



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO STRIKE DENIED: June 6, 2018

CBCA 5907

WALKER DEVELOPMENT & TRADING GROUP INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Terrance Walker, President of Walker Development & Trading Group Inc., Reno, NV, appearing for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **GOODMAN**, and **CHADWICK**.

BEARDSLEY, Board Judge.

Respondent, Department of Veterans Affairs (VA), moves to strike paragraph 6, counts I through VI, and the section titled "Damages" of the complaint of appellant, Walker Development & Trading Group Inc. (Walker). VA asserts that the Board lacks jurisdiction to decide these portions of the complaint because they were not included in Walker's August 2 and 6, 2017, claims. VA asserts that the only issues presented in Walker's claims and over which the Board has jurisdiction in the appeal are the propriety of the termination for cause and the request for monetary relief in the amount of \$458,175.53.

In its August 2 claim, Walker not only challenged the basis for the termination for cause and asked that the termination for cause be converted to a termination for convenience,

but also claimed that the VA acted in bad faith; delayed, hindered and prevented its contract performance; and repudiated the contract first by pursuing other offers and then rebuffing Walker's inquiry as to other options by phone on July 28, 2017. Walker also asserted that it did not repudiate the contract and that it incurred excusable delay. In its August 6 claim, Walker included its request for its alleged costs arising from the VA's actions and reasserted its claim that the VA hindered, delayed and prevented Walker's contract performance; acted in bad faith; failed to disclose material information to Walker; and breached the contract. Walker claimed that the VA acted "in bad-faith terminating us when attempting to ask for further direction (and parsing our email out of context to justify termination), costs [sic] us additional time wasted with potential subcontractors." Walker claimed \$458,175.53 in monetary damages, to include costs incurred as a result of the VA's actions, costs incurred "bidding, rebidding, and working on obtaining the contract," lost profits, and damages for the loss of other contracts. Walker certified its claim as required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). The contracting officer denied both claims in their entirety, and Walker appealed to the CBCA the contracting officer's two final decisions.

In its complaint, Walker describes the same course of events that it alleged in its claims, but sometimes characterizes the events differently and uses different labels to set forth its legal theories. In paragraph 6(i), (ii), (iii),¹ (iv), (vi), and the section titled "Damages," Walker alleges that VA improperly terminated Walker, hindered its ability to perform, withheld material information, rebuffed its inquiry on July 28, 2017, as to other options, breached the contract, and acted in bad faith. In the "Damages" section and counts I, IV, and VI of the complaint, Walker also claims that it was improperly terminated for cause and claims VA abused its discretion, hindered performance, and breached the implied duty of good faith and fair dealing. In fact, count I is titled "Abuse of Discretion and Bad Faith," count IV is titled "Breach of Contract – Covenant of Good Faith and Fair Dealing," and count VI is titled "Breach of Contract – Illegal Constructive Termination due to VA's Failure to Cooperate and Hindering Performance." In paragraph 6, the "Damages" section, and count VI of the complaint, however, Walker characterizes its bad faith claim as VA acting maliciously, oppressively, and with the intent to injure and get rid of Walker; and in paragraph 6(iv) and (v) and counts II and III, Walker labels the breach of good faith and fair dealing as VA failing to give Walker a fair opportunity to compete or be considered for additional work. Walker states that the amount in dispute is \$458,175.53, which is the amount requested and certified in its August 6 claim.

The Board may not consider new claims a contractor failed to present to the contracting officer. *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017) (citing *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987)). "A claim is new when it 'present[s] a materially different factual or legal theory' of relief." *Id.* (quoting *K-Con Building Systems, Inc. v. United States*, 778 F.3d

¹ The complaint erroneously refers to 6(iii) as a second 6(ii).

1000, 1006 (Fed. Cir. 2015)). A claim before the Board is not required to rigidly adhere “to the exact language or structure of the original administrative CDA claim” presented to the contracting officer. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). It is enough that the claim to the contracting officer and the claim before the Board “arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery.” *Id.* “Materially different claims ‘will necessitate a focus on a different or unrelated set of operative facts.’” *Lee’s Ford*, 865 F.3d at 1369 (quoting *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)).

VA asserts that Walker’s complaint focuses almost entirely on alleged bad faith by VA, an issue VA believes was not raised in Walker’s claims. We do not read appellant’s claims as narrowly as VA does. In addition to bad faith, Walker alleged in its claims breach of contract, abuse of discretion, repudiation, delay, hindrance of performance, wrongful termination, and breach of the duty of good faith and fair dealing. While Walker’s complaint expands on the factual and legal theories asserted in its claims, the allegations in the complaint arise from the same operative facts and are not materially different. Also, the amount of monetary relief requested in the complaint is the same as requested and certified in its August 6 claim. Counts I through VI of the complaint likewise rely on the same operative facts and only in some cases present new legal theories or use different labels to assert the same legal theory for recovery of lost profits and other monetary relief claimed by Walker in its August claims. Accordingly, we have jurisdiction to decide the claims set forth in the complaint and deny the motion to strike.

Decision

Respondent’s motion to strike portions of appellant’s complaint for lack of jurisdiction is **DENIED**.

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

We concur:

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

Kyle Chadwick

KYLE CHADWICK
Board Judge