



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DECISION ON JURISDICTION TO HEAR APPEAL: May 29, 2018

CBCA 6021

MICHAELSON, CONNOR & BOUL,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Margaret A. Dillenburg of Law Offices of Margaret Dillenburg, P.C., Potomac, MD, counsel for Appellant.

Jonathan English, Dean Roy, and Julie Cannati, Office of General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **RUSSELL**, **O'ROURKE**, and **CHADWICK** (presiding).

Opinion for the Board by Board Judge **RUSSELL**. Board Judge **CHADWICK** dissents.

Appellant, Michaelson, Connor & Boul (MCB), seeks payment for services provided to the United States Department of Housing and Urban Development (HUD or agency) in support of an agency program for reacquiring certain properties from mortgagees. After filing the complaint in this appeal, the Board raised concerns about whether the claim presented to the contracting officer is the same claim that MCB presented on appeal. MCB was ordered to clarify whether it is seeking relief (1) under the contract identified in the notice of appeal, (2) under no contract, or (3) under a different contract. Based on its response, MCB was then ordered to show cause why the claim described in its complaint was based on the same operative facts as those in its claim presented to the contracting officer.

After a review of the record, including MCB's filings in response to the Board's orders, a majority of the panel finds that the Board has jurisdiction over this appeal.

Background

The Federal Housing Administration (FHA), an organizational unit within HUD, insures lenders against the risk of loss on loans that lenders finance for the purchase and, in certain instances, the rehabilitation of single family homes. In the event of default on an FHA insured loan, a lender acquires title to the property by foreclosure or other method, files a claim for insurance benefits, and conveys the property to HUD. As a result of this insurance program, HUD routinely acquires, and has a need to manage, a large inventory of single family homes.

In February 2010, HUD awarded a contract to MCB to serve as HUD's mortgagee compliance manager. The contract ended in September 2015. According to the contract's performance work statement, the mortgagee compliance manager's primary responsibility was to assist HUD with ensuring lender compliance with property conveyance requirements of HUD's real-estate portfolio. As the mortgagee compliance manager, MCB was responsible for both pre- and post-property conveyance services to ensure that HUD's interest was adequately protected.

After the contract ended, MCB submitted a claim to the contracting officer requesting payment in the amount of \$661,312.81, which MCB stated was incurred relevant to work performed "in connection to" the mortgagee compliance manager contract. In its claim, MCB alleged that, following the award of the contract, HUD asked MCB to perform extra work, or "extra-contractual work," identified as reacquisition services¹, and agreed to reimburse MCB for the cost of performing the work. MCB additionally alleged that from their words and actions, both HUD and MCB personnel were consistent in their shared belief that the reacquisition services were not expressly required under the mortgagee compliance manager contract awarded to MCB, and that MCB would need to be paid for the costs of performing these services.

The contracting officer denied MCB's claim, and MCB then filed a "Notice of Appeal & Complaint" (complaint) with the Board appealing the contracting officer's decision. In the first paragraph of its complaint, MCB states:

¹ "Reacquisition services" refers to the process by which HUD reacquires property after a mortgagee resolves title or property preservation issues.

Michaelson, Connor & Boul (“MCB” or “the Contractor”), hereby notices its intent to . . . appeal the denial of the Claim by the Contracting Officer, U.S. Department of Housing and Urban Development (“HUD”), . . . to reject the claim of MCB, under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109 (CDA) submitted to HUD on June 16, 2017 (the Claim) . . . requesting payment of costs due in connection with the Mortgagee Compliance Manager (MCM) contract. . . .

Further in its complaint, MCB states:

On November 9, 2017, HUD issued a Contracting Officer’s Final Decision in response to the MCB claim, denying the claim in its entirety. . . .

. . . .

By this submission, MCB hereby timely appeals the Contracting Officer’s Final decision denying the underlying MCB Certified Claim for Mortgagee Compliance Management Services, submitted on June 16, 2017.

