UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO AMEND COMPLAINT GRANTED IN PART:
April 6, 2022

CBCA 7090

ZACH FUENTES, LLC,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

William Selinsky and Andrew D. Gillman of Whitcomb, Selinsky, P.C., Denver, CO, counsel for Appellant.

Tami S. Hagberg and Terrius D. Greene, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **SHERIDAN**, and **KULLBERG**.

**SHERIDAN**, Board Judge.

Pending before the Board is a motion from appellant, Zach Fuentes, LLC (ZFL), seeking leave to file an amended complaint. Respondent, the Department of Health and Human Services (HHS), objects to that motion, arguing that ZFL seeks a "do-over" now that it has retained new counsel, that HHS would be prejudiced by the amendment, that ZFL unduly delayed raising its new count of breach of the implied duty of good faith and fair dealing, and that amendment would be futile. For the reasons explained below, except to the extent that ZFL attempts to add an allegation of affirmative bad faith, we grant ZFL's motion for leave to amend.

Background

On April 14, 2020, the Indian Health Services (IHS), an agency of HHS, awarded a contract to ZFL for the purchase of one million KN95 respiratory masks. After delivery, IHS informed ZFL that it was rejecting the entire order because the masks delivered were not from the same manufacturer as the samples provided to IHS prior to contract award. Exhibit 28.[1]

ZFL submitted a certified claim to the IHS contracting officer on June 22, 2020, for breach of contract in the amount of $3,428,892. Exhibit 30. In its claim, ZFL represented that the contract did not reference a specific manufacturer from which the masks were to be supplied and asserted that IHS had accepted delivery of all one million masks. *Id*. ZFL alleges in the certified claim that IHS improperly rejected the masks because they were not from Mezorrison Health Science & Technology Co., Ltd. (Mezorrison), a Chinese KN95 mask manufacturer with whom Gabriele Business Corporation (GBC) had a relationship and whose masks Mr. Zachary Fuentes originally used to market the KN95 masks to IHS.[2] ZFL alleges in its certified claim that "ZFL offered multiple times to replace any defective masks. To date, IHS has not identified a single defect despite having inspected the masks and held them for over a month. Instead, IHS claims it is rejecting the masks because they were [sic] produced by an unknown Chinese manufacturer." *Id.* (footnote omitted.) ZFL offered several other reasons why IHS's proffered bases for rejecting the masks were legally inadequate and "pretextual in nature," concluding that "the real reason for IHS's rejection of the masks is likely the unexpected media and political attention surrounding the contract." Mr. Fuentes, the chief executive officer of ZFL, had previously worked in the White House, and ZFL speculated that Mr. Fuentes' political connections and a mounting investigation into the award of this contract had caused IHS to withhold payment for the one million masks. *Id*.

After asserting that IHS's failure to pay for the masks was "unacceptable, unfair, and a breach of the parties' contract," ZFL demanded payment or a contracting officer's final decision on its claim, insisting that it had fulfilled all of its obligations under the contract.

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[1] All exhibits are found in the appeal file, unless otherwise noted.

[2] ZFL alleges that GBC was the company IHS originally approached to provide KN95 masks and that, at the time of the award and related discussions, Mr. Fuentes was working as an independent contractor for GBC. ZFL further alleges that, because GBC was unable to register as a small business through the purchasing system that IHS was using (the System for Award Management website (SAM.gov)), Mr. Fuentes offered to provide the masks through his own company, ZFL, at the same price and quantity as GBC (using GBC as the supplier).

ZFL appealed the contracting officer's "deemed denial" to the Board, asking for a final decision regarding its claim for full payment. On June 17, 2021, the contracting officer issued a final decision denying the claim.

ZFL subsequently filed a notice of appeal with the Board. It then filed a complaint alleging a single count of breach of contract, arguing that it entered into a valid and binding contract with IHS, that it performed all of its obligations under the contract, and that IHS breached the contract by failing to pay for the delivered masks. Complaint ¶¶ 83–87.

