted an REA with Attachments A through F. The REA was signed by PWC's Assistant General Manager Stephen J. Lubrano. (R4, tab 23) The government contends that it never received attachments A and F (*see* gov't letters of 12 and 21 April 2011).

30. On 22 May 2006, Matthew Paice (Paice), Manager at PWC's PV Internal Audit, e-mailed CO Ford inquiring the status of the REA whose final part DSCP was said to have received 10 March 2006 (Motion Papers No. 4, ex. 25). CO Ford's 23 May 2006 e-mail reply said "Understand the importance of the REA," and DSCP was "diligently working to review and complete all invoices and REAs" (*id.*). On 24 May 2006, CO Ford asked Paice to send her "a copy of the certified REA letters that are associated with the trucks that were out over 29 days or a summary sheet of the submissions" (*id.*). Paice's 29 May 2006 e-mail "attached the original REA letter and the revised spreadsheets for each of the submissions" (*id.*). CO Ford's declaration, furnished with the government's 21 April 2001 letter to the Board confirmed this sequence of events:

On May 24, 2006, following an inquiry from Matthew Paice of PWC, I sent a e-mail to Mr. Paice asking him to "send me a copy of the certified REA letters that are associated with the trucks that were out over 29 days or a summary sheet of the submissions." Mr. Paice replied on May 29, 2006 with a copy of the REA letter and copies of the attachment B, C, D, and E. Attachment A and F were not included in the e-mail.

(Gov't letter of 21 April 2011, decl. of CO Ford) Regardless of whether CO Ford received PWC's REA in December 2005, she received the 12-page REA plus Attachments B, C, D, and E (as contained in R4, tab 14) on 29 May 2006.

31. Not having heard from CO Ford, Paice e-mailed her on 28 August 2006. The e-mail said "On March 10, 2006, the Government verified receipt of a 'hard' copy 'Request for Equitable Adjustment (REA), October 2004 - September 2005, Submissions 1, II & III' submitted to your office, concerning the retention of PWC assets past the 29-day contractual window. In addition, per the Government's request on May 24, 2006, PWC submitted a 'soft' copy, via email, of the certified REA on May 29, 2006." Paice asked the CO to "provide a date for a response to and resolution of these pending amounts." (Motion Papers No. 4, ex. 26).

32. On 21 December 2006, PWC submitted a two-page certified claim to CO Ford. The claim letter said "On December 20, 2005, PWC submitted a certified

Request for Equitable Adjustment (REA), for which the company has received additional information request but no written disposition on the REA.” The claim sought payment in the amount of \$12,490,060.00. It attached “the documentation submitted in the earlier REA (specifically, Submissions I, II, and III on 20 December 2005), with the inclusion of the newly added Submission IV, for the costs incurred by PWC due to the Government’s utilization of PWC truck asset past the 29 day maximum.” (R4, tab 14 at 2) In referencing and attaching them, we find that PWC had incorporated and made its 12-page 20 December 2005 REA and attachments a part of its certified claim. The claim, certified by PWC’s Senior Contract Manager, James A. Kibbee, Jr., was based on the legal theory of unjust enrichment:

Pursuant to Common Law, and under the definition of “unjust enrichment”, the Government has gained a windfall (receives additional services) at the expense of PWC. As a legal doctrine, it states that the party who has thus gained must return the property (restitution) to its rightful owner, even though the property was not obtained illegally....

In invoking the legal theory of unjust enrichment, the claim letter went through a 5-step question and answer analysis of the theory’s legal elements.⁸ (R4, tab 14, Claim letter)

33. The REA included a 12-page narrative and referenced Attachments A through F (R4, tab 14, REA at 8). Attachment A was said to provide “The breakdown of costs.” Attachments B, C and D contained spreadsheets listing its trucks returning after 29 days during the period October through December 2004 (Submission I), January through February 2005 (Submission II), and March through September 2005 (Submission III). Attachment E provided a summary for Attachments B, C and D. (R4, tab 14, REA at 8) Attachments B, C and D spreadsheets show how PWC arrived at the amount it claims for each truck trip into Iraq. Attachment F was said to show “a matrix of events during the time period in question...depicting road closure dates, escort issues, elections etc, which when viewed in conjunction with the dates these trucks were deployed explain a portion of the additional days.”⁹ (*Id.* at 9)

⁸ The 5-step analysis was apparently taken from a website on the subject of unjust enrichment. See http://en.wikipedia.org/wiki/Unjust_enrichment.

