UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION TO AMEND ANSWER GRANTED: September 14, 2023

CBCA 7269, 7675, 7784

JITA CONTRACTING, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Ivan A. Sarkissian, Nathaniel R. Jordan, and Carin J. Ramirez of McConaughy & Sarkissian, P.C., Denver, CO, counsel for Appellant.

Jack F. Gilbert and Kristina L. Porzio, Office of Chief Counsel, Federal Highway Administration, Department of Transportation, Lakewood, CO, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **SULLIVAN**, and **CHADWICK**.

CHADWICK, Board Judge.

This case involves a termination for default. Appellant, Jita Contracting, Inc. (Jita), seeks leave to file a second amended answer to assert two new affirmative defenses to the termination, which is a government claim. Respondent, Department of Transportation (DOT), opposes the motion, arguing that the proposed amendments are too late and would be prejudicial to DOT. We grant the motion to amend because (1) both new defenses are closely related to defenses of which DOT was already aware, and (2) DOT does not show that it lacks or cannot obtain information that it will need to rebut either new defense.

Background

The contract at issue provided for Jita to resurface and rehabilitate two roads in Mesa Verde National Park, in Colorado, for a firm fixed price. The Federal Highway Administration, a subagency of DOT, awarded the contract in February 2021, issued a cure notice to Jita in September 2021, and terminated the contract for default in November 2021. Jita timely appealed the default termination to the Board in CBCA 7269, which has since been consolidated with two related appeals.

The Board directed DOT to file the complaint. *See* Board Rule 6(a) (48 CFR 6101.6(a) (2022)) ("The Board may in its discretion order a respondent asserting a claim to file a complaint."); *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987) ("The default termination order is deemed . . . to be a decision by the contracting officer on a government 'claim' against the contractor."). Jita filed the answer in CBCA 7269 in March 2022.[1] Jita asserted as one of four affirmative defenses that DOT "failed to follow the requirements for a termination for default, including [48 CFR] 52.249-10 Default (Fixed-Price Construction)." In October 2022, Jita moved to amend its answer in CBCA 7269 to add, as a fifth affirmative defense to the termination, that "[t]he contract was impossible or impracticable to perform." Jita stated in its October 2022 motion that DOT had "reviewed this motion and the proposed amendment" and that DOT "takes no position, neither objecting to nor opposing the amendment." The Board granted the motion to amend as unopposed. *See* Rule 6(c).

Under the schedule now in place for the consolidated appeals, fact discovery will end in October 2023, and expert discovery will end in January 2024.

Jita filed the instant motion in August 2023. Jita proposes to file a second amended answer in CBCA 7269, introducing two more affirmative defenses, which are: "Appellant is not responsible for the consequences of defects in the plans and specifications pursuant to *[United States] v. Spearin*, 248 U.S. 132 (1918)," and "Respondent waived its right to terminate Jita for default," citing *Martin J. Simko Construction, Inc. v. United States*, 11 Cl. Ct. 257 (1986), *vacated in non-relevant part and remanded*, 852 F.2d 540 (Fed. Cir. 1988). Jita argues in the motion, among other things, that "[j]ustice requires that Appellant be entitled to pursue all legal defenses available to it." Jita adds:

> The amendments requested in this motion do not include any additional or changed factual bases and, therefore, there is no unfair prejudice to the

[1] The pleadings in the other consolidated appeals, CBCA 7675 and 7784, were later designated separately by the Board, *see* Rule 6(a), and are not at issue here.

> Respondent. Discovery is ongoing [as of August 2023], and there are several months of discovery remaining . . . during which the Respondent can do any additional discovery it believes is necessary to investigate the factual bases of the additional defenses.

DOT argues in opposition that Jita "could have . . . identified" the two new defenses earlier and has, therefore, "failed to justify the delay in seeking to amend its answer." DOT maintains that it would incur prejudice from the proposed amendment because "the Government . . . essentially concluded its [planned] discovery" in July 2023 and has no more fact depositions scheduled before the October 2023 deadline.

Discussion

The Board will "freely give[]" permission to amend a pleading under Rule 6(a) "absent a specific . . . reason" not to, "such as prejudice to the opposing party or futility of amendment." *Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539, at 178,003 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see, e.g.*, *Optimus Technology, Inc. v. Office of Personnel Management*, CBCA 2952, 16-1 BCA ¶ 36,543, at 178,022 (denying on jurisdictional grounds respondent's motion to amend the answer to assert a counterclaim). The considerations are the same whether the pleading is a complaint or an answer. *E.g.*, *Long v. Wilson*, 393 F.3d 390, 400 (3d Cir. 2004) (discussing interchangeably decisions on amendments of complaints and answers). "Prejudice sufficient to deny leave to amend . . . must be 'substantial or undue.' . . . Where substantial prejudice is lacking, leave to amend may still be denied based on 'truly undue or unexplained delay.'" *Zach Fuentes, LLC v. Department of Health & Human Services*, CBCA 7090, 22-1 BCA ¶ 38,091, at 184,981 (citations omitted) (granting appellant's motion to amend the complaint in part and denying it in part as futile on jurisdictional grounds).

As noted, DOT complains of both delay and prejudice.[2] We find neither contention persuasive, as we do not find the alleged prejudice "articulable" or concrete, *see A-Son's*

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[2] DOT does not argue that the amendment would be futile. We have independently considered our jurisdiction to entertain the new affirmative defenses and see no reason to question it, given that neither defense seeks money or to change the contract. *See M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1331 (Fed. Cir. 2010) ("[A] contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the [Contract Disputes Act], whether asserting the claim against the government as an affirmative claim or as a defense to a government action."); *Total Engineering, Inc. v. United States*, 120 Fed. Cl. 10, 15–16 (2015) (holding that an affirmative defense of defective specifications need not be raised via claim).

Construction, Inc. v. Department of Housing & Urban Development, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,206, or the timing of the amendment particularly unfair.

DOT's objections to Jita's new affirmative defenses of waiver and defective specifications ring hollow given that Jita alleged in March 2022 that the agency did not follow the termination regulation and, in October 2022, that the contract requirements were impossible or impracticable. Those allegations should reasonably have motivated DOT to ask in discovery what Jita claimed went wrong procedurally, and on what basis Jita alleged that the contract work could not be performed. To be sure, Jita's new allegation that DOT waived its right to terminate for default is more precise than Jita's original procedural defense, and an allegation of defective specifications under *Spearin* does not overlap exactly with the elements of the earlier affirmative defense of impossibility or impracticability. *See Caddell Construction Co. v. United States*, 78 Fed. Cl. 406, 410–11 (2007). Nonetheless, we agree with Jita that the new defenses closely resemble the older ones and involve the same events and evidence. The proposed second amended answer does not, in other words, "substantially change[] the theor[ies] on which the case has been proceeding." 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1487 (3d ed. 2018).

DOT fails to articulate, moreover, exactly how it might be disadvantaged in meeting the new affirmative defenses as the case proceeds. Both new defenses implicate information that DOT already has or should have. Jita's affirmative defense of waiver will turn on (1) how much time elapsed between the scheduled completion date and the termination for default and (2) the extent to which DOT "communicat[ed] concern" about the schedule "or [the agency's] intention to assess liquidated damages." *BES Design/Build, LLC v. Department of Veterans Affairs*, CBCA 6453, et al., 23-1 BCA ¶ 38,319, at 186,074 (citing cases and noting that waiver occurs in construction cases only in unusual circumstances), *appeal filed*, No. 23-2270 (Fed. Cir. Aug. 11, 2023).[3] DOT knows both of those things. Similarly, DOT knows or should know how it developed the road specifications, the problems that Jita said it had in meeting the specifications during performance, and whether other contractors in the same or similar circumstances have been able to satisfy them.

To the extent that DOT genuinely does not yet understand the reasoning behind the two new affirmative defenses, this case is far from over. Should the case proceed to a hearing or some other resolution of the merits, ample prehearing filings, conferences, and/or merits briefs lie ahead in which Jita will be obliged to get specific. The Board can ensure that DOT is not unfairly surprised and that the issues are fully joined.

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[3] The decision that Jita cites in the affirmative defense is not binding on us but holds to the same effect.

We could in theory deny leave to amend for lateness alone, even with no prejudice. *See, e.g.*, *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982) ("Mere passage of time need not result in a denial of leave to amend, but delay becomes fatal at some period of time."). What we have said above explains why we do not think Jita waited unreasonably or inexplicably long to raise the new affirmative defenses, which are essentially refinements of Jita's previously disclosed theories of the case.

Decision

The Board **GRANTS** Jita's motion to file the second amended answer in CBCA 7269.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge