

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
Bahadir Construction Engineering	)	ASBCA Nos. 64038, 64336, 64428
Contracting & Trading Inc. Co. and	)	
Impreza Costruzioni Giuseppe Maltauro	)	
S.p.A Joint Venture	)	
	)	
Under Contract No. W912ER-20-C-0010	)	

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OPINION BY ADMINISTRATIVE JUDGE D’ALESSANDRIS
ON THE GOVERNMENT’S MOTION TO DISMISS

The Army Corps of Engineers (government or USACE) awarded a contract to appellant, Bahadir Construction Engineering Contracting & Trading Inc. Co. and Impreza Costruzioni Giuseppe Maltauro S.p.A. Joint Venture (BMJV), to perform construction work at the Al Udeid Air Base in Qatar. BMJV alleges that its performance was delayed by the government. At issue in this motion are two delay claims¹ that were submitted by BMJV and denied, or deemed denied, by the contracting officer (CO). The claims use a “windows analysis” to quantify the alleged delay. The claims are far from a model of clarity, but undisputedly state a sum certain for the entire claim. The supporting documentation provided with the claims provides the information necessary to calculate the delay claims for each window, and by event alleged to be the controlling delay. The government moves to dismiss BMJV’s

¹ A third claim that is the subject of ASBCA No. 64428 is not subject to this motion.

appeals for failure to state a claim, asserting that BMJV is actually asserting 38 distinct claims and has not separately stated a sum certain for each distinct claim. The government additionally seeks dismissal for lack of jurisdiction for what it contends to be four of BMJV's claims because they were not first submitted to the CO for a decision. We deny the government's motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

I. The Contract

BMJV and the government entered into Contract No. W912ER-20-C-0010, a firm-fixed price contract, on May 22, 2020, for construction at the Al Udeid Air Base for a price of \$524,416,900 (R4, tab 1). The contract incorporated Federal Acquisition Regulation (FAR) 52.243-4, CHANGES (JUN 2007) (*id.* at 36). The contract was for a "design-bid-build" project and contained specifications located in the Conformance Award Set (CAS) (R4, tabs 2-5). Generally, construction was to comply with the specifications contained in the contract and the CAS (R4, tab 2 at 23). The contract contemplates that in the event of a delay, BMJV would "[p]rovide a time impact analysis that demonstrates the effects of the delay or impact on the project completion date" (R4, tab 2 at 1153). When submitting a Time Impact Analysis (TIA), the contract required that BMJV submit the analysis "with each cost and time proposal for a proposed change based on industry standard AACE 52R-06" (*id.*). The TIA "must illustrate the influence of each change or delay on the Contract Completion Date or milestones" (*id.*).

II. BMJV's Certified Claims

BMJV asserts that, shortly after the contract's award in 2020, it began noticing that the government-provided designs were incomplete, contained discrepancies, and contradicted other specifications within the contract and CAS (compl. ASBCA No. 64038 (compl. 1) ¶¶ 20-98; compl. ASBCA No. 64336 (compl. 2) ¶¶ 19-219). BMJV alleges that, as a result of the government's inadequate designs, it experienced an extensive and continuous delay to the project (R4, tab 50 at 6, tab 58 at 5). BMJV submitted two certified claims (R4, tab 50 at 1, tab 58 at 1).

A. BMJV's First Claim

On October 10, 2024, BMJV filed a certified claim seeking \$66,871,576 for increased costs, both incurred and forecast, for what BMJV contends was government-caused delay (R4, tab 50 at 6). BMJV's First Prolongation Claim (first claim) included an executive summary of BMJV's claim; a description of the delay events; a description of BMJV's delay analysis methodology; an illustration of BMJV's window analysis; and a report detailing the various categories of costs BMJV incurred (*id.* at 6,

13-44). Within the first claim, BMJV described three delay events that it contends contributed to the delay of the project: the DC-2 changes to door hardware; the addition of the MX04 Hush House;² and changes to the testing and commissioning (T&C) requirements (*id.* at 13, 17, 19). BMJV used a window analysis to assess the government's purported delay in five specific intervals or "windows" (*id.* at 30-37; *see also* app. supp. R4, tabs 276-94).