⁹ The government maintains that it never received the REA or its attachments when sent in December 2005 (gov’t letter dated 21 April 2011). As indicated in SOF ¶ 30, CO Ford did obtain from PWC the 12-page REA on 29 May 2006. PWC’s 21 December 2006 certified claim included this 12-page REA. According to CO Ford, Attachment A provided with the certified claim was “a copy of the December 20 2005 REA letter” and Attachment F provided with the certified claim was titled “F-Submission Summary,” an Excel spreadsheet showing the total

34. PWC also forwarded separately other supporting documents including (1) Delivery Notes which indicate “when the truck has entered the camp, when it has been downloaded, and when it leaves, along with any comments or notes made,” (2) MicroTransport Reports which provide trip length data and Transport Officer comments along the journey, (3) Convoy Reports which report on cargo departure time, destination, and (4) Squad Leader Reports which provide information from “eyes-on personnel” (R4, tab 14, REA at 9-10). These documents occupy the bulk of the ten-volume Rule 4 file.

35. PWC’s REA said there were “many reasons” why its trucks failed to return from Iraq “within the stipulated times as stated in the contract” including these 6 bullet point reasons listed on page 3 of the REA:

- Lack of convoy escorts
- Road closures
- Lack of storage
- Vehicles being used for missions by the Military
- Vehicles being used by other contractors
- PWC assets being utilized for recovery or other delivery missions.

(R4, tab 14, REA at 3)

36. PWC’s REA sought recovery under the legal theory of “unjust enrichment,” a term it repeatedly used:

As finite-lived, revenue-bearing assets, truck retention without adequate compensation provides a sufficient basis for an REA to DSCP based on *Unjust Enrichment*.

....

...PWC SPV should be made whole as a result of pecuniary damage inflicted by the government’s failure to return PWC assets in a timely manner and without payment to PWC for uncompensated use/retention of these assets during these periods. Such retention is precluded by law, has impaired our

claim in four PWC claim ‘submission.’” (*id.* at 2). Attachments A and F submitted with PWC’s 21 December 2006 certified claim are thus different from Attachments A and F referenced in PWC’s 2005 REA.

ability to perform our mission, impacted PWC's ability to do business as a commercial entity, and in our opinion represent *unjust enrichment* to the U.S. Government, compensation for which is mandated by law and is now due and payable to PWC.

....

The U.S. Government's retention of PWC SPV's revenue-bearing finite-lived commercial assets without compensation and beyond the scope of the contract means that the U.S. Government received a benefit with no associated cost. This is a clear example of *unjust enrichment* to the U.S. Government.

(R4, tab 14, REA at 6, 8) (Emphasis added)

37. CO Ford denied PWC's claim by decision dated 9 April 2007 for the following reasons:

Bilateral Modification P00027, effective September 16, 2004, established a maximum number of days applicable for Iraq transport fees. It states "The maximum number of allowable trip days is 29. The Government will not pay transportation fees beyond this established maximum." The 29 day cap on the truck transport fee was established in reference to the Transportation Officers (TO) program objectives and responsibilities, awareness of the detention situation in Iraq, and the 14 day average truck transport time. PWC was aware of this at the time it executed P00027 and agreed to the 29 day cap. Furthermore, while the subject claim acknowledges that distribution fees were already paid for each of the stated deliveries, it offers no evidence to substantiate that the amount paid was unfair, unreasonable, or inequitable. The distribution fees paid for each of the deliveries stated in the claim were fair, reasonable, equitable, and in line with the intent of P00027. As such, PWC is not entitled to an equitable adjustment.

(R4, tab 15) The decision did not address the bullet point causes of truck delay listed on page 3 of the REA. It did not address the government's obligations under MOD 1 relating to escorted convoy (§ 2), use of PWC trucks as storage (§ 4), and emergency

situations where additional efforts were required at the direction of military commanders (¶ 6). As indicated by the correspondence between the parties, these issues were not unfamiliar to the CO.

38. Thereafter, PWC, through its vice president and general counsel, appealed the CO decision by notice dated 29 May 2007. The Board docketed the appeal on 1 June 2007.

39. PWC's complaint alleges that its claim "was for those days in excess of the 29 days in P00027 when the Government used Appellant's trucks without its permission or compensation." Such use allegedly included "use as temporary storage, use by other contractors, use for recovery or other missions and failure to provide convey [sic] escorts." (Compl. ¶ 7) PWC's complaint did not advance any legal theory for recovery. The government's answer denied these allegations for "lack of information and knowledge" (answer ¶ 7).

40. The parties subsequently agreed to attempt to resolve their disputes through non-binding Alternative Dispute Resolution (ADR). The Board approved a signed ADR agreement on 7 July 2009. Difficulties with respect to the scope and use of audit information surfaced. By mid-January 2010, the parties decided to resume litigation.

41. On 8 October 2010, the government moved to dismiss PWC's appeal, and in the alternative, for summary judgment (Motion Papers No. 1). The government contends that an unjust enrichment claim requires the absence of a valid contract (*id.* at 16), and since there is an express contract—Contract 3061 and MOD 27—addressing directly transport fees up to and exceeding 29 days, there cannot be a separate "implied-in-law" contract covering the same subject (*id.* at 17). The government contends that "[t]he only legal basis presented by PWC for its claim and appeal is unjust enrichment" (*id.* at 13), and since unjust enrichment is "premised on the existence of a contract implied by law," and since the Board has no jurisdiction over implied-in-law contracts, the Board "lacks jurisdiction over PWC's appeal" (*id.* at 15).

42. In moving for summary judgment, the government contends that the appeal turns on the interpretation of MOD 27 which "clearly addressed the Government's liability for transportation fees in Iraq," and which "clearly established a maximum liability for each trip" (Motion Papers No. 1 at 20).

43. In response, PWC moves to amend its complaint. Its motion is accompanied by its first amended complaint. (Motion Papers No. 2) PWC urges the Board to grant its motion because amending its complaint "does not change the essential nature or operative facts of the Claim," "would further frame and join the issues," and "would be fair to both parties" (*id.* at 4). In moving to amend its complaint, PWC does not challenge the

government's position on unjust enrichment. Nor does it address the government's motion for summary judgment. The introductory paragraph of its first amended complaint says "Amending the Complaint will also moot portions of the Government's Motion to Dismiss and in the Alternative for Summary Judgment" (*id.*, Motion To Amend Complaint at 1).

44. PWC's first amended complaint contain 50 paragraphs culminating in 3 counts: Count 1 is for "Breach of the Express Terms of the Contract." PWC alleges in this count that "[t]he Government's use of the trucks as storage and for other purposes unrelated to the delivery of subsistence items from PWC's warehouse to Authorized Customers breached the express terms of the Contract." Count 2 is for "Constructive Changes." PWC alleges in this count that "[t]he Government's directions that the trucks be used for purposes unrelated to the delivery of subsistence items from PWC's warehouse to Authorized Customers constituted constructive changes to the Contract." Count 3 is for "Breaches of the Government's Implied Duty to Cooperate With and Not Hinder PWC's Performance." PWC alleges in this count that the Government "breached its implied duty to cooperate with and not hinder PWC's performance of the contract... when, for example, the Government":

- (a) used the trucks for purposes unrelated to the delivery of subsistence items from PWC's facilities in Kuwait to Authorized Customers;
- (b) unreasonably denied PWC's truck access to the facilities where they were to be off loaded;
- (c) refused to timely off load and return trucks to PWC, despite being capable of doing so;
- (d) failed to take reasonable efforts to ensure that sufficient convoys were available to escort the trucks to their delivery points and be returned to Kuwait; and
- (e) did all of the above despite PWC's best efforts to reduce the average length of truck-trips.

