UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS TO DISMISS DENIED: February 14, 2017

CBCA 5323

H.C. BECK, LTD.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Timothy D. Matheny of Peckar & Abramson, P.C., Dallas, TX, counsel for Appellant.

John S. Tobey and Catherine Crow, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **DRUMMOND**, and **LESTER**.

DANIELS, Board Judge.

The General Services Administration (GSA), respondent, moves to dismiss – for failure to state a claim for which relief may be granted, and alternatively for lack of jurisdiction – an appeal filed by H.C. Beck, Ltd. (Beck). We deny the motions.

Background

On July 24, 2009, GSA awarded to Beck a contract for the renovation of the San Antonio Hipolito Garcia United States Post Office and Courthouse in San Antonio, Texas. The contract was awarded at a firm fixed price of $34,040,575.

The project documents included information indicating the presence of a small quantity of asbestos containing materials (ACM) in the building and required Beck to remove those materials. As the contractor proceeded to perform its work, it identified significantly more ACM than was shown in the project documents. To compensate Beck for additional work required to remove this material, GSA agreed to sixty-three contract modifications, with a total value of $16,672,848, thereby increasing the contract value to $50,713,423. Beck completed the project by the required project completion date of March 28, 2012.[1]

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[1] Each of the modifications includes a statement regarding accord and satisfaction. For example, modifications PS02, 03, 04, 05, 06, 08, 19, 20, and 23 include the statement:

> Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised.

Modifications PS21, 22, and 39 include:

> Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for money for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised.

Modifications PS24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 38, 42, 43, and 47 include:

> CONTRACTOR[']S STATEMENT OF RELEASE:
> In consideration of the modification agreed to herein as complete equitable adjustment, the contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to this modification. Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised.

The Board directed the parties to address in further briefing whether these statements in the contract modifications preclude recovery by the contractor on the claims at issue in the

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By letter dated April 19, 2012, Beck submitted to the contracting officer a request for equitable adjustment (REA) of the contract price in the amount of $2,271,073. In this letter, Beck asserted:

> As a direct result of the differing site conditions encountered, Beck was required to engage in work beyond what was originally contemplated in the Statement of Work ("SOW") in the performance of the following tasks:
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> 1. Performing ACM assessments, reports, and recommendations for abatement/remediation;
> 2. Confirming the accuracy of GSA's licensed asbestos consultant's (GEO [International Management, LLC]) clearance and monitoring reports;
> 3. Maintaining, testing, and reporting air quality through the building;
> 4. Cleanup of the ACM's in the disturbed second floor area;
> 5. Additional management, safety supervision, and scheduling due [to] the increased scope of ACM abatement, remediation, and work stoppage;
> 6. Additional management and insurance costs due to the work stoppage;
> 7. Demobilization/remobilization activities due to the work stoppage;
> 8. Additional equipment storage, rescheduling, and relocation due to the work stoppage and additional abatement; and
> 9. Providing temporary HVAC [heating, ventilation, and air conditioning] for an extended duration due to the work stoppage and additional ACM abatement.
> 10. Engage legal counsel to assist in dealing with the differing site conditions and the potential of ACM exposure, as well as, assisting with putting together the REA for the extra work.

In its REA, Beck said that it "is seeking a REA under the provisions of FAR [Federal Acquisition Regulation] 52.235-1 – Differing Site Conditions and GSAR [General Services

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[1] (...continued)
case. In response, Beck maintains, with supporting affidavits and other documents, that at least beginning with modification PS21, the modifications released only claims for the direct costs of the asbestos removal itself; the modifications reserved to the contractor future claims for ancillary costs. GSA says that it has concluded "that more evidence is necessary to determine whether the statements in the specified contract modifications preclude recovery entirely and GSA's defense of accord and satisfaction is not amenable to disposition by dismissal at this time." Accordingly, we do not consider in this decision whether the quoted portions of the modifications preclude recovery.

Acquisition Regulation] 552.243-71 – Request for Equitable Adjustments." The contract contains clauses entitled "FAR 52.236-2 – DIFFERING SITE CONDITIONS (APR 1984)" and "GSAR 552.243-71 – EQUITABLE ADJUSTMENTS (APR 1984)," which the parties agree are the ones Beck referenced (or meant to reference). In pertinent part, these provisions read as follows:

> FAR 52.236-2 – DIFFERING SITE CONDITIONS (APR 1984)
>
> (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract . . . .
>
> (b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.
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> GSAR 552.243-71 – EQUITABLE ADJUSTMENTS (APR 1984)
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> (a) The provisions of the "Changes" clause prescribed by FAR 52.243-4 are supplemented as follows:
>
> (1) Upon written request, the contractor shall submit a proposal, in accordance with the requirements and limitations set forth in the "Equitable Adjustments" clause, for work involving contemplated changes covered by the request. . . .
>
> . . . .
>
> (b) The provisions of the "Differing Site Conditions" clause prescribed by FAR 52.236-2 are supplemented as follows: The Contractor shall submit all claims for equitable adjustment in accordance with, and subject to the requirements and limitations set out in paragraph (a) of this "Equitable Adjustments" clause.

By letter dated November 22, 2013 (received on November 25, 2013), Beck converted this REA into a certified claim. GSA believed that the certification was deficient, and Beck

resubmitted the claim by letter dated January 8, 2014 (received on January 9). Beck withdrew from settlement discussions and amended its claim to be in the amount of $1,170,429 on August 31, 2015. By letter dated February 10, 2016, the contracting officer denied the claim in its entirety. Beck appealed the contracting officer's decision to the Board on May 10, 2016.

Discussion

Motion to Dismiss for Failure to State a Claim

When considering a motion to dismiss for failure to state a claim upon which relief can be granted, we "must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (citing *Papasan v. Allain*, 478 U.S. 265, 283 (1986)). Even viewed in this advantageous light, however, the complaint "must plead factual allegations that support a facially 'plausible' claim to relief in order to avoid dismissal." *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the [tribunal] to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 557). *See Strawberry Hill, LLC v. General Services Administration*, CBCA 5149, 16-1 BCA ¶ 36,561, at 178,061.

GSA reasons as follows in urging us to dismiss this appeal for failure to state a claim upon which relief may be granted: Beck seeks recovery under the contract's Differing Site Conditions clause. This clause "appl[ies] only to conditions existing when the contract was executed." *Olympus Corp. v. United States*, 98 F.3d 1314, 1318 (Fed. Cir. 1996). Beck's claim, however, pertains to ACM disturbances which occurred after the parties entered into the contract. Therefore, "it is impossible for Beck to establish required elements for a claim under this clause." Furthermore, if Beck had submitted its claim under the contract's Changes or Suspension of Work clauses,[2] the Board would have to consider a different set

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[2] FAR 52.243-4 – CHANGES (JUN 2007) provides, in part, that:

> (a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including

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of operative facts, so that would be a different claim from the one which was submitted to the contracting officer. Finally, even if the claim could be considered under the Differing Site Conditions clause, Beck cannot meet some of the "indispensable elements" of such a claim set forth in *Weeks Dredging & Contracting, Inc. v. United States*, 13 Cl. Ct. 193, 218 (1987) – in particular, the contractor cannot prove that it reasonably relied on the indications

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[2] (...continued)
changes –

(1) In the specifications (including drawings and designs);
(2) In the method or manner of performance of the work;
(3) In the Government-furnished property or services; or
(4) Directing acceleration in the performance of the work.

* * *

(d) If any change under this clause causes an increase or decrease in the contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing.

FAR 52.242-14 – SUSPENSION OF WORK (APR 1984) provides, in part, that:

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

of subsurface conditions in the contract when preparing its bid, or that the claimed excess costs were solely attributable to the materially different subsurface conditions.

These arguments are not convincing. The parties modified the contract to increase its price by nearly fifty percent to compensate Beck for removing far greater amounts of ACM than expected (more than thirty-one times as much as expected, according to Beck). This demonstrates plainly that the subsurface conditions when the contract was executed were far different from those which were actually encountered. *Frank Lill & Son, Inc.*, ASBCA 35774, 88-3 BCA ¶ 20,880, at 105,584 (in appropriate circumstances, the unanticipated discovery of ACM can constitute a differing site condition). Furthermore, Beck did not submit its claim solely under the Differing Site Conditions clause of the contract; it implicated also the Equitable Adjustments clause. GSA does not explain why we would have to consider different operative facts if Beck had submitted its claim under the Changes clause (which is supplemented by the Equitable Adjustments clause). If the claim had been founded on the Suspension of Work clause, the only difference in consideration noted by the agency is that we would have to review one less issue – the contractor's profit on awarded costs. In any event, merely asserting a different legal theory for recovery, based on the same operative facts, does not change the nature of the claim. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365-66 (Fed. Cir. 2003); *CB&I AREVA MOX Services, LLC v. Department of Energy*, CBCA 5395, 17-1 BCA ¶ 36,591, at 178,217 (2016); *Sage Western Investments v. General Services Administration*, CBCA 1680, 09-2 BCA ¶ 34,297, at 169,418; *but see K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015) ("presenting a *materially* different . . . legal theory . . . does create a different claim" (emphasis added)).

Whatever the underlying clause, it is clear that Beck believes that the claimed costs were all incurred because the project involved far more ACM than anyone expected. Whether the claimed excess costs were solely attributable to the materially different subsurface conditions is something Beck will have to prove to prevail on the merits, but at this stage of the proceedings, it has presented sufficient factual allegations to survive a motion to dismiss for failure to state a claim upon which relief may be granted. Those allegations support a facially plausible claim – they allow us to draw the reasonable inference that GSA is liable for the costs asserted. *Strawberry Hill, LLC v. General Services Administration*, CBCA 5149, 16-1 BCA ¶ 36,561, at 178,061 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

Motion to Dismiss for Lack of Jurisdiction

A tribunal would normally consider a motion to dismiss for lack of jurisdiction before any other motion, for if the tribunal does not have jurisdiction, it cannot proceed to other matters placed before it. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95,

101-02 (1998). In this case, though, GSA has made its jurisdictional motion subordinate to its other motion – and with good reason, for the agency's arguments as to jurisdiction are nothing more than a rehash of the arguments it made in far greater detail in pursuing dismissal for failure to state a claim. The arguments fare no better in this iteration.

GSA summarizes the justification for its jurisdictional motion in the following paragraph:

> The basis for dismissal for lack of jurisdiction is that the services and work for which Beck seeks to recover in this Appeal are only recoverable upon the submission of claims under FAR 52.243-4 Changes and/or FAR 52.242-14 - Suspension of Work[]. Here, Beck has not presented a claim under these clauses to the Contracting Officer for a Final Decision. In turn, there has been no appeal of a Final Decision for claims under the Changes Clause or the Suspension of Work Clause. As such, the Board lacks jurisdiction over Beck's claim to $1,170,429.00 and must dismiss.

Beck says that GSA's arguments "are simply nonsensical." We hesitate to use such pejorative language in evaluating a party's position, but here, we must agree with the appellant's characterization. The Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012), under which we consider this case, contains specific requirements regarding the jurisdiction of a board of contract appeals. To place a matter before a contracting officer, a contractor must submit a claim to such an officer for decision; the claim must be in writing; and, if it is for more than $100,000 (as this one is), it must contain a specified certification. *Id.* § 7103(a)(1), (2), (b). After receiving a claim from a contractor, a contracting officer is to issue a decision in writing. *Id.* § 7103(d). The contractor may appeal the decision to the appropriate board within ninety days from the date of receipt. *Id.* § 7104(a). "The Civilian Board [of Contract Appeals] has jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than [named agencies of which GSA is not one]) relative to a contract made by that agency." *Id.* § 7105(e)(1)(B). All the required events transpired with regard to this matter, and Beck appealed the contracting officer's decision to us within ninety days of the date on which it received the decision. That is all that is necessary for us to have jurisdiction over the case.

Decision

GSA's **MOTIONS TO DISMISS** for failure to state a claim upon which relief may be granted and for lack of jurisdiction are both **DENIED**.

STEPHEN M. DANIELS
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

HAROLD D. LESTER, JR.
Board Judge