In other sections of its complaint, MCB reiterates the basis of its claim. MCB alleges that during the period of the mortgagee compliance manager contract, HUD requested that MCB perform reacquisition services which, according to MCB, were not required by the terms of the contract. As it did in its certified claim to the contracting officer, MCB refers to this work as “extra work,” “extra-contractual work,” and “outside the scope” of the mortgagee compliance manager contract. Additionally, MCB alleges that HUD committed to reimbursing MCB for the reacquisition services, but failed to do so. In its complaint, MCB seeks the exact same monetary relief that it did in its certified claim submitted to the contracting officer.

After receiving MCB’s complaint, the Board ordered MCB, in its initial order on proceedings, dated February 7, 2018, to clarify the basis of its appeal. The order stated, in relevant part:

[T]he complaint does not plainly allege that the claim arises under a contract. Rather, the complaint alleges that the appellant performed “extra-contractual services,” which the appellant “agreed to do” at the request of unidentified “HUD personnel.” The certified claim used similar language. The Board awards money under the Contract Disputes Act only under valid procurement contracts. *E.g., Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1356 (Fed. Cir. 2011) (affirming dismissal on alternative grounds of lack of contracting

authority); *United Rentals, Inc.*, HUD BCA 03-D-100-C1, 06-1 BCA ¶ 33,131, at 164,188 (2004); *Great Northern Forestry Service*, AGBCA 85-260-1, et al., 90-2 BCA ¶ 22,668, at 113,885. “[T]he mere receipt of . . . services, even to the benefit of the Government, [does] not create an implied-in-fact contract to pay for them.” *Trauma Service Group v. United States*, 104 F.3d 1321, 1327 (Fed. Cir. 1997).

“The operative facts of a claim alleging the absence of a contract differ from the operative facts of a claim under a contract.” *Bank of America, National Association v. Department of Housing & Urban Development*, CBCA 5571 (Dec. 11, 2017). Accordingly, . . . the appellant shall **CLARIFY** in a filing with the Board whether it seeks relief (1) under contract C-OPC-23418, (2) under no contract, or (3) under a different contract, and if the latter, what facts alleged in the complaint would support a finding that this contract was formed.

In its response to this order, MCB stated that its underlying claim and this appeal seek payment for services rendered by MCB, as requested by HUD, *under* the mortgagee compliance manager contract. In this same response, MCB stated that its claim was submitted to “HUD on June 16, 2017, (the Claim) requesting payment of contract performance costs due in connection with services performed under the [mortgagee compliance manager contract].”

HUD subsequently answered MCB’s complaint and, after that, the Board ordered MCB to show cause as to whether the claim presented to the contracting officer was the same as presented in this appeal. The show cause order stated in relevant part:

MCB’s certified claim alleged that “HUD and MCB personnel were consistent in their shared belief that the reacquisition services [at issue] were outside the scope of the [subject] contract.” The complaint echoes this and further alleges, “HUD never disputed that ‘Reacquisition Services’ were outside the terms of the . . . Contract.” Notwithstanding this alleged “shared belief” that MCB was working extra-contractually (which HUD denies), MCB states in its March 7 filing that it seeks relief here “under” the mortgagee compliance contract.

The only way that the Board can see that MCB’s present claim for relief “under” the contract could be the “same claim” as its prior certified claim for compensation for services that *both parties allegedly agreed* were “outside the scope” of that contract – that is, for these theories to be based on the same “operative facts” – would be if the direction that MCB allegedly received from

HUD to perform the reacquisition services *came from someone with actual authority to modify the mortgagee compliance contract*. See, e.g., *Bay Ship & Yacht Co.*, DOT BCA 2913, 96-1 BCA ¶ 28,236 (contracting officer ordered contractor to remove asbestos outside contract scope). Under these facts, the certified claim and the complaint might both be liberally construed as alleging a constructive change. See John Cibinic, Jr., James F. Nagle & Ralph C. Nash, Jr., *Administration of Government Contracts* 389-420 (5th ed. 2016); cf. *California Business Telephones v. Department of Agriculture*, CBCA 135, 07-1 BCA ¶ 33,553 (program analyst lacked actual authority to order contract services).

