ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
American General Trading & Contracting, WLL	)	ASBCA No. 56758
	)	
	)	
Under Contract No. DABM06-03-C-0009	)	

APPEARANCE FOR THE APPELLANT: Vonda K. Vandaveer, Esq.
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Washington, DC

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ K.L. Grace Moseley, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MELNICK
ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT UPON THE FIRST CLAIM, ON THE GOVERNMENT'S MOTION TO DISMISS THE SECOND CLAIM FOR LACK OF JURISDICTION, AND ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT UPON THE SECOND CLAIM

American General Trading & Contracting, WLL (appellant or AGT) appeals from the denial of a claim for damages for breach by the Army of a laundry services contract for soldiers stationed at five camps in Kuwait during 2003, and additional compensation allegedly owed by the Army in return for laundry facilities and services AGT provided at two additional sites in Kuwait. AGT's breach allegation is presented here as its first claim, and is premised upon the government negligently estimating its laundry needs in Kuwait, which were significantly reduced after the 2003 invasion of Iraq. AGT's demand for compensation for the two additional sites, Camp Victory and 35th Brigade (BDE), is presented here as its second claim.[1]

Originally, the government moved for summary judgment upon both claims. Regarding the first claim, based upon an alleged negligent estimate, the government argues that the invasion of Iraq was a non-compensable sovereign act. Respecting the second claim, for additional payment for AGT's laundry services at Camp Victory and 35th BDE, the government maintains that it does not owe any additional amount for those services. In response, and in its cross-motion for summary judgment, AGT contends that

[1] In some locations, the complaint abbreviates the 35th Brigade as "BRG." We use the abbreviation BDE throughout for consistency.

the sovereign acts doctrine is inapplicable to its negligent estimate claim and that ample evidence demonstrates the government's negligence. Citing FAR 50.103-2(c), Formalizing Informal Commitments, AGT claims that its reliance upon the government's alleged promise to pay for the extra laundry facilities and services at Camp Victory and 35th BDE obligated the government to pay the amounts sought.

After considering the parties' briefs, we issued a letter to them noting AGT's reliance upon FAR 50.103-2(c) to support its second claim. We sought additional briefing respecting our jurisdiction to entertain that claim. In response, the government has moved to dismiss the second claim for lack of jurisdiction, while AGT has filed a motion in support of the Board's jurisdiction over the second claim, explaining that the claim is also based upon the theory that the government breached an implied-in-fact contract obligating the government to pay for the additional services at the two sites. The government opposes that motion.

We deny the parties' cross-motions for summary judgment respecting the first claim based upon negligent estimates. We also deny the government's motion to dismiss the second claim for lack of jurisdiction. We agree with the government that we lack jurisdiction to entertain a claim based upon FAR Part 50. However, we conclude we possess jurisdiction over AGT's second claim based upon its alternative legal theory of breach of an implied-in-fact contract and that AGT has adequately stated such a claim. The cross-motions for summary judgment upon the second claim are moot.[2]

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 17 February 2003, the U.S. Army Central Command-Kuwait awarded Contract No. DABM06-03-C-0009 to AGT to perform laundry services at five locations in Kuwait: Camp Pennsylvania, Camp Virginia, Camp New York, Camp New Jersey, and Camp Connecticut. As modified, the contract was for six months, with an option to extend for six more months. (R4, tabs 3, 4) The total contract award was KWD 2,287,333.24 ($7,887,356) (R4, tab 3 at 1, 8).

[2] The filings that are cited in this decision are as follows, and abbreviated as indicated: Government's Motion for Summary Judgment (gov't mot.); Appellant's Motion in Opposition to the Government's Motion for Summary Judgment (app. opp'n); Appellant's Cross-Motion for Summary Judgment (app. mot.); Government Motion to Dismiss Claim II for Lack of Jurisdiction (gov't mot. dismiss); Appellant AGT's Motion in Support of ASBCA Jurisdiction Over the Claim for Costs for the Construction of Two Laundry Facilities (app. mot. jur.); Government's Response to Appellant's Reply Regarding Jurisdiction Over Claim II Under an Implied in Fact Theory (gov't resp. jur.).

2. The solicitation, issued 29 January 2003, and awarded contract provided that it was a firm-fixed unit-priced contract with total item numbers adjustment (R4, tab 1 at 2, 21, 29, tab 3 at 2, 14). They estimated that the laundry requirements for each camp would be 1,000 soldiers, capable of surging up to 7,000 soldiers per camp on a monthly basis, with the number of items to be laundered ranging from 2,520,000 to 17,640,000 (R4, tab 1 at 2, 7, 22, tab 3 at 2, 9, 15). The services to be required included loading, unloading, segregating, transporting, counting, washing, drying and obtaining necessary documents for the items within 72 hours of pick up (R4, tab 1 at 7, tab 3 at 9).

3. The solicitation and contract also estimated the average number of soldiers that would be located in each camp would be 3,500, equating to 8,820,000 items (R4, tab 1 at 2, tab 3 at 2).

4. The solicitation's Notice to Bidders informed them that "[t]he contract is based on the average number of troops for each camp" (R4, tab 1 at 29).

5. The Price Quote Guidelines in the solicitation stated: "The contractor should place [its] Bid by laundry pieces based on 7,000 troops x 5 Camps x 4 weeks/mo x 21 pieces x 6mo = 17,640,000 pieces..." (R4, tab 1 at 23).

6. The contract does not contain the FAR 52.216-21, REQUIREMENTS (OCT 1995) clause, nor does it contain the FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995) clause. The contract did incorporate the FAR 52.211-18, VARIATION IN ESTIMATED QUANTITY (APR 1984) clause. It states, in pertinent part:

> If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party.

(R4, tab 3 at 18)

7. The contract contained an Adjustment Quantity Clause, which stated:

> The purpose of this clause is to state the Government's best estimate of pieces of laundry to be serviced. The contractor will be paid for the total number of pieces received for laundry service. If the quantity washed is lower than the total amount of the contract, the total amount to be paid will be equally reduced....

(R4, tab 3 at 14)

8. AGT relied upon the estimated requirements in the solicitation to determine its contract price (Declaration of Sheila S. Gittens ¶¶ 22-24 (Gittens decl.)).

9. AGT began accepting laundry for processing on 16 March 2003 (1st amended compl. and answer, part I ¶ 32, answer, part II ¶ 14).

10. On 20 March 2003, the president ordered the invasion of Iraq, resulting in fewer soldiers in the camps in Kuwait (1st amended compl. and answer, part I ¶ 33).

11. Over the course of the contract's six month base term, the actual amount of laundry provided to AGT from the five camps was 72.4% below the estimated average requirements (Gittens decl. ¶ 26).

12. On 25 June 2003, AGT, by email, notified Ms. Colleen Rodriquez, in the contracting office, that it "set up Purchase Orders for the Tents, Generators and AC units and have interviewed additional staff to start the mobilization and construction required for the laundry facility" at Camp Victory. The email further stated that "Lt Tucker" directed AGT to identify the location "ASAP in order to insure that we obtain this location. Based on the above we require a notice to proceed...." Ms. Rodriquez instructed AGT to "keep proceeding with your efforts." She stated she was "in the process of preparing a change order...." (R4, tab 5)

13. By email dated 26 June 2003, Ms. Rodriquez inquired of AGT about a "timeline as to when you could have a full service laundry set-up at the 35th BDE location." AGT responded on 28 June 2003 that it could do so by 12 July 2003. AGT also noted that "both Victory and 35th BDE will be at the new rates previously given." Ms. Rodriguez replied that "[t]he only rates that I have are those in the contract," and asked "[w]hen were the new rates provided and please give justification." (Gittens decl., ex. B)

14. By email dated 30 June 2003, AGT notified Ms. Rodriguez that the Camp Victory site had not been cleared yet, and that AGT was still "waiting for a notice to proceed for 35 BDE." Ms. Rodriguez responded that AGT could "consider this email as your notice to proceed." (Gittens decl., ex. B)

15. On 9 July 2003, AGT complained by email to Ms. Rodriguez about difficulties encountered by its carpenters installing counters at 35th BDE. Also on that day, AGT reported about the amount of laundry it was receiving at Camp Victory, and that a competing service was operating at that site. Ms. Rodriguez responded that she "didn't know anything about this," and would "GET TO THE BOTTOM OF THIS." (*Id.)*

16. On 13 July 2003, AGT informed Ms. Rodriguez that it had "started 35th BDE on the 12th of July as promised" (*id.*).

17. On 9 August 2003, AGT communicated to Ms. Rodriguez that it had commenced laundry operations at Camp Victory based upon an estimate of receiving 400 to 600 bags per day (*id.*).

18. On 1 September 2003, AGT forwarded invoices to Ms. Rodriguez for Camp Victory and 35th BGE (*id.*).

19. On 12 October 2003, the Army paid AGT KD 23,357 ($79,948.68), part of what AGT claims is due for work performed at Camp Victory and 35th BDE (Gittens decl. ¶¶ 16-18).

