UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: May 22, 2014

CBCA 3450

KIEWIT-TURNER, A JOINT VENTURE,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

William E. Dorris, Chad V. Theriot, Reginald A. Williamson, and Damian M. Brychcy of Kilpatrick Townsend & Stockton LLP, Atlanta, GA; and Michael A. Branca of Peckar & Abramson, P.C., Washington, DC, counsel for Appellant.

Stacey North-Willis, Khaliah Wrenn, Charlma Quarles, Eyvonne Mallet, Benjamin Diliberto, and Joylyn Winter, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **POLLACK**, and **STEEL**.

STEEL, Board Judge.

Respondent, the Department of Veterans Affairs (VA), awarded contract no. VA101CFM-C-0100 to Kiewit-Turner, a Joint Venture (appellant or KT), on August 31, 2010, for pre-construction services with an option for construction services to build a replacement medical center campus in Aurora, Colorado.

The contract is an integrated design and construct (IDc) contract executed in accordance with Federal Acquisition Regulation (FAR) 16.403-1, Fixed-Price Incentive (Successive Target), and FAR 52.216-17. The IDc contract is the procurement by the

Government, under one contract, with one firm or joint venture both pre-construction and optional construction services for a specific project. The contract contemplated two phases:

> A. CLIN [contract line item number] 0001, Pre-Construction Services. The contractor is responsible for providing the oversight, quality control, and administrative tasks needed to perform the services in accordance with the specifications and in an expeditious and economical manner consistent with the best interests of the Government. The contractor assists the Government during the preconstruction phase by providing all personnel, office facilities and equipment to perform the administrative services required to review and evaluate the construction documentation. . . .
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> B. CLIN 0002, Initial Target Price (Initial Target Cost + Initial Target Profit). Work includes general construction, alterations, roads, walks, grading, drainage, mechanical and electrical work, laboratory equipment, utility systems, elevators and dumbwaiters, wet fire sprinkler system, fire alarm system, nurse call system, voice and data infrastructure, necessary removal of existing structures – including asbestos abatement, and interior renovation work, and certain other items.

The VA entered into a separate contract with an architect/engineer (A/E) joint venture team which was responsible for the project's design and quality. KT was to work with the VA and the A/E as they developed a design for the project and to notify the VA project manager (PM) about design problems and issues it found as it reviewed the design work produced by the A/E. Design review was to be a cooperative effort among the VA, the A/E, and KT. The VA, however, was the only party in contract privity with the A/E; KT had no authority to direct the work of the A/E.

This process had been going on for about a year when, on October 27, 2011, KT submitted a firm target price (FTP) proposal for CLIN 0002 in the amount of $604,087,179. On November 11, 2011, Supplemental Agreement 007 (SA-007) was executed by KT and the VA whereby the Government exercised the construction option of the contract, CLIN 0002, and provided additional money in the amount of nearly two million dollars to extend the preconstruction services that KT was to perform under CLIN 0001. SA-007 set an FTP of $604,087,179, with a ceiling price adjustment to $610,087,179. The agreement required that the VA and the A/E must get the project price at or below the $604 million target price, and included the statement that "[T]he VA shall ensure the A/E . . . will produce a design that meets their Estimated Construction Cost at Award (ECCA) of $582,840,000."

KT has alleged that its cost to construct this project will exceed $1 billion, that it has so informed the VA, and that it has not received a design from the VA that can be built for the ECCA of $582,840,000. KT also submits that in a January 23, 2013, letter to the A/E, the VA admitted that the cost to build the A/E design exceeds the ECCA by $199 million. KT further alleges that while it has agreed to monitor the feasiblity and cost of the design proposed by the A/E, it has no contractual relationship with the A/E.

KT, on April 30, 2013, requested a final decision from the contracting officer (CO) regarding whether the VA had breached its obligation to provide a design that could be built for $582,840,000, and, therefore, whether KT had the right to stop work under the contract. On June 26, 2013, the CO denied KT's requests and directed that KT continue working. On July 8, 2013, KT filed its notice of appeal with the Civilian Board of Contract Appeals (CBCA) requesting declaratory relief.

Specifically, KT requests in its complaint that this Board declare that (1) the VA had a material obligation under the contract and SA-007 to provide a design that can be constructed for the ECCA of $582,840,000; (2) the VA breached its obligations under the contract and SA-007; and (3) KT is entitled to immediately suspend performance until the VA provides a design that can be built for the ECCA of $582,840,000.

The VA denies that KT is entitled to the declaratory relief it seeks, and therefore requests that the appeal be dismissed. The VA is not challenging the basic jurisdiction of the CBCA to issue declaratory judgments, but rather suggests that this is not an appropriate case for rendering such relief.

Discussion

The granting of a motion to dismiss for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle it to a legal remedy. *Boyle v. United States*, 200 F.3d 1369 (Fed. Cir. 2000); *Charles Engineering Co. v. Dept. of Veterans Affairs*, CBCA 582, 07-2 BCA ¶33,698. However, the Court of Appeals for the Federal Circuit has noted that in considering "a dismissal for failure to state a claim, we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *Anaheim Gardens v. United States*, 444 F.3d 1309,1314-15 (Fed. Cir. 2006) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). Dismissal for failure to state a claim should not be granted unless it appears beyond doubt that the appellant cannot prove any set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Icenogle Construction Management, Inc.* ,VABCA 7534, 06-2 BCA ¶ 33,325, at 165,271; *South Carolina Public Service Authority*, ASBCA 53701, 04-2 BCA ¶ 32,651, at 161,607; *Thai*

Hai, ASBCA 53375, 02-2 BCA ¶ 31,971 at 157,920, *reconsideration denied*, 03-1 BCA ¶ 32,130, *aff'd*, 82 F. App'x 226 (Fed. Cir. 2003). Thus we must assume, for the purpose of considering the respondent's motion to dismiss, that the facts as alleged by KT are true and must make appropriate inferences in its favor. Given those inferences, if the appellant might be able to prove the necessary facts in support of its claim, the motion to dismiss must be denied. *AKAL Security, Inc. v. Dept. of Homeland Security*, CBCA 3389, 14-1 BCA ¶ 35,532, at 174,132.

Kiewit Turner is seeking declaratory relief regarding the following three questions: (1) Did the contract modification known as SA-007 obligate the VA to provide a design that could be built for $582 million? (2) Did the VA materially breach the contract by failing to provide a design that could be built for $582 million? (3) Assuming such a breach occurred, is KT entitled to stop work? Respondent asks that the Board dismiss the complaint seeking a contract interpretation declaratory judgment, arguing that such relief is inappropriate in this appeal and that the tribunal is not obligated to render a declaratory judgment just because a party requests it. The parties are in agreement that the essential case to consider in reviewing whether a declaratory relief is appropriate is *Alliant Techsystems, Inc. v. United States*,178 F.3d 1260 (Fed. Cir. 1999). KT argues that it satisfies the three-part test in *Alliant*, and respondent argues that it does not.

In *Alliant*, the Federal Circuit concluded that the boards of contract appeals and the Court of Federal Claims have broad discretion to issue declaratory relief during performance of a contract, including the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. *Alliant*, 178 F.3d at 1270-71. Thus, declaratory relief in situations involving a "fundamental question of contract interpretation or a special need for early resolution of a legal issue" is appropriate. *Id.* at 1271. *See also Kellogg Brown & Root Services, Inc.*, 13 BCA ¶ 35,411 (*KBR*).

Alliant has set forth three criteria for a court or board to consider when evaluating the appropriateness of declaratory relief: (1) whether the claim involves a live dispute between the parties, (2) whether a declaration will resolve that dispute, and (3) whether the legal remedies available to the parties would be adequate to protect the parties' interests.

A. Is there a live dispute?

Regarding the first criteria, the parties agree that the claim involves a live dispute between the parties. KT has been ordered to proceed with CLIN 0002, the construction phase of the contract, on plans that it claims will cost hundreds of millions of dollars over the FTP specified in SA-007. The disagreement clearly exists, it has significant ramifications, and it continues to impact appellant. *KBR* at 173,712.

B. Would a declaratory judgment resolve the dispute?

Under the second prong of the *Alliant* decision, the Board must consider whether issuance of a declaratory judgment would resolve the dispute. Respondent suggests that the request goes beyond the contract by urging that the Board determine whether the respondent was obligated to provide a design that could be constructed for the ECCA of $582,840,000; whether that obligation was material, and whether the respondent had in fact breached that obligation. In light of KT's obligation under CLIN 0001 to collaborate in the development of the plans for the project, respondent argues that the Board would need to consider evidence of cost evaluations and additional activities not likely to be provided at a hearing seeking declaratory relief, making the issue too involved for resolution via interpretation of the contract. It argues that this appeal does not satisfy the requirement of *Alliant* that the court or board restrict the occasions for intervention during contract performance to those involving a "fundamental question of contract interpretation or a special need for early resolution of a legal issue."

Appellant agrees that the *Alliant* court acknowledged that contractors have an obligation to continue performing work "while any dispute is occurring" and that declaratory relief during contract performance would be appropriate when there is a fundamental question of contract interpretation or a special need for early resolution. In this case, appellant argues, the case presents such a fundamental question of interpretation and an urgent need for early resolution of the issue.

Here there is clearly a dispute as to whether the contractor has an obligation to perform. The Federal Circuit advises that to hold that a contractor has a contractual obligation to perform in accordance with the contracting officer's decision until it receives a different ruling on the scope of the contract does not mean that it must postpone seeking such a ruling until it has performed in full and seeks compensation for the additional work that the contract did not require.

If appellant must continue work when it believes it is not obligated to do so, a fundamental issue is implicated in the contract, and in the face of potential cost overruns of hundreds of millions of dollars, it has a special need for early resolution of this issue. Were the Board to find that the Government has breached the contract, and that therefore appellant, in the face of the Government's breach, is entitled to stop work, the essential dispute between the parties would be determined. Though every detail in dispute would not be resolved, the parties would at least have a fundamental framework within which to analyze those remaining issues. *See, KBR* at 173,713. Therefore, the *Alliant* second prong is satisfied.

C. Is there an adequate legal remedy to protect KT's interests?

The VA argues that declaratory judgment is inappropriate because the real issue is money -- observing that the *Alliant* court stated that it is "normally appropriate" for a board or a court to decline to issue declaratory judgments on contract interpretation matters when the issue in the case involves whether a contractor will later be entitled to additional compensation. KT submits, by contrast, that it is critical to resolve these contractual interpretation issues so that KT and its numerous subcontractors, many of which are small businesses and veteran owned, know whether they are required to continue to perform in the face of both the VA's alleged breach and potential financial difficulties resulting from financing the VA's project. *See*, *SUFI Network Services., Inc.*, ASBCA 54503, 04-2 BCA ¶ 32,714.

When taken in the light most favorable to the appellant, the facts alleged suggest that appellant's legal remedies short of a declaratory judgment are inadequate to protect its interests. The VA proffers that KT can rely on the contract's changes clause to recoup funds it must expend while performing the construction. But the *Alliant* court found that to file a claim under the changes clause for compensation when the work is completed can be an inadequate remedy. 178 F.3d at 1269. Here, the appellant alleges that completion of the work would increase its price for completion of the project, as currently designed, by at least $200 million, or more than 30% of the initial ECCA. This would be, at the least, a cardinal change to the contract, and would require appellant to serve as long-term banker for the Government, while it makes its way through the pitfalls of submitting claims under the changes clause to a contracting officer who, according to KT, does not have funds allocated to the contract beyond the $582,000,000 ECCA.[1] At this stage, appellant's legal remedy must be assumed to be inadequate and it has a special need for early interpretation of the contract. As the Federal Circuit suggests, to hold that KT has a contractual obligation to perform in accordance with the contracting officer's decision until it receives a different ruling on the scope of the contract does not mean that it must postpone seeking such a ruling from the Board until it has performed in full and seeks compensation. *Id.* at 1266.

Based on the pleadings, we conclude that appellant has stated valid causes of action. KT's allegations are sufficient to withstand a motion to dismiss for failure to state a claim upon which relief can be granted.

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[1] The appellant is already in the process of submitting to the contracting officer, and ultimately this Board, what might be as many as eighty-eight claims for changes, some of which have been pending for several years.

Decision

The motion to dismiss the appeal is **DENIED**.

CANDIDA S. STEEL
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

HOWARD A. POLLACK
Board Judge