In each of the 3 counts, PWC seeks damages in the amount of \$12,490,060. (Motion Papers No. 2, first amended compl. ¶¶ 52, 54, 56)

45. The government's 7 December 2010 response opposed PWC's motion to amend. The government asserts that PWC seeks to amend its complaint by adding "new legal theories based on new factual allegations" and that PWC's "new counts...exceed the scope of the claim submitted to the contracting officer." (Motion Papers No. 3 at 1-2)

DECISION

The doctrine of unjust enrichment is based “not on agreement but [is] equitable in nature,” stemming from “a perception that a party *ought* to be bound rather than from a conclusion that a party has *agreed* to be bound.” *Aetna Casualty and Surety Co. v. United States*, 655 F.2d 1047, 1059 (Ct. Cl. 1981). Unjust enrichment provides support for the remedial device known as a contract implied in law. *Cleveland Chair Co. v. United States*, 557 F.2d 244, 246 (Ct. Cl. 1977). Under the Contracts Disputes Act (CDA), our jurisdiction extends only to express or implied-in-fact contracts, and does not extend to contracts implied-in-law. 41 U.S.C. § 7102(a); *Beyley Construction Group Corp.*, ASBCA No. 55692, 08-2 BCA ¶ 33,999 at 168,141; *Amplitronics, Inc.*, ASBCA No. 44119, 94-1 BCA ¶ 26,520 at 131,995; *Eaton Corp.*, ASBCA No. 38386, 91-1 BCA ¶ 23,398 at 117,403; *Jack D. Higgins*, ASBCA No. 33086, 87-3 BCA ¶ 20,132 at 101,924. The government correctly argues that we do not have jurisdiction to grant relief based on unjust enrichment.

PWC apparently does not disagree with the government’s argument in this respect. In response to the government’s motion to dismiss, PWC moves to amend its complaint. Its first amended complaint seeks relief under three new legal theories: Count 1, “Breach of the Express Terms of the Contract,” Count 2, “Constructive Changes,” and Count 3, “Breaches of the Government’s Implied Duty to Cooperate With and Not Hinder PWC’s Performance.” The government opposes PWC’s motion to amend, contending that the new legal theories advanced are based on “new factual allegations” not previously submitted in its certified claim to the CO (Motion Papers No. 3 at 13).

The CDA requires all claims by a contractor be submitted to the CO for decision. 41 U.S.C. § 7103(a)(1). We lack jurisdiction over claims raised for the first time on appeal, in a complaint or otherwise. *Versar, Inc.*, ASBCA No. 56857, 10-1 BCA ¶ 34,437 at 169,957. Whether a claim before the Board is new or essentially the same as that presented to the CO depends upon whether the claims derive from common or related operative facts. *Versar*, 10-1 BCA at 169,957, *citing Dawkins General Contractors & Supply, Inc.*, ASBCA No. 48535, 03-2 BCA ¶ 32,305 at 159,844 (collecting cases).

The government contends Count 1 (Breach of the Express Terms of the Contract) exceeds the scope of the claim presented to the CO because (1) PWC failed to allege breach and “any contract provision or requirement that the Government failed to comply with” (Motion Papers No. 3 at 25), and (2) “[t]he elements of a breach of contract claim have virtually nothing in common with the elements of an unjust enrichment claim” so that “[t]he two claims are not even remotely the same, and hence almost by definition cannot be based on the same related operative facts” (*id.* at 22-23).

The government contends Count 2 (Constructive Changes) exceeds the scope of the claim presented to the CO because (1) PWC's claim "gave no information asserting someone with authority had ordered PWC to perform work outside the contract or changed the contract requirements, nor does it allege any contract provision or requirement that was changed or enlarged—the gravamen of a constructive change claim" (Motion Papers No. 3 at 28), and (2) in comparing the legal elements for constructive change against the legal elements for unjust enrichment there is "no relationship or overlap" between the elements (*id.* at 26).

The government contends that Count 3 (Breaches of the Government's Implied Duty to Cooperate With and Not Hinder PWC's Performance) exceeds the scope of the claim presented to the CO because (1) the claim did not assert "the Government's actions interfered with or hindered PWC's performance" (Motion Papers No. 3 at 30), (2) the four examples ((a)-(d)) PWC gave in Count 3 (*see* SOF ¶ 44), (a) [used trucks for unrelated purposes] could only "arguably be remotely tied to the REA or certified claim" (*id.* at 29) and (b) [denied truck access], (c) [refused to timely off load] and (d) [failed to ensure sufficient convoys] were "never raised...or presented to the contracting officer," and (3) the six reasons PWC listed in its REA as the reasons its trucks failed to return within 29 days, either "do not involve the Government using PWC's trucks at all" or there is no indication "the missions were related to the delivery of subsistence items" (*id.*).

Matching the elements of unjust enrichment against the elements of the new legal theories PWC posed does not resolve the question whether the claim before us in the amended complaint is the same one presented to the CO. *URN Industries, Inc. v. United States*, 962 F.2d 1013, 1024 (Fed. Cir. 1992) (noting "the meaning of claim was not dependent on the legal theory proposed"). We have said the assertion of additional facts or new legal theories of recovery, when based upon the same operative facts as included in the original claim, does not constitute a new claim. *Trepte Construction Co.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385-86. Moreover, the requirement that the appeal brought before us be based on the same claims previously presented to and denied by the CO "does not require ridged adherence to the exact language or structure of the original administrative CDA claim" if the claims "arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery." *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). There is no requirement that a CDA claim "be submitted in any particular form or using any particular wording." "All that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and the amount of the claim." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987).

In this case, despite the attachments and the voluminous supporting documentary support PWC furnished to the CO, the crux of the claim is factually embodied in the six bullet points listed on page three of PWC's REA (SOF ¶ 35). In determining the scope of the claim, moreover, we are not limited to the claim document but "[w]e may examine the totality of the correspondence, as well as the continuing discussions, between the parties." In the same vein, we may examine the correspondence and discussions between the parties "to decide whether [a contractor's] complaint goes beyond the scope of its claim." *Vibration and Sound Solutions Ltd.*, ASBCA No. 56240, 09-2 BCA ¶ 34,257 at 169,270; *General Construction Co., a Div. of Wright Schuchart, Inc.*, ASBCA No. 39983, 91-1 BCA ¶ 23,314 at 116,917 (noting "The Board may determine the sufficiency of a claim based on the claim letter and the totality of the previous correspondence between the parties"); *Mendenhall v. United States*, 20 Cl. Ct. 78, 83 (1990) (noting the CDA does not require the court to interpret contractor's claim letter "in a vacuum").

Citing Environmental Safety Consultants, Inc., ASBCA No. 54615, 07-1 BCA ¶ 33,483 at 165,979, the government points out that the Board has held that its jurisdiction is determined by examining the claim "as it was submitted to the contracting officer, not by subsequent correspondence with the Board" (*see* gov't letter dated 21 April 2011 at 2). Even if the CO and others at DSCP did not receive PWC's REA and its attachments when sent by e-mail on 20 December 2005, CO Ford asked for and was provided the REA on 29 May 2006 (SOF ¶ 30). When PWC finally submitted its certified claim, it attached the documentation submitted in the earlier REA and updated it with Submission IV. As CO Ford acknowledged, Attachment A to the certified claim was "a copy of the December 20, 2005 REA letter" (SOF ¶ 33 n.8). Thus, CO Ford received PWC's 12-page REA at least twice. Because PWC's 21 December 2006 certified claim letter specifically attached its 2005 REA, the REA is a part of the claim. Nor does it matter that the CO never received attachment F to the REA. Attachment F is a spreadsheet detailing the causes of truck delays summarized in the six bullet points of the REA which was resubmitted as a part of PWC's 21 December 2006 certified claim.

The REA listed 6 bullet point reasons as causes for the trucks' failure to return from Iraq in 29 days: (1) Lack of convoy escorts, (2) Road closures, (3) Lack of storage, (4) Vehicles being used for missions by the Military, (5) Vehicles being used by other contractors, and (6) PWC assets being utilized for recovery or other delivery missions (SOF ¶ 35). In reply to the government's opposition to its motion to amend, PWC provided documentation—mostly e-mail between the parties—to demonstrate the various bullet point causes of truck delay were brought to the attention and discussed with the CO and other DSCP officials leading up to submission of its certified claim. These e-mails and documents provide insight into the operative facts underlying the bullet points in PWC's certified claim. With the aid of the parties' prior e-mails and discussions, we review the operative facts PWC alleges in its first amended complaint to determine if

they go beyond the parties' e-mails and discussions as embodied in the bullet points PWC listed in its claim/REA.

With respect to PWC certified claim's first bullet point, "Lack of convoy escorts," we note that after PWC signed MOD 27 in January 2005, it sought to have CO Ford rescind the 29-day cap for transport fees (SOF ¶ 13). In response to CO Ford's suggestion to submit a proposal to address the transport fee cap (SOF ¶ 14), PWC furnished by e-mail on 18 February a spreadsheet analysis which identified "escorts" as one of the two issues that were delaying truck returns (SOF ¶ 16). Briefing slides show that in July 2005 CO Ford and her team at DSCP were told by PWC that "[d]eviation in Military handing of convoys & assets in IZ from contract" was one of the challenges it faced from June 2004 to May 2005 (SOF ¶ 25). We conclude that PWC's allegation in Count 3(d) of its first amended complaint to the effect that the government "failed to take reasonable efforts to ensure that sufficient convoys were available to escort the trucks to their delivery points and be returned to Kuwait" (SOF ¶ 44) is derived from common or related operative facts made known to the CO and embodied in the claim's bullet point "Lack of convoy escorts."

With respect to PWC certified claim's second bullet point, "Road closures," the record shows that PWC's 13 January 2005 e-mail advised CO Ford that truck delays were driven by "military mission, situation, or other controlling parties' inefficiencies" and "projected road closures" would make the situation worse (SOF ¶ 13). We conclude PWC's allegation in Count 3(b) of its first amended complaint to the effect that the government "unreasonably denied PWC's truck access to the facilities where they were to be off loaded" (SOF ¶ 44) is based on common or related operative facts made known to the CO and embodied in the claim's bullet point "Road closures."

With respect to PWC's certified claim's third bullet point, "Lack of storage," correspondence between the parties prior to submission of the claim shows that the CO and other government officials were well aware of the problem: Shortly after MOD 27 became effective, PWC advised the CO and other government officials that "[s]torage issues continue to hamper the turn around [sic] time at some locations" (SOF ¶ 10). Internal e-mail in February 2005 shows that DSCP recognized that the Army had a "storage problem" which was causing truck delays (SOF ¶ 18). Also, in February 2005, PWC sent the government a spreadsheet analysis showing trucks remaining at destinations 11 to 13 days before returning as a result of insufficient storage capacity (SOF ¶ 16). In March 2005, PWC complained to CO Ford that "the customer IS holding our trucks as storage" in violation of the terms of MOD 1 and that "[t]he Army and KBR personnel on the ground in Iraq feel they have authority to hold our trucks" (SOF ¶ 20). In proposing a "demurrage fee" to address the situation, PWC told the CO in March 2005 delays were caused by "Hub, DFAC and/or Mobile Kitchens (MKT's) inability to offload and release PWC's assets within the required timeframe, and Military use of PWC Prime

Vendor trucks as storage facilities” (SOF ¶ 21). In evaluating PWC’s proposal, a DSCP contract specialist reported to CO Ford by e-mail on 16 March 2005 that “[t]he real problem is the Service use of PWC’s units for storage and making extra deliveries” (SOF ¶ 22). The ACO’s 30 March 2005 e-mail forwarded to CO Ford and others reported empty reefers were used for storage of misdirected cargo (SOF ¶ 24). We conclude that PWC’s allegations in its first amended complaint to the effect that the government’s use of the trucks as storage and for other purposes unrelated to the delivery of the subsistence items breached the express terms of the contract (Count 1), constituted constructive changes (Count 2), and constituted breaches of the government’s implied duty to cooperate with and not to hinder PWC’s performance (Count 3 (a), (c), and (e)) are based on common or related operative facts made known to the CO and embodied in the claim’s bullet point “Lack of storage.”