On February 4, 2022, several months after IHS answered the complaint, ZFL filed a motion for leave to amend its complaint. Through its proposed amended complaint, ZFL would add an additional count of breach of the implied duty of good faith and fair dealing, as follows:

> HHS refused to cooperate with ZFL's multiple offers to cure; and unreasonably impeded performance and dealt in bad faith by making repeated negative and false public statements or insinuations about ZFL's performance behind his back while reassuring him through [the contracting officer] that his performance was acceptable, and seeking to impose additional, non-existent requirements as a pretext in order to deny conformity of goods to attempt to coerce a no-cost termination for convenience, and to cancel ZFL's order when the primary reason was in fact the government's mistake in improperly failing to define the specification to require EUA [Umbrella Emergency Use Authorization[3]] approved KN95 masks necessary for use by health care personnel in health care settings.

Proposed First Amended Complaint ¶ 67. ZFL asserts that justice requires the Board to grant the motion because ZFL recently retained new, more specialized, counsel and contends that amending the complaint will not unduly delay or prejudice the Government or be futile.

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[3] An EUA is issued by the United States Food and Drug Administration (FDA) authorizing emergency use of certain foreign-manufactured non-NIOSH [National Institute of Occupational Safety and Health] approved respiratory masks by health care personnel in health care situations. Normally, NIOSH "must formally approve such medical devices proposed for uses in [health care] settings." Proposed First Amended Complaint ¶ 15.

## Discussion

### Standard for Reviewing a Motion to Amend

In opposing ZFL's motion for leave to amend its complaint, HHS argues that simply retaining new counsel is insufficient grounds to amend a complaint. HHS asserts that ZFL's breach of the duty of good faith and fair dealing claim is based on information that was available to it since it submitted its certified claim and that ZFL should be precluded from raising it now. HHS further contends that the complaint as amended contains facts that are inconsistent with the certified claim, original complaint, ZFL's Board filings, and discovery to date.

Board Rule 6(c) provides a party is entitled to amend its complaint once without leave of the Board at any time "before a responsive pleading is filed." 48 CFR 6101.6(c) (2020). ZFL correctly recognizes that pursuant to Board Rule 6(c), it may now amend its complaint only by seeking the Board's permission.

The Board has previously discussed the standards upon which we review a motion to amend a complaint:

> Our rules do not expressly address the standards that we should apply in evaluating motions for leave to amend a complaint. "In the absence of applicable Board Rules" creating such standards, "the Board generally employs the Federal Rules of Civil Procedure," and particularly Federal Rule of Civil Procedure (FRCP) 15, as "guidelines." Although we are "not inexorably bound to apply those rules to administrative hearings which are generally of a somewhat less formal nature" than federal court proceedings, we still look to the principles underlying FRCP 15 when a request for leave to amend a complaint has been opposed to ensure fairness to the parties.

*Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539 (citations omitted).

FRCP 15 seeks "to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities" and "to limit the role of the complaint and answer to that of providing 'notice of the nature of the pleader's claim or defense and the transaction, event, or occurrence that has been called into question.'" *Crane & Co.* (citing 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1471 (3d ed. 2010)). Accordingly, "absent a specific justifying reason such as prejudice to the opposing party or futility of amendment, leave to amend a complaint or an answer is to be freely given." *Id.* (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Tribunals are

"required to take into account any prejudice" to the non-moving party, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971), and may consider a number of factors, including bad faith or dilatory motive, undue delay, harm to the movant if leave is not granted, and futility of amendment. *Foman*, 371 U.S. at 182.

Prejudice

Prejudice sufficient to deny leave to amend a complaint must be "substantial or undue." *Cureton v. National Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir. 2001). "[P]rejudice can result where a proposed amendment raises a new legal theory that would require the gathering and analysis of facts not already considered by the opposing party, but that basis for a finding of prejudice essentially applies where the amendment is offered shortly before or during trial." *Crane & Co.* (quoting *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4th Cir. 1986)). "An amendment is not prejudicial, by contrast, if it merely adds an additional theory of recovery to the facts already pled and is offered before any discovery has occurred." *Id.* (quoting *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006)). We do not find that granting ZFL leave to amend its complaint will substantially prejudice the Government. Although discovery has already occurred, ZLF's motion to amend its complaint is not being offered shortly before trial. Pursuant to the Board's January 19, 2022, scheduling order, a hearing is presently scheduled for the end of August, nearly five months from the issuance of this order. Further, information about the Government's good faith reasons for rejecting ZFL's masks should be in the Government's possession, rendering concerns about discovery unnecessary. The Government has provided no further argument for denying ZFL's motion as prejudicial. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987) ("The party opposing amendment bears the burden of showing prejudice").

Undue Delay

Where substantial prejudice is lacking, leave to amend may still be denied based on "truly undue or unexplained delay." *In re Fleming Cos.*, 323 B.R. 144, 149 (Bankr. D. Del. 2005) (quoting *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993)). Delay without more does not justify denial of leave to amend a complaint, but at some point a delay becomes "undue," placing a burden on the court or the opposing party. *See In re Laitram Machinery, Inc.*, No. 421, 1995 WL 138959, at *4 (Fed. Cir. Mar. 21, 1995). ZFL waited five months to submit its amended complaint, but we do not find that this delay is undue.

Futility

In deciding whether to permit an amendment, futility of the amendment is a relevant factor. *Foman*, 371 U.S. at 182. ZFL's proposed complaint adds an additional count alleging bad faith and a breach of the implied duty of good faith and fair dealing. The Government alleges that the proposed amended complaint is a "material departure[] from the facts supporting [ZFL's] original certified claim and the original Complaint." HHS Response at 16. Although not framed as a jurisdictional futility argument, the Government's assertion calls into question whether ZFL's amended complaint should be denied on the basis of futility. "When a party faces the possibility of being denied leave to amend on the ground of futility, that party must demonstrate that its pleading states a claim on which relief could be granted, and it must proffer sufficient facts supporting the amended pleading that the claim could survive a dispositive pretrial motion." *Crane & Co.* (quoting *Kemin Foods, L.C. v. Pigmentos Vegetales del Centro S.A. de C.V.*, 464 F.3d 1339, 1354-55 (Fed. Cir. 2006)).

The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018), governs the resolution of contract disputes that arise between the Government and contractors. *Applied Cos. v. United States*, 144 F.3d 1470, 1477 (Fed. Cir. 1998). The CDA expressly requires that "[e]ach claim by a contractor against the Federal Government relating to a contract shall be in writing" and "shall be submitted to the contracting officer for a decision." 41 U.S.C. § 7103(a)(1), (2). If the amount of a claim exceeds $100,000, the claim must be certified by the contractor. *Id*. § 7103(b)(1). The CDA further requires that "[t]he contracting officer shall issue a decision in writing and shall . . . furnish a copy of the decision to the contractor." *Id*. § 7103(d). These requirements are "jurisdictional prerequisites to any appeal." *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004) (quoting *Sharman Co. v. United States*, 2 F.3d 1564, 1569 n.6 (Fed. Cir. 1993), *overruled on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc)). Accordingly, "jurisdiction over an appeal of a contracting officer's decision is lacking unless the contractor's claim is first presented to the contracting officer and that officer renders a final decision on the claim." *Id*.

Before the Board can entertain a legal or factual issue under its CDA jurisdiction, the claim upon which the appeal is based must have provided adequate notice of the factual basis of that issue. *Crane & Co.* (citing *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987)). To perform the appropriate analysis, we compare the operative facts in the proposed amended complaint with those set forth in the certified claim, rather than with the original complaint. *Id.* (citing *Foley Co. v. United States*, 26 Cl. Ct. 936, 940 (1992), *aff'd*, 11 F.3d 1032 (Fed. Cir. 1993)). While an amended complaint "does not require ridged adherence to the exact language or structure of the original administrative CDA claim," *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003), "presenting a materially different factual or legal theory (e.g., breach of contract for not

constructing a building on time versus breach of contract for constructing with the wrong materials) does create a different claim." *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015). "In determining whether a contractor's attempt to alter the legal theories underlying its claim constitutes a 'new' claim, [we] 'look at whether the new issue is based on the same set of operative facts' as the claim submitted to the contracting officer." *Crane & Co.* (quoting *Foley Co.*, 26 Cl. Ct. at 940).