BMJV asserts that it conducted its window analysis in accordance with AACE 29R-03 and followed the AACE guideline CDR.2849, TIA in Windows – Concurrency Analysis (R4, tab 50 at 25). The five window periods are: Window 1 – September 1, 2023, through November 30, 2023; Window 2 – December 1, 2023, through February 29, 2024; Window 3 – March 1, 2024, through May 31, 2024; Window 4 – June 1, 2024, through August 31, 2024; and Window 5 – September 1, 2024, through December 23, 2025 (the forecasted completion date) (R4, tab 50 at 32-34). BMJV conducted a prospective analysis and a retrospective analysis for windows 1 through 4, but only conducted a prospective analysis for window 5 (*id.* at 25-27). BMJV contends that each analysis identifies a different event that drove the project's delay (*id.* at 31-35). BMJV characterizes its prospective analyses as a TIA used to identify the effect of each delay event (*id.* at 26). BMJV asserts that it would begin the analysis by inserting a fragnet³ representing the delay event at the beginning of each of the five windows. The analyses were compared with the project's estimated completion date to determine the expected impact of the delay. (*Id.* at 28, 30) The fragnets were submitted to the government within the claim's Appendix B (*id.* at 28; app. supp. R4, tab 276).

BMJV characterizes its prospective window analysis as showing how each of the three events delayed the project within each window (R4, tab 50 at 30). As a result, according to BMJV, the delays attributed to each event can be extracted from the claim's window analysis (*id.*). BMJV points to Section 6.1.1 of the first claim, which summarizes the delay analysis as follows:

² A "Hush House" is a facility designed to limit noise transmission while testing aircraft engines.

³ A fragmentary network, or "fragnet," is "a sequence of new activities and/or activity revisions, logical relationships, and resource changes added to an existing schedule to demonstrate the influence of a new activity on the schedule." *Nassar Grp. Int'l N.G.I. S.A.L. (Offshore) R.C., Doing Bus. As NGI Afghanistan for Contracting*, ASBCA No. 58451 et al., 22-1 BCA ¶ 38,206 at 185,549 n.15.

Delay Event	Window 1 Delay Days	Window 2 Delay Days	Window 3 Delay Days	Window 4 Delay Days
RFP-021 Hush House	66	156	241	338
RFP-032 DC-2 Changes	243	309	490	562
Testing and Commissioning		171		

(*Id.*)

BMJV also conducted a retrospective analysis for each window (*id.* at 31-35). BMJV asserts that its retrospective analyses identified the “longest path” by working backward from the completion date to the data date of each window (*id.*). BMJV used the longest path to determine which event caused the most delay days within each window (*id.*). BMJV asserts that it relied on its retrospective analyses when determining the days in which it is entitled to prolongation costs (*id.*). BMJV submitted to the government, in Appendix B, Window Analysis, the results of its retrospective analyses (app. supp. R4, tabs 280-94). BMJV summarized the results of its retrospective analyses as follows:

Window	Total Delay	Driving Delay Events
Window 1	87	RFP-021 Hush House
Window 2	96	RFP-032 DC-2 Changes; Testing and Commissioning
Window 3	88	RFP-032 DC-2 Changes; Testing and Commissioning
Window 4	66	RFP-032 DC-2 Changes; Testing and Commissioning
Window 5	247	RFP-032 DC-2 Changes; Testing and Commissioning

(R4, tab 50 at 31-35)

BMJV asserts that its window analyses also show that it did not cause any concurrent critical-path delays, and explains that compensable delays are those in which only the government is culpable for the delay (*id.* at 35-37). Finally, in Section 7 of its first claim, BMJV described what it contends to be the costs to which it is entitled as a result of the government-caused delay (*id.* at 38-43). BMJV asserts that it split the costs by window and calculated them based on each window’s share of the delay caused by the government (*id.* at 38). BMJV supplied the government with a

methodology and calculation for these costs in the claim's Appendix C, Prolongation Costs (R4, tabs 70-74; app. supp. R4, tabs 295-330). With respect to Window 2, BMJV stated in its first claim that of the 96 days of compensable delays, "about 57 days to the delay in the window can be attributed to the T&C changes" (R4, tab 50 at 34). In Section 6.2.2 of the first claim, BMJV asserted that it is entitled to 96 compensable delay days during the 91-day window from December 1, 2023, to February 29, 2024, as a result of the T&C sequence changes imposed by the government (R4, tab 50 at 33-34). For Window 4, BMJV explained in its narrative that even though it listed two driving events in a summary chart, RFP-0032, DC-2 Changes, was the driving delay (R4, tab 50 at 34 ("Retrospectively, the late administration of RFP-032 is . . . driving the completion as it continues to delay the procurement of critical door hardware and ACS.")).

BMJV contends that it is possible to determine the dollar amount for each asserted delay event. Within Appendix C, BMJV separated its costs into four annexures: BMJV indirect costs (Annexure A); subcontractor indirect costs (Annexure B); head office overhead costs (HOOH) (Annexure C); and warranty extension costs (Annexure D) (*id.* at 38-39). BMJV also submitted an Annexure 0 to the government, which provided an overview of its damage calculation (R4, tab 70). This chart was also included in Section 7.6 of BMJV's first claim (R4, tab 50 at 44). BMJV also included a table in Annexure A that attributed the delay costs to each window, based on the number of compensable delays calculated during BMJV's window analysis (R4, tab 71 at 1).

In Annexure A, BMJV further separated the costs into subcategories, including: staff salaries (Annexure A(1)); labor costs (Annexure A(2)); establishment costs (Annexure A(3)); project running costs (Annexure A(4)); plant and equipment costs (Annexure A(5)); labor camp and food costs (Annexure A(6)); insurance and bond fees (Annexure A(9)); and ICM Qatar Branch office costs (Annexure 10) (R4, tab 71; *see also* app. supp. R4, tabs 295-330). Annexure B contained a similar table, attributing BMJV's incurred subcontractor costs to each window (R4, tab 72 at 3); Annexure D provided the amount of costs associated with BMJV's HOOH (R4, tab 73) and Annexure E explained BMJV's warranty extension costs (R4, tab 74 at 1).

B. BMJV's Second Claim

On June 10, 2025, BMJV filed a claim seeking \$5,182,306 in additional indirect prolongation costs allegedly incurred due to government-caused delay (R4, tab 58 at 1, 50). BMJV's Second Prolongation Claim (second claim), similar to its first claim, included: an executive summary of BMJV's claim; a description of the delay events; a description of BMJV's delay analysis methodology; an illustration of BMJV's window analyses; and a report detailing the various categories of costs BMJV incurred (*id.* at 5, 11-26). BMJV provided the government with appendices containing supporting

documentation for its claimed costs as attachments to the second claim, including Appendix B, Windows, and Appendix C, Prolongation Costs. BMJV categorized the delay events under this claim with respect to the Request for Proposal (RFP) to which the changes fell under. Specifically, BMJV used the following headings in organizing its second claim:

- RFP-0032 – DC2 changes in Door Hardware and Access Control System (RFP-0032);
- RFP-0027 – Modification No. P00020 – QA026, Site Changes RFIs;
- RFP-0028 – SQ01 Auditorium Changes;
- RFP-0036 – Relocation of Valve in Chilled Water Network;
- RFP-0037 – SQ01 Auditorium Projector Related Changes; and
- RFP-0043 – Amalgamated Changes due to RFIs Responses

(*Id.* at 11-19) BMJV also described one delay event in which an RFP had not yet been issued, and its corresponding heading was “RFI-0783 – SQ-01 – Changes in Chilled Water Pipe Sizes” (*id.* at 25).

For RFP-0027, BMJV issued several Requests for Information (RFIs) to the government highlighting what it contends were various design discrepancies and inconsistencies. The RFP included the following RFIs: RFI-0400, “Generator Fuel System”; RFI-0539, “MX08 Concrete walkways Clarification”; RFI-0542, “Site lighting located within walkways areas”; RFI-0547, “UTB10-Letter C-1094 revised RFI-0275 response discrepancy clarification”; and RFI-0585, “MM02 Trench drainpipe termination & detail clarification” (app. supp. R4, tab 199 at 2-3). BMJV’s second claim also listed RFI-0128, RFI-0584, and RFI-0630 as relating to the changes under RFP-0027 (R4, tab 58 at 12). RFI-0128 referenced RFI-0094 (app. supp. R4, tab 69 at 79). BMJV’s second claim referenced the “several RFI-related changes” included in RFP-0027 (R4, tab 58 at 12).

BMJV continued its window analysis for the second claim, focusing on the retrospective analysis of Window 5, which originally included the period spanning from September 1, 2024, to December 23, 2025 (R4, tab 50 at 34-35). In this claim, BMJV modified Window 5 to include the period spanning from September 1, 2024, through November 30, 2024 (R4, tab 58 at 26). BMJV also conducted an analysis of Window 6, which it characterizes as primarily comprising mitigation and acceleration efforts by both parties to reduce the contract’s completion time (*id.* at 38–39). A majority of the mitigation measures relate to the parties’ completion of the T&C requirements (*id.* at 5, 38-39). Window 6 covers December 1, 2024, through

February 28, 2025 (*id.* at 26). BMJV's retrospective window analysis in its second claim reduced the number of compensable delay days for Window 5, from 247 days to 41 days (*id.* at 39). BMJV's window analysis concludes that the RFP-0032, DC-2 Hardware, was the driving delay of Window 5, and RFI-0783 was driving the longest path in Window 6 (*id.* at 40, 42).

BMJV submitted supporting documentation in its Appendix B, Window Analysis (app. supp. R4, tabs 331-46). BMJV additionally provided support for the costs it claims to be entitled as a result of the government-caused delay (R4, tab 58 at 43-49). Similar to the first claim, BMJV split the costs by window and calculated them based on each window's share of BMJV's government-caused delays (*id.* at 43-44). Similar to its first claim, BMJV supplied the government with a methodology containing figures detailing the amount to be attributed to each window and delay event for these costs in the claim's Appendix C (R4, tabs 75-80; *see also* app. supp. R4, tabs 347-74).

BMJV separated its costs within Appendix C of its second claim into five annexures: BMJV indirect costs (Annexure A); subcontractor indirect costs (Annexure B); HOOH costs (Annexure C); warranty extension costs (Annexure D); and duplicative costs associated with RFP-0038 (that were subtracted from the claim's total) (Annexure E) (R4, tabs 76-80; app. supp. R4, tabs 347-74). Additionally, BMJV submitted an Annexure 0 with its claim, providing a summary of its damage calculation (R4, tab 75). This chart was also included in Section 5.8 of BMJV's second claim (R4, tab 58 at 50). Within Annexure A, BMJV separated the costs into subcategories, including staff salaries (Annexure A(1)); labor costs (Annexure A(2)); establishment costs (Annexure A(3)); project running costs (Annexure A(4)); plant and equipment costs (Annexure A(5)); labor camp and food costs (Annexure A(6)); insurance and bond fees (Annexure A(9)); and ICM Qatar Branch office costs (Annexure 10) (R4, tab 76; app. supp. R4, tabs 347-74). Using its window analysis and the number of compensable delays for each window, BMJV attributed delay costs to each window. BMJV submitted a chart summarizing this information in Annexure A (R4, tab 76).

Annexure B contained a table allocating BMJV's incurred subcontractor costs to each window (R4, tab 77 at 3). Annexure C provided the amount of costs associated with BMJV's HOOH. HOOH was applied at a daily rate for the 41 days of compensable delay (R4, tab 78 at 1). Annexure D explained the warranty extension costs for BMJV and its subcontractors. The warranty extension costs were also applied at a daily rate for the 41 days of compensable delay (R4, tab 80 at 1). Annexure B, Annexure C, and Annexure D included detailed spreadsheets supporting BMJV's claimed costs (*id.* at 2-3; R4, tab 77 at 4-2133, tab 78 at 2-3). Annexure E, attached a spreadsheet accounting for costs that overlapped with RFP-0038 (R4,

tab 79, tab 58 at 48). These costs were subtracted from BMJV's claim (R4, tab 58 at 48, 50; *see also* R4, tab 75).

III. BMJV's ASBCA Appeals and Corresponding Complaints

A. Appeal of First Prolongation Claim

On December 16, 2024, BMJV appealed the government's deemed denial of its first claim to the Board (R4, tab 53). In its complaint, BMJV asserted four counts of entitlement (compl. 1 ¶¶ 106-45). In addition, the complaint notified the government that BMJV was updating the quantum in its certified claim (compl. 1 ¶ 103). BMJV stated in its complaint, as it did in its claim, that "[t]he fifth window, spanning [from] September 1, 2024, to December 23, 2025, was assessed prospectively to evaluate ongoing delays and forecast their impact on project completion" (*id.*; R4, tab 50 at 25-27). BMJV further stated that "[g]iven that events in this prospective window have continued to evolve and new delays have emerged post-submission of the certified claim, BMJV has limited this Complaint to Windows 1 through 4 for the period September 1, 2023, to August 31, 2024," and updated the sum certain to \$44,357,778 (compl. 1 ¶ 103).

B. Appeal of Second Prolongation Claim

On August 20, 2025, BMJV appealed its second claim to the Board after receiving a CO's final decision denying its claim in full (R4, tab 54). BMJV submitted its corresponding complaint on September 22, 2025, and asserted one count of entitlement (compl. 2). In its complaint, BMJV organized the delay events by RFP, or if an RFP had not yet been issued, by RFI (compl. 2 ¶¶ 16-219). BMJV's complaint included the following headings for the delay events: RFP-0032 & Modification No. P00019, DC-2 Changes in Door Hardware and Access Control Systems; RFP-0027 & Modification No. P00020 – Site Change RFIs; RFP-0028 & Modification No. A00016 – Auditorium Changes; RFP-0036 & Modification No. A00014 – Relocation of Valve in Chilled Water Network; RFP-0037 & Modification No. A00015 – SQ01 Auditorium Changes; RFP-0043 & Modification No. P00024 – Amalgamated Changes; and RFI-0783 – Changes in Chilled Water Pipe Sizes (*id.*).

C. BMJV's Updates To Its Claim Amounts

In its opposition to the government's motion to dismiss, BMJV revises its claim amounts. BMJV asserts that the revised amounts are updated numbers based on more accurate and updated figures for its delay analysis, including adjustments for delays claimed to have been caused by the T&C changes and RFI-0783. Using the figures from its certified claims and window analyses, replicated below, BMJV presents a table with an updated delay damages calculation:

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Window	Driving Event	Delay Days	Daily Rate (USD)	Claim Amount (USD)	Claim Amount Including Profit (USD)
Window 1(B)	RFP-0021	87	\$131,752	\$11,462,511	\$12,400,144
Window 2(B)	RFP-0032	96	\$123,573	\$11,863,008	\$12,833,402
Window 3(B)	RFP-0032	88	\$116,223	\$10,227,624	\$11,064,244
Window 4(B)	RFP-0032	66	\$120,662	\$7,963,692	\$8,615,122
Window 4(B)	RFP-0038 (Duplicate)			(\$513,146)	(\$555,121)
Window 5(B)	RFP-0032	41	\$129,688	\$5,317,208	\$5,752,156
Window 5(B)	RFP-0038 (Duplicate)			(\$526,837)	(\$569,932)
Total					\$49,540,015

(App. resp. at 23)

DECISION

I. Standard of Review

Although the Board’s rules do not include an equivalent to FED. R. CIV. P. 12(B)(6), “we permit motions to dismiss for failure to state a claim upon which relief may be granted.” *Fluor Intercontinental, Inc.*, ASBCA Nos. 62550, 62672, 22-1 BCA ¶ 38,105 at 185,095. “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1365 (Fed. Cir. 2013) (noting that a tribunal “must accept well-pleaded factual allegations as true and must draw all reasonable inferences in favor of the claimant”). “We are not limited to the four-corners of the complaint,” and may review “‘matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned[.]’”

Fluor, 22-1 BCA ¶ 38,105 at 185,096 (quoting 5B CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 1357 (3d ed.)).

The government's motion also seeks, in the alternative, to dismiss portions of BMJV's complaint for lack of jurisdiction. BMJV bears the burden of proving the Board's subject matter jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *see also United Healthcare Partners, Inc.*, ASBCA No. 58123, 13-1 BCA ¶ 35,277 at 173,156. "The facts supporting jurisdiction are subject to our fact-finding upon a review of the record." *CCIE & Co.*, ASBCA Nos. 58355, 59008, 14-1 BCA ¶ 35,700 at 174,816.

In addition, to establish Board jurisdiction, a contractor must show that it submitted a valid claim to the relevant CO and that it received either a final decision on, or deemed denial of, that claim. *M. Maropakakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

II. BMJV's Complaints State A Sum Certain

A. The FAR's Sum Certain Requirement

The Contract Disputes Act (CDA) does not define the term "claim," instead, we look to the definition in the FAR, which requires, in relevant part, "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain." *See* FAR 52.233-1(c), DISPUTES (MAY 2014). Moreover, a CDA claim does not need to be submitted in a specific format or use any particular wording, but it must contain "a clear and unequivocal statement that gives the CO adequate notice of the basis and amount of the claim." *Cont. Cleaning Maint., Inc., v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987).

Notably, the legal authority above refers to a "claim" (singular). However, a contract can give rise to multiple claims (plural). *See, e.g., Placeway Constr. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990). An appeal presents "separate claims if they *either* request different remedies (whether monetary or non-monetary) *or* assert grounds that are materially different from each other factually or legally." *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1005 (Fed. Cir. 2015). Thus, when a claim submitted to a CO contains more than one legally distinct claim, each legally distinct claim must state a sum certain. *Id.*, *citing Joseph Morton Co. v. United States*, 757 F.2d 1273, 1281 (Fed. Cir. 1985) ("Congress did not intend the word 'claim' to mean the whole case between the contractor and the Government; but, rather, that 'claim' mean each claim under the CDA for money that is one part of a divisible case."); *see also A4 Constr. Co.*, ASBCA No. 63252 *et al.*, 24-1 BCA ¶ 38,578 at 187,504.

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B. BMJV Has Stated A Claim Upon Which Relief Can Be Granted

The government moves to dismiss BMJV's appeals for failure to state a sum certain for each of what the government contends to be 38 distinct claims asserted in BMJV's complaints (gov't mot. at 33-36). BMJV opposes the government's motion, asserting that it stated a sum certain for each delay window, and that the other separate and independent delays are not on the longest path (aka the critical path), and thus, do not contribute to the delay calculation (app. resp. at 26).

BMJV's claim documents are far from a model of clarity; however, after a detailed review of BMJV's claims and the supporting schedules, including a verification of BMJV's claim calculations, we hold that the claims present sufficient information to determine a sum certain amount for each legally distinct claim. We deny the government's motion.

In its first complaint, BMJV asserts four counts: delays due to defective door hardware specifications (compl. 1 ¶¶ 106-15); delays due to changes to the hush house facility (*id.* ¶¶ 116-25); delays due to T&C schedule and process (*id.* ¶¶ 126-34); and breach of the duty of good faith and fair dealing (*id.* ¶¶ 135-45). BMJV's second complaint asserts a single count for delays due to the myriad delays enumerated in the preceding 200-plus paragraphs of the complaint (compl. 2 ¶¶ 226-32).

"The sufficiency of a sum certain in a given case is a matter for the Board to explore on the merits." *ECC Int'l Constructors v. Sec'y of the Army*, 79 F.4th 1364, 1377 (Fed. Cir. 2023). As the Federal Circuit explained:

When a claimant presents a statutorily valid CDA claim subject to disagreement on the merits whether the claim comprises one or multiple claims each requiring a sum certain, the fact that the party "got it wrong" by organizing its subclaims in a manner different from how the Board would sub-divide the claims does not mean that the Board lacks authority to hear the case; it speaks instead to a factual dispute on the merits.

Id. at 1377-78. "A disagreement over whether a claim comprises one or multiple claims, each requiring a sum certain, is a factual dispute for the Board to resolve on the merits." *McCarthy HITT – Next NGA W. JV*, ASBCA No. 63571 *et al.*, 24-1 BCA ¶ 38,483 at 187,043, citing *ECC Int'l Constructors v. Sec'y of the Army*, 79 F.4th 1364, 1377-78 (Fed. Cir. 2023).

The government is not moving to dismiss BMJV's claims for a lack of subject matter jurisdiction – a 12(b)(1) claim under the Federal Rules of Civil Procedure

(FRCP). Instead, the government, correctly, is seeking to dismiss BMJV's claims for failure to state a claim upon which relief may be granted – a FRCP 12(b)(6) motion. The distinction between a 12(b)(1) and 12(b)(6) motion determines the facts that the Board is permitted to consider in deciding the motion. *L-3 Commc 'ns. Integrated Sys., L.P.*, ASBCA Nos. 60713, 60716, 17-1 BCA ¶ 36,865 at 179,625. Although the sum certain requirement is not jurisdictional, BMJV must still allege the elements of a claim for which relief may be granted, including a sum certain. Because the government's motion is for failure to state a claim upon which relief may be granted, BMJV's allegations regarding the elements of its claim are not subject to fact-finding by the Board. *Id.*

Here, BMJV alleges that a sum certain is reasonably calculable for each window and each alleged delay. A review of the claims, based upon BMJV's briefing, demonstrates that a sum certain can be determined. The government essentially concurs in its opposition brief:

The periods of delay, daily rates, and putatively calculable sums certain presented by BMJV for the first time in its Response are not expressly stated in its claims. Rather, they are possible interpretations of numerous equivocal statements in BMJV's claims.

(Gov't reply at 17) A motion to dismiss is only to be granted when appellant can allege no set of facts entitling it to relief. *Ashcroft*, 556 U.S. at 678. With this statement, the government essentially concedes that BMJV has alleged facts sufficient to entitle it to relief. Ultimately, we may agree with the government that BMJV is actually asserting distinct and separate claims for relief.⁴ However, under the motion to dismiss standard, we must deny the government's motion.

The government contends that we are bound by our decision in *A4 Constr. Co.*, 24-1 BCA ¶ 38,578. In *A4 Constr.*, we denied a government motion to dismiss for failure to state a sum certain, but granted the government's motion in the alternative to strike three paragraphs of the complaint for failure to state a sum certain. *A4 Constr.*, 24-1 BCA ¶ 38,578 at 187,503-05. In *A4 Constr.* the Board dismissed the paragraphs of the complaint for failure to allege a set of facts that would entitle the appellant to

⁴ The Federal Circuit's guidance that the determination of whether there are separate and distinct legal claims is a factual dispute on the merits potentially pushes resolution of the issue to a later stage of litigation. Thus, a contractor that prevails on a jurisdictional question at the motion to dismiss stage risks a factual determination on the merits at a point when the statute of limitations prevents the contractor from submitting a revised claim correcting potential jurisdictional deficiencies.

relief. Unlike in this appeal, the appellant in *A4 Constr.* organized its claim and complaint such that it asserted distinct claims for different purported government changes. *A4 Constr.* included individual sums certain for many, but not all, of its distinct claims. For example, *A4 Constr.* asserted various COVID-related price increases and material delays. The contractor included in its complaint claims for price increases to its subcontractors due to COVID, including: paragraph 8(C), \$39,820 for subcontractor Arapahoe Fire Protection; paragraph 8(D), \$67,796.88 for subcontractor Foster Electronic Corporation's security system; paragraph 8(E), \$504,771 for the same contractor for installation of audio-visual equipment. *Id.* at 187,499. In paragraph 8(F), the contractor sought the same cost increases for Foster Electronics as claimed in paragraphs 8(D) and 8(E). In paragraph 8(J), the contractor sought 14 days of COVID-caused delay in the delivery of roofing material. *Id.* None of these claims were struck. What the Board struck was paragraph 8(A) of *A4 Constr.*'s complaint asserting "among other things, the project was delayed and impacted by: COVID-19-related impacts for which insufficient time was permitted, in violation of the OMB instructions." *Id.* at 505.

The Board additionally struck paragraph 8(H) of *A4 Constr.*'s complaint alleging delay due to an earthquake. *A4* alleged a two-day delay due to the earthquake, and the CO extended the contract by two calendar days in the final decision. *A4* did not allege or identify any costs or damages that it incurred due to the earthquake. *Id.* at 187,500. Finally, the Board struck paragraph 8(M) of *A4*'s complaint seeking compensation for "impacts to the work performed by the subcontractor BZ Phase, for which an equitable adjustment in time and money was refused." *Id.* at 187,501. *A4*'s claim asserts that the government's allowance of 64 days for the delay was unacceptable, but did not quantify the amount to which it contends to be entitled. *Id.*

Here, BMJV organized its claim by delay windows, and a claim amount can be calculated for each window, satisfying the sum certain requirement. In *A4*, it appears that the contractor organized its claim by event and provided sums certain for most, but not all, of the identified events. Where *A4* failed to specify a sum certain, it failed to allege the elements necessary to support a claim to relief. To the extent *A4* alleged that "all its purported 'sub-claims' arise from the same material facts, present the same legal theories and seek the same remedies" (*id.* at 187,504), legal argument cannot supply missing elements that were not asserted in the claim document. *A4* organized its claim by what it characterized as distinct claims and provided sums certain for parts of its COVID claim, its RME subcontract and differing site conditions, its jobsite flooding, gas piping change, and delay claims, but failed to allege sums certain for the distinct COVID, earthquake, and BZ subcontract claims. *A4* chose the organization of its claim and failed to satisfy the pleading requirements. In this appeal, BMJV organized its claim by delay window and met the pleading requirements for the delay windows.

The government additionally contends that BMJV's use of the word "about" in its discussion of window 2 makes the claim amount equivocal and not a sum certain (gov't mot. at 34-35). In decisions predating *ECC*, the Board held that a claim seeking an approximate amount did not state a sum certain. *See, e.g., J.P. Donovan Constr., Inc.*, ASBCA No. 55335, 10-2 BCA ¶ 34,509 at 170,171, *aff'd*, 469 Fed. Appx.903 (Fed. Cir. 2012) (finding that a claim seeking "approximately \$65,000" did not state a sum certain); *Northrop Grumman Sys. Corp. Space Sys. Div.*, ASBCA No. 54774, 10-2 BCA ¶ 34,517 at 170,228, 170,233 at (claim seeking "approximately \$5.5 million" did not state a sum certain). However, our precedent also holds that contractors may use estimated or approximate costs to determine the value of a claim, so long as the claim asserts a sum certain for the overall demand. *See, e.g., Gov't Servs. Corp.*, ASBCA No. 60367, 16-1 BCA ¶ 36,411 at 177,538. Here, BMJV's claim seeks 96 delay days for window 2 due to RFP-032 DC-2 Changes and Testing and Commissioning. (R4 tab 50 at 31-35). BMJV's supporting claim schedules can be used to convert the number of days into dollar amounts.

In its claim, BMJV explains that "about 57 days to the delay in [window 2] can be attributed to the T&C changes" (R4, tab 50 at 34). Thus, BMJV has provided a sum certain for Window 2 (\$12,833,402 in BMJV's revised claim calculation (app. resp. at 23)) but is permissibly providing an estimate as to the allocation of the delay between the RFP-0032 delays and the T&C delays.

III. BMJV's Second Complaint Does Not Raise New Claims Not Presented to the Contracting Officer

The government contends that BMJV is asserting four new claims that were not first presented to the CO, and thus, that the Board lacks jurisdiction to entertain these claims (gov't mot. at 36). Specifically, the government separately moves to dismiss BMJV's claims for MX-08 Concrete Walkways; Walkway lighting; Fuel Truck Unloading Areas; and Trench Drainpipes (gov't mot. at 36-39⁵). BMJV asserts that the four allegedly new claims were part of a proposed change that was presented to the CO (app. resp. at 43).

As with the government's motion to dismiss for failure to state a claim, the question here is whether BMJV is asserting a separate and distinct claim for the

⁵ In its reply brief, the government requests that the Board, in the alternative, dismiss Counts III and IV of compl. 1, and dismiss paragraphs 30-219 of compl. 2, to "narrow the scope of these appeals to only those 'material' delays for which BMJV still maintains it is entitled to relief" (gov't reply at 2). Arguments raised for the first time in a reply brief are waived. *See, e.g., Buck Town Contractors & Co.*, ASBCA No. 60939, 18-1 BCA ¶ 36,951 at 180,059.

concrete walkways, walkway lighting, fuel truck unloading areas and trench drainpipes. BMJV opposes the government's motion on two bases: first, BMJV asserts that the questioned changes were asserted in its claim; and second, BMJV alleges that the cited changes were not on the critical path, and thus that it is not seeking delay damages for the events, but just citing them as additional proof of government delay (app. resp. at 43-44). We determine that BMJV is not asserting any new claims not presented to the CO.

As explained above, on a motion to dismiss standard of review, we cannot conclude that BMJV is asserting separate claims for the concrete walkways, walkway lighting, fuel truck unloading areas, and trench drainpipes. Thus, we cannot conclude that we are without jurisdiction to entertain the claims because they were not presented to the CO. In addition, we note that BMJV did reference the concrete walkways, walkway lighting, fuel truck unloading areas, and trench drainpipes in its claim and associated schedules (R4, tab 58 at 12; app. supp. R4, tab 69 at 79, tab 199 at 2-3).

To the extent BMJV asserts that it is not seeking recovery for the concrete walkways, walkway lighting, fuel truck unloading areas, and trench drainpipe issues because they are not on the critical path, we note that contractors are permitted to allege additional facts in their claims and complaints to provide context to the claims. Moreover, in the event that BMJV does not prevail on some element of the delay claim, as currently asserted, the concrete walkways, walkway lighting, fuel truck unloading areas, and trench drainpipes issues may become critical-path issues, even though they are currently considered concurrent delays. The government's motion to dismiss for lack of jurisdiction is denied.

CONCLUSION

For the reasons stated above, we deny the government's motion to dismiss for failure to state a claim and lack of jurisdiction.

Dated: July 16, 2026



DAVID D'ALESSANDRIS
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

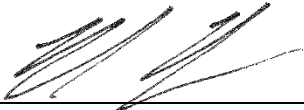
(Signatures continued)

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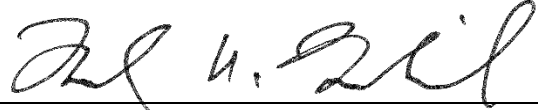
This version has been approved for public release.

I concur



J. REID PROUTY
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 64038, 64336, 64428, Appeals of Bahadir Construction Engineering Contracting & Trading Inc. Co. and Impreza Costruzioni Giuseppe Maltauro S.p.A Joint Venture, rendered in conformance with the Board's Charter.

Dated:

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