. . . MCB shall . . . **SHOW CAUSE** why the Board should consider the claim before us the “same claim,” involving the same “operative facts,” as the claim set forth in the certified claim.

In response to the show cause order, MCB stated:

Concurrently filed with this response, MCB file[s] a Motion for Leave to File an Amended Complaint. MCB respectfully requests that its Motion for Leave to Amend its Complaint be incorporated by reference into this Response.

. . . MCB’s Amended Complaint deletes language from its initial Complaint regarding relief sought for services that were “outside the scope” of the contract. MCB’s Amended Complaint makes clear that its appeal of the Contracting Officer’s Final Decision is based upon services MCB performed and costs it incurred that constitute matters arising under or relating to [the mortgagee compliance manager contract]. Furthermore, MCB’s Amended Complaint is based upon the same operative facts arising under or related to as its certified claim for additional costs incurred performing the MCB Contract. These costs were incurred by MCB for work directed by Respondent that were beyond the requirements of the MCB Contract.

HUD, in its response to the show cause order, argued that MCB, in both its certified claim and this appeal, failed to allege sufficient facts reflecting that (1) someone with contracting authority ordered MCB to perform the reacquisition services, and (2) there is an adequate basis for a claim whether resting on a change order, a constructive change, or an implied contract given MCB’s assertion that the requested reacquisition services were “extra-contractual.” Further, HUD argued that, to the extent that MCB’s amended complaint seeks payment *under* the contract, the amended complaint is not the same claim as that presented to the Contracting Officer.

Discussion

I. Legal Standard

To pursue a claim under the Contract Disputes Act (CDA), a contractor must show the existence of a contract, express or implied, with an executive agency for the procurement of (1) property, other than real property in being; (2) services; (3) construction, alteration, repair, or maintenance of real property; or (4) the disposal of personal property. 41 U.S.C. § 7102(a). The CDA, however, does not define “claim.” Therefore, courts and boards look to the Federal Acquisition Regulation, which defines “claim” as a “written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.” 48 CFR 2.101 (2017). “[T]he phrase ‘as a matter of right’ in . . . [this] definition . . . requires only that the contractor specifically assert entitlement to the relief sought.” *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1265 (Fed. Cir.), *reh’g denied*, 186 F.3d 1379 (Fed. Cir. 1999). “That is, the claim must [merely assert] . . . a demand for something due or believed to be due. . . .” *Id.*

The Board “has jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency [with certain exceptions] . . . relative to a contract made by that agency.” 41 U.S.C. § 7105(e)(1)(B); *see also Engage Learning, Inc.*, 660 F.3d at 1353. To invoke the Board’s jurisdiction, the contractor’s complaint before the Board “must be based on the same claim previously presented to and denied by the contracting officer.” *Cerberonics, Inc. v. United States*, 13 Cl. Ct. 415, 417 (1987). In deciding whether a contractor has presented the same claim to the Board as it did to the contracting officer, we look to whether the two claims presented – the one to the contracting officer and the one to the Board – are “based on a common or related set of operative facts.” *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990). “If the [Board] will have to review the same or related evidence to make its decision, then only one claim exists.” *Id.*

II. MCB Establishes “Common Operative Facts” in Its Appeal

The allegations MCB raises in this appeal are fundamentally the same as those asserted in its claim to the contracting officer. In its certified claim to the contracting officer, MCB alleged that it was seeking payment “relevant to the performance of work . . . in connection to” the mortgagee compliance manager contract. In its appeal to the Board, MCB expressly states that it is challenging the contracting officer’s decision on its certified claim, and reiterates that it is seeking payment of costs “due in connection with” the mortgagee compliance manager contract. In both its certified claim and in its appeal to the Board, MCB

identifies the same facts in support of its claim – i.e., that HUD asked, and agreed to pay, MCB to perform reacquisition services not required by the terms of the mortgagee compliance manager contract, that MCB performed those services, and that HUD never paid MCB for this work. Further, in its appeal to the Board, MCB requests the same amount – to the penny – as requested in its certified claim to the contracting officer, \$661,312.81. Thus, MCB has relied on the same operative facts in its complaint filed at the Board as those in its claim presented to the contracting officer.

Although MCB uses various phrases to describe the relationship between its claim for reacquisition services and the mortgage compliance manager contract, the differences are de minimis and do not defeat a finding of jurisdiction. For example, in its claim to the contracting officer, MCB stated that it is seeking payment for services “relevant to the performance of work that was performed *in connection to*” the mortgage compliance manager contract, whereas in its complaint to the Board, it states that it is seeking “payment of costs due *in connection with*” that contract. In its response to the initial order, MCB stated that it is seeking “payment for services rendered by [it], as requested by HUD, *under*” the mortgage compliance manager contract and that the “services that form the basis for [its] underlying claim were performed *during the period*” of the mortgagee compliance manager contract. In its response to the show cause order, MCB stated that “its appeal of the Contracting Officer’s Final Decision is based upon services [that it] performed and costs it incurred that constitute matters *arising under or relating to*” the mortgage compliance manager contract. (Emphasis added.) Furthermore, in both its claim to the contracting officer and its complaint to the Board, MCB uses the terms “extra work,” “extra-contractual” work, and “outside the scope” of the contract to describe the reacquisition services at issue. In its response to the show cause order, MCB uses the phrase “beyond the requirements of the . . . Contract” to describe the reacquisition services.

We find these differences in semantics immaterial, and as such, they do not present an impediment to our jurisdiction. First, the “common or related set of operative facts” standard does not require that a contractor rigidly adhere to the exact language of its certified claim brought before the contracting officer in its appeal brought before the Board. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). And second, MCB, in its filings with the Board, unwaveringly identifies its certified claim and the operative facts alleged therein as the basis of its appeal.

III. MCB's Failure to Set Forth Facts Supporting the Existence of a Contract or Legal Theory for Its Claim Is No Hindrance to the Board's Jurisdiction

As HUD suggests, MCB, in both its certified claim to the contracting officer and its complaint to the Board, does not provide any facts related to the identity and conduct of any contracting official with the authority to have ordered the reacquisition services; nor does it provide any legal theory for its claim. At this juncture, however, we need not decide whether these or any other frameworks for a contract exist between MCB and HUD. *See Engage Learning, Inc.*, 660 F.3d at 1353 (contractor need only assert “a non-frivolous *allegation* of a contract with the government” to invoke Board’s jurisdiction); *Academy Partners, Inc. v. Department of Labor*, CBCA 4947, 16-1 BCA ¶ 36,463, at 177,685 (Board found that it had jurisdiction notwithstanding contractor’s failure to identify agency contracting official with authority to direct the services as described in claim; contractor, in its claim, merely stated that agency or agency employees directed the disputed work for which contractor sought payment). Indeed, such determinations are not jurisdictional, but rather ones on the merits of a claim. *Engage Learning, Inc.*, 660 F.3d at 1355; *see also Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 639-40 (Fed. Cir. 1989) (jurisdiction “is not defeated . . . by the possibility that [contractor’s] averments might fail to state a cause of action on which [the contractor] could actually recover.”) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

IV. The Dissent's Analysis Hinges on Factors Not Required to Establish Jurisdiction

There are a few points from the dissent that we wish to address. First, the dissent states that we rely solely on the complaint for our decision. This is evidently not the case. Nevertheless, we do believe that MCB’s complaint alleged sufficient facts to establish the jurisdiction of the Board – without the necessity of further clarification.

Second, the dissent takes issue with the structure of MCB’s complaint before the Board – specifically, that “it contains no separate counts, headings, or other labels specifying a legal theory of relief.” Yet, our rules place no such requirements on the filing of complaints. The rule on pleadings states:

The complaint should set forth the factual basis of the claim or claims, with appropriate reference to the contract provisions, and should state the amount in controversy, or an estimate thereof, if any and if known. No particular form is prescribed for a complaint, and the Board may designate the notice of appeal, a claim submission, or any other document as the complaint, either on its own initiative or on request of the appellant, if such document sufficiently states the factual basis and amount of the claim.

Rule 6(b) (48 CFR 6101.6(b) (2017)).

The Board's rules do not contain a requirement for the form of the complaint (i.e., no headings or labels needed). Indeed, the Board's rule on pleadings comports with established precedent of the Federal Circuit. *See Placeway Construction Corp.*, 920 F.2d at 908 ("In fact, this court de-emphasized the importance of the form in which claims are submitted, stating, 'We know of no requirement in the Disputes Act that a "claim" must be submitted in a particular form or use any particular wording.'" (quoting *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987))).

Third, contrary to the dissent's assertion, the Board's rule on complaints does not require that an appellant identify a theory of relief. *See* 48 CFR 6101.6(b). Even if MCB had identified one theory in its claim before the contracting officer and another before the Board, we would still have jurisdiction as long as the theories are based on the same operative facts. *See Quality Control International v. General Services Administration*, CBCA 5008, 17-1 BCA ¶ 36,675, at 178,586. In *Quality Control International*, for example, the Board found jurisdiction by focusing on the *factual allegations* presented in the appellant's constructive change claim to the Board and the appellant's price adjustment claim presented to the contracting officer. *Id.* In making its finding, the Board stated, "In evaluating whether two legal theories share substantially the same operative facts, we have to take a common-sense look at the degree to which the facts underlying both theories are intertwined and interrelated, considering whether 'the same or related evidence' is relevant to both theories." *Id.* at 178,586-87 (quoting *Placeway Construction Corp.*, 920 F.2d at 907); *see also JRS Management v. Department of Justice*, CBCA 3053, 13 BCA ¶ 35,235, at 172,996-97 ("The fact that appellant asserts differing legal theories and seeks greater relief does not convert claim 2 into a new claim, as it arose from the same operative facts as those in claim 1. . .").

Finally, the dissent, agreeing with HUD, would deny jurisdiction because MCB, in its response to the initial order, stated that its claim seeks payment for services rendered by MCB, as requested by HUD, *under* the mortgagee compliance manager contract. The dissent argues that this language suggests a fundamentally different claim than that presented to the contracting officer – i.e., that MCB's claim to the contracting officer was based on work outside the scope of its contract with HUD. However, we believe that the dissent relies too much on this one line from just one of MCB's filings in deciding that, in the dissent's view, the Board lacks jurisdiction. The dissent ignores that MCB, in its response to the initial order, never stated that it was abandoning the facts presented in its underlying claim or in its complaint to the Board. And when subsequently proposing to amend its complaint in response to the show cause order, MCB stated that its amended complaint would be "*based upon the same operative facts arising under or related to its certified claim* for additional costs incurred performing the" mortgagee compliance manager contract. (Emphasis added). MCB additionally stated that it was seeking payment for "costs [that] were incurred by [it]

for work directed by [HUD] that were *beyond the requirements of the MCB Contract.*² (Emphasis added).

Although we are not ruling on MCB's motion for leave to amend, we would grant it. As noted by the Board in a previous decision, "[f]ederal courts are specifically directed by statute to permit amendments of defective jurisdictional allegations[.]" *See Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,604 (citing 28 U.S.C. § 1653). In that same decision, the Board explained that, "[e]ven without regard to that statute, it is clear that, as a general principle, courts have wide discretion to look to the 'whole record' if an appellant 'fail[s] to properly allege' facts supporting jurisdiction and that insufficient allegations 'will not defeat the jurisdiction of the [tribunal] if, as a matter of fact,' review of the record establishes a basis for jurisdiction." *Safe Haven Enterprises, LLC*, 15-1 BCA at 175,604 (quoting *Kelleam v. Maryland Casualty Co. of Baltimore*, 112 F.2d 940, 943 (10th Cir. 1940), *rev'd on other grounds*, 312 U.S. 377 (1941)).