In comparing the operative facts in the proposed amended complaint with those set forth in the certified claim alleging bad faith and a breach of the implied duty of good faith and fair dealing, we look to see whether the factual elements in the proposed amendment exist within ZFL's certified claim. In rejecting the masks that ZFL delivered, the agency objected that the delivered masks were not the brand that ZFL had delivered to the agency for sample testing. ZFL disputes that it was required to provide the same mask that it originally discussed with the agency when it entered the contract, and, in this appeal, it seeks damages for the rejection of the masks. In its certified claim challenging the rejection of the delivered masks, ZFL alleged that the agency had "provided the thinnest of pretextual excuses" for rejecting the masks when the real reason for rejection was "likely the unexpected media and political attention surrounding the contract." Exhibit 30. ZFL also alleged in its certified claim that it "offered multiple times to replace any defective Masks" but was rebuffed. *Id.*

In its proposed amended complaint, in which it attempts to set up an implied duty of good faith and fair dealing breach claim, ZFL alleges that contract performance was impeded by the agency's "repeated negative and false public statements or insinuations about ZFL's performance behind his back while reassuring him through [the contracting officer] that his performance was acceptable"; that the agency sought "to impose additional, non-existent requirements as a pretext in order to deny conformity of goods or to attempt to coerce a no-cost termination for convenience"; and that the agency "cancel[led] ZFL's order when the primary reason was in fact the governments's mistake in improperly failing to define the specification to require EUA-approved KN95 masks necessary for use by health care personnel in health care settings." Proposed First Amended Complaint ¶ 67. ZFL also alleges that the agency "refused to cooperate with ZFL's multiple offers to cure." Are these factual allegations the same as the operative facts on which ZFL's certified claim is based? Certainly, the factual allegations in the proposed amended complaint are more detailed than in the certified claim. In its certified claim, ZFL does not elucidate on the "pretextual" actions that the agency allegedly took when rejecting ZFL's masks. Nevertheless, the allegations that ZFL now makes appear to be intended to provide a more fulsome explanation of how the original rejection was pretextual. Thus, we find that the operative facts underlying ZFL's certified claim are sufficiently similar to those upon which ZFL's implied duty breach claim is based to allow the Board to exercise jurisdiction over the new implied duty breach legal theory.

Although the Board's jurisdiction extends to the implied duty of good faith and fair dealing breach claim, to the extent that ZFL is raising an affirmative bad faith claim against the agency in paragraph 67 of its proposed amended complaint, the Board lacks jurisdiction to entertain it. "To prove bad faith by the Government, a contractor must establish, by clear and convincing evidence, that a government official acted with 'some specific intent to injure the [contractor].'" *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377 (quoting *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002) (quoting *Kalvar Corp. v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976))). Bad faith is not a required element of every implied duty breach claim, *CAE USA*, but, to the extent that any arguments that ZFL is raising depend on a finding of actual bad faith, ZFL would have to prove an intent by the agency to harm ZFL to prevail. ZFL's certified claim is devoid of any allegations regarding the agency's specific intent to harm him or of any examples of such intentional harm, rendering such an argument beyond the confines of the certified claim itself. Accordingly, we lack jurisdiction to consider any bad faith claim in this appeal.

## Decision

Because ZFL's amended complaint, including its new breach of the duty of good faith and fair dealing claim, is neither prejudicial, unduly delayed, nor futile, ZFL's motion for leave to amend is **GRANTED IN PART**, except to the extent that it alleges affirmative bad faith.

*Patricia J. Sheridan*
PATRICIA J. SHERIDAN
Board Judge

We concur:

*Harold D. Lester, Jr.*
HAROLD D. LESTER, JR.
Board Judge

*H. Chuck Kullberg*
H. CHUCK KULLBERG
Board Judge