UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM DENIED: August 23, 2018

CBCA 6038

STERLING DESIGN, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Matthew R. Keller of Matthew Keller Law, PLLC, Herndon, VA, counsel for Appellant.

Carlin R. Walsh, Office of Procurement Law, United States Coast Guard, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **SHERIDAN**.

SOMERS, Board Judge (Chair).

Sterling Design, Inc. (Sterling) appealed a contracting officer's decision denying its claim for $177,235.09 in unpaid invoices under a fixed-price Department of Homeland Security (DHS) task order. DHS filed a motion to dismiss the appeal for failure to state a claim upon which relief can be granted. We deny the motion.

Background

We base this summary on the complaint's factual allegations, which we treat as true for this purpose, and on contract documents attached to or integral to the complaint.

On March 9, 2012, DHS issued a firm fixed price commercial order with Sterling for diagnostic inspections on twenty-five personal computers (PCs) for a total sum of $3,125, with the possibility of the contracting officer modifying the contract to add repairs to the units as necessary. Between March and September 2012, Sterling ran diagnostics on all twenty-five units. Sterling informed DHS that it determined that two of the units did not need repair, but the other twenty-three units did. Sterling returned the two units to DHS after completing the diagnostic testing.

On September 18, 2012, DHS issued contract modification P00001, which increased the contract value to $109,825, and authorized Sterling to perform repairs on the remaining twenty-three units. When Sterling failed to complete repairs on any of the twenty-three remaining units, DHS issued modification P00002, which directed Sterling to return the units. Sterling did so.

After multiple exchanges between the parties discussing the termination of the contract and the outstanding voucher, in an email dated November 15, 2016, Sterling submitted an invoice totaling $43,673 for the purchase order. Later, Sterling's president sent an email with a revised invoice attached. The email stated:

> I am informed that despite the reality of this contract being terminated for the convenience of the government supported by written and verbal instructions, you have made the decision that this claim/invoice is to be processed under CFR 41 U.S. Code § 7101 contract disputes and not under CFR 48-52.249-2 - Termination for Convenience of the Government (Fixed Price). I am further informed that this decision is FINAL with NO appeal. Therefore I am submitting our revised invoice #948 dated 10/1/2017.

The revised invoice for $177,235.09 included the following charges:

1. Creation/review/send/receive 660 emails ($24,750)
2. Test diagnosis time ($10,800)
3. Creation test fixtures ($4,373)
4. Assemble cost data ($750)
5. Contingent time for negotiation from 1/6/1027 forward 20 hours ($3,000)
6. General and administrative expense ($3,756.86)
7. Profit ($7,678.01)
8. Cost of capital at small business unsecured rates from award to present ($122,127.22)

The president certified the claim:

> I as president of Sterling Design am authorized to CERTIFY that the claim is made in good faith, the supporting data previously supplied in voluminous detail is accurate and complete to the best of my knowledge and belief; and the amount requested accurately reflects the contract adjustment for which Sterling Design believes the Coast Guard is liable.

Sterling provided no additional explanation or supporting cost data for this revised itemized claim.

On November 29, 2017, the contracting officer issued a final decision on the claim. Pointing to Federal Acquisition Regulation (FAR) clause 52.212-4(l), incorporated in the purchase order, the contracting officer noted that in the event of termination for convenience, the "Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination." The contracting officer found:

> The charges submitted do not adequately demonstrate that they occurred prior to the termination, or as a result thereof, nor do they represent a percentage of price that corresponds to the work performed prior to the notice of termination. Because all 23 circuit cards [from the PCs] under the repair modification were returned in an un-repaired condition, there is no indication that any repair work was performed prior to termination. Thus, there is insufficient information to support payment of monies due beyond the originally awarded, and completed, [diagnostic tests] as negotiated for $3,125.00.

Sterling timely appealed the final decision, which the Board docketed on February 20, 2018. The notice of appeal identified the amount in dispute as $177,235.09, referencing the amended invoice. However, in its complaint, Sterling claims entitlement to $55,107.87, plus interest from October 31, 2017, based upon an alleged breach of contract. The only invoice attached to the complaint states that $177,235.09 is due in costs. Sterling provides no explanation for this discrepancy.

Discussion

Pending before us is DHS's motion to dismiss Sterling's appeal for failure to state a claim upon which relief may be granted, pursuant to Board Rule 8(c)(1) (48 CFR 6101.8(c)(1) (2017)). Under the corresponding Federal Rule of Civil Procedure, Rule 12(b)(6), to survive such a motion, the "complaint must allege facts 'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *Kam-Almaz v. United*

States, 682 F.3d 1364, 1367 (Fed. Cir. 2012) (quoting *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009)). The facts as alleged "must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555 (2007). "This does not require the plaintiff to set out in detail the facts upon which the claim is based, but enough facts to state a claim to relief that is plausible on its face." *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing *Twombly*). Ultimately, however, in reviewing the sufficiency of the complaint under our Rule 8(c)(1), as under Rule 12(b)(6), we must accept all well-pleaded factual allegations as true and draw all reasonable inferences in the appellant's favor. *See Call Henry, Inc. v. United States*, 855 F.3d 1348, 1354 (Fed. Cir. 2017).

Thus, to survive a motion to dismiss for failure to state a claim, Sterling's complaint must have alleged facts that plausibly suggest that it had performed compensable work and that it is entitled to compensation. Here, Sterling alleges it "incurred significant costs in the performance and termination of the contract" and that these costs included "inspection and repair of units of equipment" and "significant amounts of communications with the Agency during performance and termination of the effort."

We accept these factual allegations as true for the purpose of reviewing the sufficiency of the complaint. There appears to be no dispute that Sterling performed work under the contract, specifically the required diagnostic inspections, to which it would be entitled to payment of $3,125. The issue of whether Sterling can substantiate the remainder of its claim (whether for $177,235.09 claimed in the amended invoice dated October 1, 2017, or $55,107.87, plus interest, the amount asserted in its complaint) is, at this point in the litigation, premature for us to decide.

Decision

DHS's motion is **DENIED.** The parties shall confer and agree upon a schedule for processing this appeal to resolution. The parties are to submit this joint proposed schedule to the Board on or before September 17, 2018. Please refer to the Board's Order on Proceedings dated February 20, 2018.

Jeri Kaylene Somers

JERI KAYLENE SOMERS
Board Judge

We concur:

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge