UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS IN PART DENIED: March 8, 2007

CBCA 453

P.J. DICK, INCORPORATED,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

John C. Person of Person & Craver LLP, Washington, DC, counsel for Appellant.

Timothy C. Tozer, Office of Regional Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **DeGRAFF**, and **GOODMAN**.

GOODMAN, Board Judge.

Appellant, P.J. Dick, Incorporated, was awarded a firm, fixed price contract by the General Services Administration (GSA or Respondent) to construct a facility for the National Oceanic & Atmospheric Administration's National Environmental Satellite Data and Information Services in Suitland, Maryland. Appellant filed a claim alleging that it incurred additional excavation costs in the amount of $313,770. Respondent's contracting

officer issued a decision dated February 6, 2006, from which appellant appealed.[1] Thereafter appellant filed a complaint. Respondent has filed a motion to dismiss the third count of appellant's complaint. We deny the motion.

Background

Appellant's complaint contains thirty-four numbered paragraphs followed by three counts with additional numbered paragraphs. Each count realleges all the numbered paragraphs that precede it and sets forth an alternate legal theory upon which appellant bases its entitlement -- constructive change in Count I, defective specifications in Count II, and the rule of *contra proferentem* in Count III. Respondent has moved to dismiss the third count of the complaint on the basis that the count contains inconsistent factual allegations. It cites Federal Rule of Civil Procedure 8(e)(2),[2] which reads as follows:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has

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[1] This case was docketed at the General Services Administration Board of Contract Appeals (GSBCA) as GSBCA 16880. On January 6, 2007, pursuant to section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, the GSBCA was terminated and its cases, personnel, and other resources were transferred to the newly-established Civilian Board of Contract Appeals (CBCA). This case was docketed by the CBCA as CBCA 453. The holdings of the GSBCA and other predecessor boards of the CBCA are binding on this Board. *Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464 (Jan. 18, 2007).

[2] In its motion, respondent cites rules regarding pleadings of one of this Board's predecessor boards, the GSBCA, and decisions of that Board holding that in construing its own rules the GSBCA looked for guidance to the Federal Rules of Civil Procedure. *Unisys Government Systems, Inc. v. Environmental Protection Agency*, GSBCA 12070-P, 93-2 BCA ¶ 25,566 (1992); *see Elden-Rider, Inc. v. General Services Administration*, GSBCA 8643-R, 92-2 BCA ¶ 25,005. Pending the publication of interim rules for this Board, the Board and the parties will be guided in processing this appeal by the rules of the GSBCA, the Federal Rules of Civil Procedure, and orders issued by the Board.

> regardless of consistency and whether based on legal, equitable, or maritime grounds.

Relying on the above rule, respondent bases its motion to dismiss Count III upon federal case law that holds that Federal Rule of Civil Procedure 8(e)(2) does not permit a party to plead inconsistent factual allegations in the same claim. *E.g., In re Livent, Inc. Noteholders Securities Litigation*, 151 F. Supp. 2d 371, 406 (S.D.NY. 2001) ("[T]his [rule] cannot be construed as an invitation to incoherent, self-contradictory pleadings and . . . does not grant license to plead inconsistent assertions of fact within the allegations that serve as the factual predicates for an independent unitary claim."). Respondent asserts that Count III contains inconsistent factual assertions, in that numbered paragraphs 16 and 17 of the complaint state that there is no ambiguity in specific contract provisions and Count III realleges these and all other prior numbered paragraphs and states further:

> Assuming the relevant evidence is construed in a light most favorable to GSA, an ambiguity exists in the Contract Documents. . . . The ambiguity was latent, not patent. Where, as here, an order-of-precedence clause can be used to supplant one seemingly inconsistent term with another, there is no patent ambiguity. . . . The rule of *contra preferentum* [sic] requires that the ambiguity in the Contract Documents be construed in Appellant's favor and against GSA as the drafter of the contract.

Complaint ¶¶ 47, 48, 50.

Respondent concludes that "[i]t is readily apparent that Count III of the Complaint contains inconsistent allegations in the *same* claim. On the one hand, Appellant alleges that there is <u>no</u> ambiguity. Yet, on the other, Appellant alleges that there is an ambiguity." Respondent's Motion to Dismiss at 5. Since Count III realleges prior paragraphs of the complaint asserting the lack of ambiguity but relies upon a legal theory that requires a finding of ambiguity, respondent moves to dismiss Count III on the basis that it contains inconsistent factual assertions.

Appellant responds that it is cognizant of the requirement that it must rely upon consistent assertions of fact and explains that each of its three counts is pled in the alternative to the other two. Appellant's Opposition to Respondent's Motion to Dismiss at 3. Counts I and II are based upon legal theories which would result in entitlement to the appellant if the Board found the contract documents unambiguous, while Count III is based upon a legal theory that also would result in entitlement to the appellant even if the Board determined the contract documents ambiguous. Appellant states further:

> Appellant does not allege inconsistent facts. The only alleged inconsistency that Respondent can point to is Appellant's *characterization* of certain documents in Complaint ¶¶ 16 and 17 as being "unambiguous" and its characterization in Complaint ¶¶ 47, 48, and 50 that certain contract documents are "ambiguous." However whether the relevant documents are or are not ambiguous is a matter for the Board to decide, not the parties.

Appellant's Opposition to Respondent's Motion to Dismiss at 4.

We agree with appellant. In cases involving contract interpretation, parties often assert alternative claims and defenses prior to the Board's ultimate determination as to the ambiguity or lack of ambiguity of contract provision when the parties have good faith arguments supporting their positions in the event of either determination. *See, e.g., Grunley Construction Co. v. General Services Administration*, GSBCA 13476, 98-2 BCA ¶ 29,950 (both parties assert alternative claims and defenses based upon the Board's ultimate determination as to whether contract provisions are unambiguous or ambiguous); *Prince George Center, Inc. v. General Services Administration*, GSBCA 12289, 94-2 BCA ¶ 26,889 (appellant asserts alternative claims based upon unambiguity and ambiguity of the same contract provision).

In the instant case, appellant's pleading of two counts asserting its belief that the contract provisions are unambiguous does not provide a basis for dismissing the third count that relies upon a legal theory which would require a determination that the provisions are ambiguous.

Decision

Respondent's Motion to Dismiss Count III of appellant's complaint is **DENIED**.

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ALLAN H. GOODMAN
Board Judge

We concur:

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ANTHONY S. BORWICK
Board Judge

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MARTHA H. DEGRAFF
Board Judge