In summary, we are mindful of the limits of our jurisdictional review here – whether the claim that MCB presented to the contracting officer and its complaint to the Board are "based on a common or related set of operative facts." For reasons discussed herein, we believe that they are. At this point, demanding that MCB produce facts so that we might determine (1) whether the framework for a contract exists between MCB and HUD for the reacquisition services (as HUD suggests) and (2) whether MCB has set forth a viable legal theory for its claim (per the dissent) would put the Board in a position that the Federal Circuit has indicated must be avoided, i.e., "confus[ing] or confla[ting] . . . subject matter jurisdiction and the essential elements of a claim for relief." *Engage Learning, Inc.*, 660 F.3d at 1353.

² By our determination herein, we are not saying that MCB's filings in response to the orders have been a model of clarity, only that the company has said enough to preserve the jurisdiction of the Board.

Decision

Based on the foregoing, the Board has **JURISDICTION TO HEAR MCB's APPEAL**.

Beverly M. Russell

BEVERLY M. RUSSELL

Board Judge

I concur:

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE

Board Judge

CHADWICK, Board Judge, dissenting.

This case presents the closest “same claim/new claim” issue I have come across. I do not believe there are precedents directly on point. As the presiding judge responsible for ordering the briefing of the issue, I almost concluded that we have jurisdiction to decide the appeal, for reasons similar to those stated by my colleagues in the majority. I respectfully dissent from the finding of jurisdiction. I believe the majority (1) places too little weight on the appellant’s (MCB’s) emphatic descriptions of its claim in, respectively, MCB’s certified claim and its filings with the Board; (2) fails to specify clearly the “operative facts” that the majority believes MCB’s certified claim and its claim “under the contract” in this litigation share; (3) relies on precedents that address jurisdictional issues that differ from the “same claim/new claim” issue presented here; and (4) cites a decision of our Board which, to the extent it is relevant, supports my position on jurisdiction, rather than the majority’s.

When we compare one “claim” to another, we should quote them. The majority quotes only the complaint, which, unlike in a federal trial court, “generally” does not “establish[] the bounds of [our] jurisdiction.” *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,603; *see also id.*; *Strawberry Hill, LLC v. General Services Administration*, CBCA 5149, 16-1 BCA ¶ 36,561, at 178,065 (both focusing jurisdictional analyses on the claim, the agency decision, and the claim on appeal, rather than the complaint). As the majority explains, the crux of the parties’ dispute on the merits is whether the contract required MCB to perform “reacquisition services.” In a

declaration attached to its certified claim, an MCB employee characterized those services as “related to responding to requests by mortgagees for a second acquisition of a case by HUD, . . . analyzing the request and determining approval or denial, reactivating the case into HUD’s inventory, and notifying all parties the property was again owned by HUD.” The core allegations in the claim that MCB certified to the contracting officer are:

From the start of the Contract, it became clear to both HUD and MCB directors and managers that HUD was not planning to perform Reacquisition Services using HUD personnel. MCB Executive Director discussed the terms of the . . . Contract in detail with several persons from HUD, namely Mr. William Collins, Ms. Sharon Lundstrom, Mr. Matt Matrin and Mr. Craig Karnes, at the beginning of the Contract. HUD personnel communicated to MCB that HUD would have MCB perform those extra functions and HUD would thereafter reimburse MCB for the cost of providing the extra services.

From the beginning of the . . . Contract, MCB agreed to do the extra work, and assigned specific MCB employees to perform those services. HUD was familiar with the MCB personnel that performed the Reacquisition Services and those MCB personnel were in contact with HUD personnel pertaining to the performance of that work throughout the term of the Contract.

At no time . . . did any person at HUD ever dispute the fact that “Reacquisition Services” were not covered by the terms of the . . . Contract. From their words and actions, it was clear that both HUD and MCB personnel were consistent in their shared belief that the reacquisition tasks were outside the scope of the . . . Contract, and MCB would need to be paid for performing those services by HUD.

After its claim was denied, MCB filed a complaint as its notice of appeal to the Board. The complaint echoes and expands somewhat upon the certified claim, but, like the claim, it contains no separate counts, headings, or other labels specifying a legal theory of relief. The complaint does, however, describe the reacquisition services as “extracontractual” six times. That is why, to join the issues and process the case expeditiously, *see* 41 U.S.C. § 7105(g)(1) (2012), I ordered MCB to clarify “whether [MCB] seeks relief (1) under [the written] contract . . . , (2) under no contract, or (3) under a different contract, and if the [third], what facts alleged in the complaint would support a finding that this contract was formed.” MCB responded in March 2018 that “the underlying Claim, and this Appeal, seek payment for services rendered by MCB, and requested by HUD, under [the] Contract.”

That is how the jurisdictional issue has been framed ever since. The exact words of the complaint are unimportant. MCB argues that a claim “under” the written contract is the “same claim” that it certified to the contracting officer. The respondent (HUD) disagrees. I think it is a close call but that HUD is right. The controlling question is whether MCB still intends to litigate the “operative facts” of its certified claim. *Lee’s Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017). This is “an issue of law” that we must decide based on the elements of the claim or claims. *Id.* at 1369-70. I believe MCB has, in its filings, abandoned its original “operative facts.” The historical events alleged in the certified claim were that MCB performed “extra work” that MCB and HUD “consistent[ly]” agreed—and that no one “ever dispute[d]”—was “not covered by” and was “outside the scope of” the written contract. I disagree with the majority’s view that this factual theory is “fundamentally the same” as a claim that some language *in the written contract* entitles MCB to relief, as MCB now intends to argue. “The operative facts of a claim alleging the absence of a contract[ual duty] differ from the operative facts of a claim under a contract.” *Bank of America, National Ass’n v. Department of Housing & Urban Development*, CBCA 5571, 18-1 BCA ¶ 36,927, at 179,893 (2017) (citing *Lumbermens Mutual Casualty Co. v. United States*, 654 F.3d 1305, 1316-17 (Fed. Cir. 2011)), *appeal docketed*, No. 18-1816 (Fed. Cir. April 13, 2018); *see also id.* (Lester, J., concurring in part and dissenting in part) (agreeing “that we lack jurisdiction to entertain the unjust enrichment claim presented by appellant . . . because it is not encompassed within the certified [contract] claim”); *CB&I AREVA MOX Services, LLC v. Department of Energy*, CBCA 5395, 17-1 BCA ¶ 36,591, at 178,217-18 (2016) (holding that a claim that “require[d] only an analysis of the contractual language” differed from a claim based on the agency’s post-contracting “actions and their impacts”); *North Wind, Inc. v. Department of Agriculture*, CBCA 1779, 10-1 BCA ¶ 34,419, at 169,904-05 (holding that a differing site conditions claim differed from a constructive change claim, because “[t]o evaluate [the latter] claim, the contracting officer would have to review assertions as to a change in the project design, rather than assertions as to the project as designed”). MCB did not base its certified claim on any provision, clause, or even a single word of the written contract.

The majority cites some “same claim/new claim” cases, but it relies on other precedents that address different issues. The citation of *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346 (Fed. Cir. 2011), for the proposition that a contractor need only allege (and not prove) a contract to show that a dispute arises under or in connection with a contract for purposes of the Contract Disputes Act, might be read to suggest that the distinction between alleging and proving a contract is at issue here. It is not. All agree that we must compare the *allegations* of the certified claim to MCB’s *allegations* in litigation to decide whether they form the same claim. The citation of *Academy Partners, Inc. v. Department of Labor*, CBCA 4947, 16-1 ¶ BCA 36,463, is instructive, since the contractor in that case “allege[d] that it entered into *either an oral or implied-in-fact contract . . . after the base period*” of its written

contract, and we held we had jurisdiction to decide a claim under “either an implied-in-fact contract or, possibly, an enforceable oral contract,” *id.* at 177,683, 177,686 (emphasis added)—precisely the types of claims that MCB chose *not* to pursue by unambiguously advising us that its claim before the Board arises, instead, “under” its express, written contract with HUD. I would dismiss the appeal without prejudice for lack of jurisdiction.

Kyle Chadwick
KYLE CHADWICK
Board Judge