20. AGT provided laundry services at Camp Victory and 35th BDE (1st amended compl. ¶¶ 45-47, answer, part I ¶ 47).

21. On 12 October 2003, AGT submitted a certified claim for KD 1,271,991. AGT claimed the government had negligently estimated its requirements for the Kuwait laundry contract, and had failed to pay amounts owed for laundry services provided at Camp Victory and 35th BDE. (R4, tab 8) On 11 August 2004, AGT submitted a "corrected" certified claim for KD 1,358,241.400 that "replaced" the original (R4, tab 15).

22. On 2 December 2008, the contracting officer issued a final decision denying AGT's claim in its entirety (R4, tab 16).

23. By letter dated 26 February 2009, AGT appealed from the denial of its claim. The appeal was docketed as ASBCA No. 56758.

DECISION

Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Parsons-UXB Joint Venture*, ASBCA No. 56481, 11-1 BCA ¶ 34,680. A motion to dismiss for lack of jurisdiction based upon the legal sufficiency of the allegations is reviewed under the assumption the allegations are true, and construed in the light most favorable to the claimant. If the movant denies or controverts the allegations of jurisdiction, then only uncontroverted allegations are accepted as true. All other facts relevant to jurisdiction are subject to fact-finding. *Cedars-Sinai Medical Center. v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993).

I. The First Claim Based Upon Negligent Estimates

AGT claims that the government breached this laundry contract by negligently estimating its laundry requirements for the five camps. It contends that, prior to award of the contract, the government knew that the soldiers in the five Kuwait camps would be ordered to invade Iraq, significantly reducing the number of personnel in the camps below the estimated average of 3,500 communicated to AGT.

Estimated quantities provided by the government are not guarantees. The mere fact actual contract purchases vary significantly from them typically does not lead to government liability. *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). Nevertheless, when estimates are placed in certain types of contract solicitations, contractors are entitled to rely upon them in forming their bids. So the government must use reasonable care preparing them. *Id.* When an estimate as to a material matter is provided by the government to bidders upon these contracts, it must be based upon "all relevant information that is reasonably available to it." *Womack v. United States*, 389 F.2d 793, 801 (Ct. Cl. 1968). An incorrect estimate stemming from the government's unintentional negligence is as much a misrepresentation as a deliberate one, and is consequently as much a breach of contract. *Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1328, 1335 (Fed. Cir. 2003); *Womack*, 389 F.2d at 800; *J.A. Jones Mgmt. Servs., Inc.*, ASBCA No. 46793, 99-1 BCA ¶ 30,303 at 149,832-33. Even if the government's estimate is not drastically inaccurate, if it was prepared negligently or in bad faith the government is liable for breach. *See Engineered Demolition, Inc. v. United States*, 70 Fed. Cl. 580, 592 (2006). Contractors bear the burden of proving by a preponderance of the evidence that the government's estimates were negligently prepared. *Medart*, 967 F.2d at 581. It is not enough though to show that the government was not clairvoyant. *Womack*, 389 F.2d at 801. Nor does it matter that the government failed to search for or create information. *Medart*, 967 F.2d at 582. The adequacy of the government's estimate is only tested by the relevant information reasonably available to it. *Womack*, 389 F.2d at 801.

Not all types of contracts can be breached by the government for making negligent estimates. Though not the only kind of contract subject to such claims, *see Timber Investors, Inc. v. United States*, 587 F.2d 472 (Ct. Cl. 1978), requirements type contracts clearly are subject to negligent estimate claims. *Rumsfeld*, 325 F.3d at 1334-35; *C.F.S. Air Cargo, Inc.*, ASBCA No. 40694, 91-2 BCA ¶ 23,985 at 120,040. Requirements contracts obligate designated government activities to fill all of some particularly defined requirement for supplies or services with the contractor during a specified period, though they do not guarantee any particular minimum quantity will be purchased. FAR 16.503(a); *C.F.S. Air Cargo*, 91-2 BCA ¶ 23,985 at 120,040 (quoting *Crown Laundry & Dry Cleaners, Inc.*, ASBCA No. 39982, 90-3 BCA ¶ 22,993 at 115,480-81, *aff'd*, 935 F.2d 281 (Fed. Cir. 1991) (table)).

In contrast, indefinite quantity contracts obligate the government to purchase a guaranteed minimum quantity of supplies or services under the contract, followed by whatever additional purchases the government chooses to make up to a stated maximum. FAR 16.504(a); *C.F.S. Air Cargo*, 91-2 BCA ¶ 23,985 at 120,040 (quoting *Crown Laundry & Dry Cleaners, Inc.*, 90-3 BCA ¶ 22,993 at 115,480-81). The government cannot be liable for breaching an indefinite quantity contract on the basis of making negligent estimates as long as the government orders the guaranteed minimum. *Travel Centre v. Barram*, 236 F.3d 1316 (Fed. Cir. 2001) (holding that the government's failure to disclose material information affecting its estimate for an indefinite-delivery, indefinite-quantity supply contract was not a breach as long as the government purchased the minimum quantity); *C.F.S. Air Cargo*, 91-2 BCA ¶ 23,985 at 120,040 (concluding, in contrast to requirements contracts, "whether the estimates [for an indefinite quantity contract] were negligently prepared or not is simply not material in light of the Government's legal obligation to order only the guaranteed minimum"). Consequently, the nature of any contract claimed to have been breached on the basis of negligent estimates is important.

In its 17 June 2009 motion to amend the complaint, AGT disclaimed any suggestion that the contract is a requirements contract, stating that it is a firm fixed-price contract. AGT has not explained how its negligent estimate claim applies to such a contract. In contrast, the government's motion for summary judgment describes the contract as a "firm-fixed price requirements contract," and does not dispute, in either its motion or its opposition to AGT's motion, the suggestion that the contract is one that could be subject to a claim for breach arising from negligent estimates. The government's motion simply asserts the sovereign acts doctrine as an affirmative defense that shields it from liability, while in opposition to AGT's motion the government merely contends that AGT has failed to provide sufficient evidence to support a claim based upon negligent estimates.

The contract fails to contain either the FAR 52.216-21, REQUIREMENTS (OCT 1995) clause, which would be present in the case of a requirements contract, or the FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995) clause, which would be present for an indefinite quantity contract. Further, the parties have failed to identify any other provision that either commits the government to purchase all of its laundry requirements for the five camps from AGT, as would be the case for a requirements contract, or that commits the government to purchase a guaranteed minimum, which would be consistent with an indefinite quantity contract. Without deciding upon the nature of the contract, for purposes of ruling upon the parties' cross-motions we give the benefit of the doubt to AGT that the contract is one that is subject to a breach claim based upon negligent estimates, which the government does not currently dispute.

A. The Government's Motion for Summary Judgment

In its motion for summary judgment upon the negligent estimate claim, the government contends that, because the invasion of Iraq caused the reduction in its laundry requirements in the five Kuwait camps, it is shielded from liability to AGT by the sovereign acts doctrine. For that reason, the government seeks summary judgment as a matter of law. (Gov't mot. at 8-11)

The sovereign acts doctrine provides that the government is not liable for obstructions to the performance of its contracts "resulting from its public and general acts as a sovereign." *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1574 (Fed. Cir. 1997) (quoting *Horowitz v. United States*, 267 U.S. 458, 461 (1925)); *see also Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 520 (Fed. Cir. 2011). The doctrine recognizes that when the government contracts, it is functioning in a different capacity than the sovereign. As a contractor, the government is usually subject to the same rules as any other party. As the sovereign, "it stands apart." *Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1366 (Fed. Cir. 2009). Accordingly, "if an act of the Government as sovereign would justify non-performance by any other defendant being sued for contract breach, then the Government as contractor is equally free from liability for non-performance." *Id.*

Essentially, the sovereign acts doctrine permits the government as a contractor to assert an impossibility defense to claims of non-performance, to the same extent as a private party could, when the government's sovereign acts obstruct performance. Put another way, it "relieves the Government as contractor from the traditional blanket rule that a contracting party may not obtain discharge if its own act rendered performance impossible." *Stockton East*, 583 F.3d at 1366 (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 904 (1996)). The defense does not shield the government from liability for an act "designed to relieve the Government of its contract duties," but does for "a genuinely public and general act that only incidentally" affects the contract. *Id.*; *see also Connor Bros. Constr. Co. v. Geren*, 550 F.3d 1368, 1374-75 (Fed. Cir. 2008) (explaining that the sovereign acts defense does not relieve the government from liability for acts intended to nullify contracts considered unwise).

The sovereign acts defense applies when a two-part test is met. The first question is whether the government's performance of the contract has been frustrated or obstructed by a public and general act that only incidentally falls upon the contract. If the answer to that question is yes, the second question is whether the act would otherwise qualify to release the government from liability for non-performance under ordinary impossibility or impracticability principles of contract law. *Stockton East*, 583 F.3d at 1366; *Connor Bros.*, 550 F.3d at 1379; *see also Klamath*, 635 F.3d at 521.

According to the government, because it is undisputed in this appeal that the government's laundry requirements decreased because of the deployment from the five camps in Kuwait to Iraq, AGT's claim is barred by the sovereign acts doctrine unless the contract provided a specific remedy for that act. The government relies upon *Robertson & Penn, Inc. d/b/a Cusseta Laundry, Inc.*, ASBCA No. 55625, 08-2 BCA ¶ 33,951, to support its contention. Far from providing such a remedy, says the government, the contract placed AGT on notice that the government's requirements could decrease to as low as 1000 soldiers per camp. Similarly, the government contends that because the invasion was a sovereign act, the government's estimate of its laundry requirements was not negligent. (Gov't mot. at 8-11)

The sovereign acts doctrine does not apply to AGT's negligent estimate claim. AGT does not contend that the deployment of soldiers from the camps in Kuwait, and resulting decrease in laundry requirements, constituted a failure by the government to perform its obligations under the contract, or itself demonstrates that the estimates were negligently prepared. Instead, AGT's negligent estimate claim is exactly what it purports to be, a challenge to the reasonableness of the estimated laundry requirements communicated by the government to AGT. According to AGT, because the Army allegedly knew that shortly after the award of the contract the invasion of Iraq would significantly reduce its laundry requirements in the five camps, it knew, or should have known, that its laundry estimate was inaccurate. (1st amended compl. ¶¶ 37-39, 42, 44, 66; app. opp'n at 5-6)

Here, the relevant question is not whether the government is shielded from liability for a failure to perform. It is whether the government exercised reasonable care in estimating its needs prior to performance. The fact those requirements might have been driven one way or another by potential sovereign acts did not eliminate the government's obligation to exercise reasonable care to estimate them. Indeed, often the government's contractual undertakings are for the purposes of supporting sovereign acts. Assuming this contract is one that is subject to a negligent estimates claim, then if AGT can show here that the government knew, or should have known, that the invasion of Iraq was imminent, and that as a result its laundry estimate for the five camps was wrong, the government would be no less liable for the breach resulting from that misrepresentation because the reason for the incorrect estimate was a failure to take into account a sovereign act. *See Fa. Kammerdiener GmbH & Co., KG*, ASBCA No. 45248, 94-3 BCA ¶ 27,197 at 135,555 (rejecting government contention that when its requirements vary from the estimate because of the conduct of military affairs it is not subject to liability).

Given the nature of this claim, the government's reliance upon *Robertson & Penn* is misplaced. Similar to this appeal, in *Robertson & Penn* the contractor provided the Army's laundry requirements for Fort Stewart and Hunter Army Airfield. Also like this case, after a deployment from those facilities decreased the Army's laundry requirements on the bases, the contractor claimed that the Army's estimates had been negligently

prepared. Unlike this case, *Robertson & Penn* also claimed that, even if the Army's estimate was not negligent, the troop deployment itself, causing the significant reduction in laundry requirements, entitled the contractor to relief. It was solely in response to this latter contention that the Board applied the sovereign acts doctrine, ruling that because the deployment constituted a sovereign act, the government had not engaged in any action in its contractual capacity for which compensation would be due. *Robertson & Penn*, 08-2 BCA ¶ 33,951 at 167,978-84. The Board did not apply the sovereign acts doctrine to resolve whether the government's estimate of its requirements was negligent, and it has no application to that issue. Accordingly, the government's motion for summary judgment upon the negligent estimate claim is denied.

B. AGT's Cross-Motion for Summary Judgment

In its cross-motion for summary judgment, AGT claims to have established with uncontroverted evidence that, during the January through February 2003 time period in which AGT was bidding upon the contract, the officials responsible for this solicitation knew that the March 2003 invasion of Iraq was going to occur, significantly reducing its laundry requirements for the five camps below the estimate provided. AGT alleges that these officials disregarded this knowledge and failed to correct the estimates. Having relied upon the government's allegedly negligent estimate, and suffered injury due to it, AGT seeks summary judgment upon its negligent estimate claim. (App. mot. at 6-18)

To prevail upon its negligent estimate claim, AGT must show "(a) misrepresentation in the Government proffered estimates, whether intentional or negligent, (b) reliance thereon, and (c) resulting injury." *J.A. Jones*, 99-1 BCA ¶ 30,303 at 149,833. AGT purports to support its motion with the declaration of its president, Sheila Gittens. Among the things Ms. Gittens declares is that between January and February 2003, she participated in meetings with the contracting officer, MAJ Lafonda Jernigan, and the commander of the contracting unit, LTC Marshall May, who confirmed for her the estimated average of 3,500 soldiers per camp per month. Ms. Gittens says they did not indicate a deployment to Iraq would occur in March 2003, or that they expected a substantial reduction in laundry requirements below the estimate. (Gittens decl. ¶¶ 5-8) Ms. Gittens then declares that she "believe[s]" that between January and February 2003, MAJ Jernigan, LTC May "and the Army were in fact planning a deployment," and that "starting on March 20, 2003...substantial numbers of soldiers would be deployed, and that the number of items to be laundered would be substantially lower than the estimated numbers referenced in the contract" (*id.* ¶¶ 9-12).

AGT also provided two news articles in support of its motion. The first, from September 2002, reported that classified military options had been presented to the president regarding a potential invasion of Iraq. The other, from February 2003, explained that military forces were ready to launch an attack on Iraq whenever ordered to do so. (Hersh decl., exs. C, D)

As previously described, determining whether the Army's estimate for the five camps was negligently prepared is dependent upon the information that was reasonably available. Here, AGT has failed to present any evidence about what information was reasonably available for the purpose of this laundry requirements estimate. Ms. Gittens' "belief" that MAJ Jernigan, LTC May, and the Army knew that the deployment would occur in March 2003, substantially reducing the camps' requirements below the estimate, is not evidence of that contention. Moreover, assuming MAJ Jernigan and LTC May did know when the invasion was to commence, that fact alone would not dictate that their laundry estimate for the five camps was unreasonable. Finally, news articles reporting that the president received a classified description of military options, and that subsequently military forces were prepared for an invasion of Iraq whenever it might be ordered, say very little about whether the Army's laundry estimate was negligently prepared. At bottom, AGT's motion fails to present adequate evidence of uncontroverted facts supporting its case. Therefore, it is denied.

II. The Second Claim For Additional Services At Camp Victory and 35th BDE

Apart from its negligent estimate claim arising from the express contract for the five camps, AGT also alleges that, in June 2003, a government contracting officer instructed AGT to construct two additional laundry facilities at Camp Victory and 35th BDE. AGT claims that the government told it that its additional costs for constructing these camps would be paid, and that it relied upon that representation in return for providing the additional services. AGT alleges that the government did not pay the full amount due to it, and initially relied upon FAR 50.103-2(c) as grounds for its entitlement to the remaining amounts allegedly due. (1st amended compl. ¶¶ 45-49, 69-71)

The parties cross-moved for summary judgment upon this second claim for costs associated with the two additional sites. In response to the Board's request for additional briefing, the government also moved to dismiss the claim on the ground that the Board lacks jurisdiction to grant relief under FAR Part 50. AGT responded by, among other things, explaining that it is also entitled to compensation for its second claim based upon the government's breach of an implied-in-fact contract. The government opposes that contention, arguing that AGT has failed to prove its allegations of an implied-in-fact contract adequately to permit us to exercise jurisdiction over the claim, and also stating that because the parties entered into an express contract for laundry services, the implied-in-fact contract alleged by AGT cannot exist as a matter of law.

A. The Government's Motion to Dismiss and AGT's Cross-Motion for Summary Judgment

The government's motion to dismiss correctly observes that we lack jurisdiction to grant relief under FAR 50.103-2(c) (gov't mot. dismiss at 1-2). FAR 50.103-2(c) is

contained in FAR Part 50, Extraordinary Contractual Actions. The part provides policies and procedures for entering, amending, or modifying contracts to facilitate national defense under the authority granted by Public Law No. 85-804. In particular, under certain circumstances, FAR 50.103-2(c) permits the government to formalize informal commitments for "payment to persons who have taken action without a formal contract." Importantly, FAR 50.103-2(c) does not entitle claimants to such relief. Most importantly, pursuant to FAR 33.205(a), a request for relief under Public Law No. 85-804 is not a claim under the Contract Disputes Act of 1978, and we do not possess jurisdiction to grant relief under that statute and regulatory scheme. *Paragon Energy Corp. v. United States*, 645 F.2d 966, 975 (Ct. Cl. 1981) ("[A] claim solely and directly based upon 85-804...is precluded from consideration under the Contract Disputes Act"); *East West Research, Inc.*, ASBCA Nos. 42166, 42231, 91-3 BCA ¶ 24,187 at 120,976; *see also* FAR 33.205(a). For this reason, we lack jurisdiction to entertain AGT's second claim insofar as it seeks relief under FAR 50.103-2(c). Given that AGT's cross-motion for summary judgment upon the second claim relied entirely upon FAR 50.103-2(c), this disposition renders that motion moot.

Nevertheless, AGT's most recent motion in support of our jurisdiction over the second claim states that, in addition to seeking relief under FAR Part 50, the allegations it has advanced in support of its claim for compensation for the two additional facilities also support a theory of breach of an implied-in-fact contract (app. mot. jur. at 2-9).

An implied-in-fact contract is "founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998) (quoting *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923)). The elements of an implied-in-fact contract are mutuality of intent, consideration, and lack of ambiguity in offer and acceptance. Also, the government representative that is purported to have bound it must have had actual authority to do so. *City of Cincinnati*, 153 F.3d at 1377. According to the complaint, the government's authorized contracting officer stated that the government would pay AGT's costs in return for AGT providing the additional laundry facilities. AGT relied upon that promise to construct the facilities and provide the services. The government accepted and benefitted from AGT's performance. AGT sought payment for its services, which was partially provided. (1st amended compl. ¶¶ 45-49, 69-71) These allegations describe the elements of an implied-in-fact contract. Although the complaint concedes that "a contract for the two facilities was not formally signed," (1st amended compl. ¶ 71), that statement does not preclude the possibility that an implied-in-fact contract was formed, given that such agreements are not express.

The mere fact that the complaint's allegations are consistent with a breach of contract legal theory does not determine our jurisdiction over that claim. Although the Board has been conferred with jurisdiction to entertain appeals premised upon the alleged

breach of an implied-in-fact contract, 41 U.S.C. § 7102(a), *ASFA Construction Industry and Trade, Inc.*, ASBCA No. 57269, 11-2 BCA ¶ 34,791, whether we may do so here is dependent upon the contents of the claim AGT submitted to the contracting officer. This is because, under the CDA, the Board's jurisdiction is dependent upon the contractor submitting a proper CDA claim, and then the contracting officer either issuing a decision, or failing to do so within the specified amount of time. *Environmental Safety Consultants, Inc.,* ASBCA No. 54615, 07-1 BCA ¶ 33,483 at 165,980. Thus, the claim, and not the complaint, determines the scope of our jurisdiction in this appeal. *Id.; see also Unconventional Concepts, Inc.*, ASBCA No. 56065 *et al.*, 10-1 BCA ¶ 34,340 at 169,591 ("[A] CDA claim cannot properly be raised for the first time in a party's pleadings before the Board."). We lack jurisdiction over a claim that was not presented to the contracting officer. *Dawkins Gen. Contractors & Supply, Inc.,* ASBCA No. 48535, 03-2 BCA ¶ 32,305 at 159,844.

An action constitutes the same claim as what was presented to the contracting officer so long as it arises from common or related facts. Thus, a claimant is free to change the legal theory that it is pursuing from what was described in the claim to the contracting officer if the action continues to arise from the same operative facts that were relied upon in the submittal to the contracting officer, and essentially seeks the same relief. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003) (finding that, though an action under the CDA must be based upon the claim presented to the contracting officer, there need not be "adherence to the exact language or structure of the original administrative CDA claim" and we have jurisdiction as long as the claim before us "arise[s] from the same operative facts, claim[s] essentially the same relief, and merely assert[s] differing legal theories for that recovery"); *Dawkins Gen. Contractors,* 03-2 BCA ¶ 32,305 at 159,844 ("The assertion of a new legal theory of recovery, when based upon the same operative facts as the original claim, does not constitute a new claim.").

AGT's breach theory is consistent with the alleged operative facts that it relied upon in its corrected claim.[3] Those allegations include the following:

> Here, the government asked AGT to set i[sic] two additional laundry facilities to meet its anticipated needs and promised to reimburse AGT for expenses incurred. AGT relied in good

[3] In its response to AGT's motion advancing its implied-in-fact contract theory, the government suggests that AGT's claim for the two additional facilities was for compensation under the existing, original contract. The government quotes from AGT's October 2003 claim, where AGT stated that it was "requesting reimbursement for losses related to the construction of two additional buildings *under the Contract*" (R4, tab 8 at 3; gov't resp. jur. at 2) (emphasis in orig.). According to the record, AGT replaced its October 2003 claim with a corrected claim submitted in August 2004 (R4, tab 15).

> faith on the government's promise and set up the buildings at a cost of KD 39,397. To date, the government has paid AGT KD 23,357 for laundry services at these two facilities which has resulted in a partial reimbursement of AGT's costs, but has nevertheless left AGT with a net loss of **KD 16,040**. Per the agreement with the government, AGT submitted a bill for reimbursement of the uncompensated costs. This bill has not yet been paid while the government has benefitted from the provision of AGT's laundry services.

(R4, tab 15 at 8) Thus, AGT's corrected claim alleged that the government promised to pay its expenses in return for AGT providing laundry services from the two additional facilities. In reliance upon that "agreement," AGT provided the services and billed the government for its costs, which the government partially paid. These are the precise allegations in the complaint upon which AGT now premises its breach theory.

The government challenges AGT's implied-in-fact contract allegation on the ground that AGT has failed to present any evidence to support the claim (gov't resp. jur.). Citing *Cedars-Sinai Medical Center,* 11 F.3d at 1583, and *RGW Communications, Inc. d/b/a Watson Cable Co.,* ASBCA Nos. 54495, 54557, 05-2 BCA ¶ 32,972 at 163,337, the government contends that AGT must prove the existence of an implied-in-fact contract for the Board to exercise jurisdiction over AGT's claim of breach (gov't resp. jur. at 4).[4] Indeed, when in dispute, a claimant must prove the facts necessary to establish a forum's jurisdiction. *Cedars-Sinai Medical Center,* 11 F.3d at 1583. However, the law is also clear that a claimant "need only allege the existence of a contract to establish the Board's jurisdiction under the CDA 'relative to' an express or implied contract with an executive agency." *Engage Learning, Inc. v. Salazar*, No. 2011-1007, slip op. at 11 (Fed. Cir. Oct. 5, 2011). A claimant need not "prove that it had either an express or an implied-in-fact contract with the [government] to establish the Board's jurisdiction." *Id.* at 10. Whether AGT can ultimately prove such a contract was formed and breached goes to the merits of its claim, not our jurisdiction to entertain it. Given that AGT has satisfied both the jurisdictional claim requirements of the CDA, and the minimum pleading requirements for pursuit of a claim before this Board, we possess jurisdiction over its claim of breach of an implied-in-fact contract respecting the two additional sites.

Finally, the government also cites to *Todd Pacific Shipyards Corp.,* ASBCA No. 55126, 08-2 BCA ¶ 33,891 at 167,755, to support a contention that an implied-in-fact contract for laundry services could not have been formed between the parties because

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[4] AGT has presented evidence to support the claim, including emails between AGT and the contracting officer indicating the government's desire for services at the two additional facilities, the contracting officer's subsequent authorization to proceed, and AGT's provision of those services (SOF ¶¶ 12-20).

they had already executed an express contract for laundry services (gov't resp. jur. at 2-3). Given that this argument relates to whether an implied-in-fact contract was actually formed, it is upon the merits of AGT's claim and does not implicate our jurisdiction over it. Accordingly, we deem it a request to dismiss for failure to state a claim upon which relief can be granted.

To survive a motion to dismiss for failure to state a claim, the complaint must allege facts "'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 557 (2007)). The allegation "must be enough to raise a right to relief above the speculative level." *Id.* Here, the government correctly observes that an express contract precludes the existence of an implied-in-fact contract upon the same subject matter. But, AGT does not allege that the implied-in-fact contract is upon the same subject matter as its express contract. The express contract involved the provision of laundry services at five bases in Kuwait. AGT's claim of an implied-in-fact contract flows from its allegations of subsequent conduct by the parties having to do with additional laundry services for Camp Victory and 35th BDE. (1st amended compl. ¶¶ 8-10, 12-13, 16, 18, 45-46, 63-71) AGT's allegations that an authorized contracting officer represented that the government would pay AGT's costs in return for it providing these additional laundry services, that AGT relied upon that promise to construct the facilities and provide the services, and that the government accepted and benefitted from AGT's performance, plausibly suggest the formation of an implied-in-fact contract upon a separate subject matter from the earlier, express contract (1st amended compl. ¶¶ 45-49, 69-71). Accordingly, we conclude AGT has stated a claim upon which relief may be granted.

B. The Government's Motion for Summary Judgment

Prior to seeking dismissal of AGT's claim respecting the two additional sites, the government sought summary judgment upon it. As previously noted, to the extent the claim is based upon FAR Part 50, we agree with the government that we lack jurisdiction to entertain a claim premised upon that theory, rendering the government's motion for summary judgment moot. Understandably, the government's motion was not directed toward AGT's assertion that the claim is also based upon the government's breach of a separate, implied-in-fact contract, given that AGT had not clarified that theory.

CONCLUSION

The cross-motions for summary judgment upon the first claim for negligent estimates are denied. The government's motion to dismiss the second claim is also denied. Though we agree we lack jurisdiction over the claim to the extent it seeks relief under FAR Part 50, we possess jurisdiction over the claim based upon AGT's alternative theory that the government breached an implied-in-fact contract, and the complaint adequately states a claim to that effect. The cross-motions for summary judgment upon the second claim are moot.

Dated: 13 December 2011

MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
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. 56758, Appeal of American General Trading & Contracting, WLL, rendered in conformance with the Board's Charter.

Dated:

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