With respect to the fourth, fifth and sixth bullet points in PWC’s certified claim asserting that its trucks were being used by the military for missions, by other contractors, and for recovery or other delivery missions, correspondence between the parties shows that government knew about them as well: PWC’s 13 January 2005 e-mail response to the CO’s inquiry about extending Contract 3061 complained that truck delays were being driven by “military mission, situation, or other controlling parties’ inefficiencies” (SOF ¶ 13). In March 2005, the ACO reported to DSCP that some in the Army believed they could divert PWC’s trucks from their original destinations “anytime,” and the Army on a continuing basis was asking PWC “to divert food from one location to another to fix their mistakes” (SOF ¶¶ 23, 24). In May 2005, PWC briefed the CO and her team at DSCP on the challenges PWC faced in Iraq from June 24 to May 2005. As reflected in the slides presented, in addition to re-direction of PWC’s assets, other issues included “Recovery of assets from IZ” involving “return from KBR in Arifjan” and “Sales of assets by 3rd Parties in Iraq.” (SOF ¶ 25) We conclude that the underlying operative facts in support of PWC’s breach (use of trucks for storage) (Count 1), constructive changes (direction that trucks be used for unrelated purposes) (Count 2), and breach of the government’s implied duty to cooperate (used trucks for unrelated purposes) (Count 3), asserted in its first amended complaint are derived from common or related operative facts made known to the CO and embodied in the claim’s bullet points “Vehicles being used for missions by the Military,” “Vehicles being used by other contractors,” and “PWC assets being utilized for recovery or other delivery missions.”

We have reviewed the first 50 paragraphs of PWC’s first amended complaint. We do not agree with the government’s contention that some of the allegations (¶¶ 9, 10, 11, 12, 13, 17, 28, 29, 34, 35, 36, 38) are based on operative facts not previously presented to the CO (*see* Motion Papers No. 3, first amended compl., i) through xi) at 16-20). What are asserted in these paragraphs are contract modification provisions the CO negotiated and thus should be familiar to her. Other facts asserted are derived from common or related operative facts made known to the CO during the course of performance and

embodied in the 6 bullet point causes of delay listed in PWC's 2005 REA which was submitted to the CO as a part of its certified claim. Although PWC now poses different legal theories for its claim, we conclude the claim is essentially the same as presented to the CO for decision. *Scott Timber*, 333 F.3d at 1366.

The Government's Motion for Summary Judgment

The government's motion for summary judgment is based on contract interpretation. Pointing exclusively to MOD 27 and its language, the government tells us that "Bilateral Modification P00027 could not state more clearly that PWC is entitled to a maximum of 29 days of fees for trips into Iraq." (Motion Papers No. 1 at 22) In moving to amend its complaint, PWC tells us if we grant its motion to amend to change its legal theory of recovery, the government's summary judgment motion could be rendered moot. PWC tells us that counsel for the government has agreed that PWC's response to the summary judgment motion may be deferred pending resolution of the government's motion to dismiss (Motion Papers No. 2, motion to amend compl. at 1). In view of the parties' agreement, the government's motion for summary judgment is not ready for decision at this juncture.

CONCLUSION

Because the operative facts underlying the legal theories PWC presented in its first amended complaint are derived from common or related operative facts which were the subject of numerous e-mails between PWC and the CO and because these same operative facts were presented to the CO as bullet points in its REA attached to and made a part of the certified claim, we conclude that the first amended complaint did not advance new claims not previously presented to the CO.

Accordingly, the government's motion to dismiss for lack of jurisdiction is denied. PWC's motion to amend its complaint is granted.

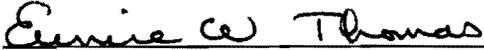
Dated: 22 June 2011



PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur



EUNICE W. THOMAS
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



MONROE E. FREEMAN, JR.
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 No. 56022, Appeal of The Public Warehousing Company, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals