UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR PARTIAL DISMISSAL DENIED: February 27, 2019

CBCA 5168, 6298

AMEC FOSTER WHEELER ENVIRONMENT & INFRASTRUCTURE, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Chad V. Theriot and William E. Underwood of Jones Walker LLP, Atlanta, GA, counsel for Appellant.

Colleen M. Burnidge and Amy M. Siadak, Office of the Solicitor, Department of the Interior, Lakewood, CO, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **VERGILIO**, and **CHADWICK**.

CHADWICK, Board Judge.

This three-year-old case about construction work in the historic prison on Alcatraz Island in California's San Francisco Bay is set for hearing in May 2019. The appellant, then called Amec Foster Wheeler Environment & Infrastructure, Inc., but now renamed Wood Environment & Infrastructure Solutions, Inc. (Amec), filed CBCA 5168 in January 2016. In this decision, we address claims that Amec added to the case when it filed now-consolidated CBCA 6298 in October 2018. The respondent, Department of the Interior (DOI), argues that Amec's amended complaint in CBCA 6298 fails to state claims of superior knowledge (count one) and negligent estimate (count two) on which the Board could grant relief. Because both counts set forth triable claims, we deny the motion.

Background

The National Park Service (NPS), a DOI component, awarded Amec the task order at issue in September 2011. The work consisted of stabilization and repairs in the underground citadel and in the shower rooms of the Alcatraz Cellhouse for a fixed price of $3,613,617. Amec alleges that it substantially completed the project in June 2014.

In CBCA 5168, Amec appealed a contracting officer's decision denying a certified claim for an equitable adjustment and an extension of 521 days. Amec's complaint in CBCA 5168, filed in January 2016 with its first notice of appeal, seeks $12,723,467 for Amec and two subcontractors under theories of constructive change and breach of the duty of good faith and fair dealing. To condense greatly (as the claims in CBCA 5168 do not directly affect our decision here), Amec essentially alleges in CBCA 5168 that NPS provided inadequate specifications and significantly changed the work, which caused, among other things, the default of Amec's primary construction subcontractor, which Amec replaced, after a delay, with a more expensive subcontractor.

During discovery in CBCA 5168, Amec decided to allege alternative grounds for largely overlapping monetary relief. In August 2018, Amec submitted a new certified claim to the NPS contracting officer for $13,236,781, an amount that Amec described in the claim as "the costs it incurred to complete the project." The grounds for relief in this claim were that NPS withheld superior knowledge from Amec prior to award, negligently performed an estimate that affected the statement of work, and breached a "pre-award duty of good faith and fair dealing" by those same actions. The contracting officer denied the August 2018 claim in October 2018. Amec appealed to the Board nine days later (CBCA 6298[1]) and promptly abandoned the "pre-award duty" theory by filing an amended complaint containing only the superior knowledge and negligent estimate counts. The Board granted Amec's unopposed motion to consolidate the appeals.

Amec's amended complaint in CBCA 6298 alleges that, whereas "CBCA 5168 involves Amec's claims that arose primarily *after* contract award," CBCA 6298 "involves claims arising principally *before* contract award" and "operative facts" that Amec "only recently" learned during discovery in the first appeal.

The new factual allegations in Amec's August 2018 certified claim and in its amended complaint in CBCA 6298 are, in essence, that, based on analyses by an engineering firm

[1] Amec also appeals in CBCA 6298 a government claim of $118,506.47 asserted by the NPS contracting officer in October 2018. That claim is not at issue here.

retained by NPS while the agency was preparing the solicitation, NPS either knew or should have known that (1) the Alcatraz prison was "crumbling" faster than bidders were ultimately told, and that (2) the contractor would need to replace more structural beams and provide the beams with more extensive shoring than the statement of work indicated. Had NPS disclosed the information it possessed, Amec alleges, "bidders would have known that the work . . . would be far more than basic 'patch' and 'repair' jobs," which is how Amec characterizes the task order as awarded.

Amec does not allege with any specificity, either in its August 2018 certified claim or in its amended complaint in CBCA 6298, the sequence of events by which NPS's alleged withholding of superior knowledge or its negligent misuse of an estimate caused Amec to incur more than $13 million in damages. The amended complaint in CBCA 6298 alleges in conclusory terms that the quantum "represents the total increased costs that Amec was forced to incur on the project as a result of NPS's breaches." We discuss the amended complaint in more detail below, in the context of the parties' arguments.

DOI filed a motion under Board Rule 8(e) (48 CFR 6101.8(e) (2018)) to dismiss the superior knowledge and negligent estimates counts of Amec's amended complaint in CBCA 6298 for failure to state claims. The motion is fully briefed.[2]

Discussion

DOI argues that Amec's claims of superior knowledge and negligent estimate are "either barred by the statute of limitations or insufficiently plead[ed]." As to each count, DOI argues that "Amec knew as of January 2012," when it began work, "that the solicitation allegedly did not reflect the conditions [that Amec] actually encountered," and that, in any event, the pleadings, including the documents cited in and attached to the amended complaint in CBCA 6298, establish that NPS did not give Amec misleading information. DOI further argues that Amec inadequately alleges damages and should litigate its superior knowledge and negligent estimate claims as constructive change claims instead.[3]

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[2] Amec's motion to file a surreply is denied.

[3] In addition, DOI departs from the two-count structure of the amended complaint and addresses some factual allegations as "claims," arguing, for example, that we should dismiss "Amec's claim that the NPS should have informed Amec that its proposal price was too low" and "Amec's claim that the NPS's actions were improperly motivated by funding problems" (capitalization altered). Consistent with Amec's briefing, we treat the legal theories of relief set forth in the two counts at issue as Amec's "claims."

We apply essentially the same standard as would a federal trial court when ruling on a motion to dismiss for failure to state a claim. Rule 8(e) ("In deciding such motions, the Board looks to Rule 12(b)(6) of the Federal Rules of Civil Procedure for guidance."). Amec must point to factual allegations that, if true, would "state a claim to relief that is plausible on its face" when we "draw all reasonable inferences in favor of the claimant." *Bell/Heery v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Kellogg Brown & Root Services, Inc. v. United States*, 728 F.3d 1348, 1365 (Fed. Cir. 2013)). We decide legal issues for ourselves, and we may treat any document that is incorporated in or attached to the complaint as part of the pleadings. *See Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789-90; Fed. R. Civ. P. 10(c).[4]

"A breach of contract claim requires two components: (1) an obligation or duty arising out of the contract and (2) factual allegations sufficient to support the conclusion that there has been a breach of the identified contractual duty." *Bell/Heery*, 739 F.3d at 1330. Amec has alleged the "components" of a timely superior knowledge claim and a timely negligent estimate claim in enough detail to overcome the motion to dismiss and proceed to the hearing, where DOI may renew its arguments that the claims are time barred or meritless.

In arguing that Amec's two new counts are time barred, DOI pays insufficient attention to the legal distinctions between Amec's original claims in CBCA 5168 and the claims in CBCA 6298. The Contract Disputes Act requires a contractor to present a claim for a decision by the contracting officer "within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A) (2012); *see* Federal Acquisition Regulation (FAR) 33.206(a) (48 CFR 33.206(a)) (same, unless shortened by mutual agreement). By regulation, a claim accrues "when all events[] that fix the alleged liability . . . and permit assertion of the claim[] were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred." FAR 33.201. Amec's claims accrued when Amec "should have known that it had been damaged" by the Government's alleged actions in breach of the contract. *Ariadne Financial Services Proprietary Ltd. v. United States*, 133 F.3d 874, 878 (Fed. Cir. 1998).

The "should have known" element of the analysis is especially significant if, as here, the contractor alleges that the Government itself knew or should have known things before award that it failed to tell the contractor. When should we expect a reasonable contractor to

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[4] The latter principle disposes of Amec's argument that we should treat DOI's motion as one for summary judgment because DOI cites the shoring specifications and other contract documents. Those documents are not "extrinsic evidence," as Amec contends.

realize this? DOI, as noted, argues that Amec could have asserted its superior knowledge and negligent estimate claims as soon as Amec arrived on the job in January 2012. DOI argues that "Amec could have established that NPS had knowledge of the condition of the building by the mere fact that NPS owned and operated the facility" and "had detailed specifications and designs" for Amec's work, and that, "[i]f the quantities and descriptions in the contract were radically incorrect" due to a misestimate, Amec should have realized this when Amec was "actively engaged in developing a shoring plan" in early 2012.

We agree with Amec that the allegations of its amended complaint, taken as true, make it plausible that Amec did not know enough to "permit assertion of" its new claims, FAR 33.201, until Amec took discovery in CBCA 5168. *Cf. Kellogg Brown & Root Services, Inc. v. Murphy*, 823 F.3d 622, 627 (Fed. Cir. 2016) (holding that a claim for subcontract costs accrued when the subcontractor sought a sum certain from the contractor). Asserting a superior knowledge claim requires alleging that "(1) [the] contractor undertook to perform without vital knowledge of a fact that affect[ed] performance costs or duration; (2) *the government was aware* the contractor had no knowledge of and had no reason to obtain such information; (3) any contract specification supplied misled the contractor or did not put it on notice to inquire; and (4) *the government failed to provide* the relevant information." *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000) (emphasis added); *see also AT&T Communications, Inc. v. Perry*, 296 F.3d 1307, 1312 (Fed. Cir. 2002). Amec's amended complaint alleges that "NPS had knowledge [before award] of Alcatraz's continually deteriorating condition [and] unique load paths," and of the harmful effects that the deterioration and the load paths could have on the project in combination, which information Amec "did not have," "could not have otherwise discovered," and "could not have been reasonably expected to" acquire. Amec further alleges that it "only learned of" the extent of the agency's preaward knowledge in discovery in CBCA 5168. If proven at the hearing, those allegations could make the superior knowledge claim timely. *Cf. Japanese War Notes Claimants Association v. United States*, 373 F.2d 356, 358-59 (Ct. Cl. 1967); *Eden Isle Marina, Inc. v. United States*, 113 Fed. Cl. 372, 486-87 (2013) (ruling on partial trial findings that a breach claim based on superior knowledge of "escalating cost estimates for building [a] road . . . could not have accrued before" the agency released the estimates). That is reason enough to deny the agency's motion to dismiss count one as time barred.

We are not convinced that "negligent estimate" is the right legal label for the claim asserted in count two of the amended complaint in CBCA 6298, alleging that NPS failed to use the engineering studies available to it in preparing the statement of work. In its brief, Amec cites cases in which a requirements contract or a similar vehicle included an estimate of the variable quantity of goods or services that the Government might order under the contract. *E.g.*, *Medart, Inc. v. Austin*, 967 F.2d 579 (Fed. Cir. 1992) (requirements contract); *Chemical Technology, Inc. v. United States*, 645 F.2d 934 (Ct. Cl. 1981) (quasi-requirements

contract for military food service); *Atlantic Garages, Inc*., GSBCA 5891, 82-1 BCA ¶ 15,479 ("requirements-type services contract"). Here, by contrast, Amec alleges that NPS failed to apply a "54% escalation and degradation factor" recommended by an engineering firm when NPS developed the statement of work, which caused NPS to overestimate how much of the work would be "repairs" and to underestimate how much would be "replacement." Like DOI, we do not see exactly what NPS's alleged "negligence" has to do with what otherwise looks like an ordinary defective specifications or constructive change claim under a fixed-price contract. Nonetheless, as Amec describes its negligent estimate claim as an "alternative" to its superior knowledge claim, based on "similar" "operative facts," we find, for similar reasons, that the amended complaint plausibly alleges that Amec could not have known about the allegedly "negligent" failure to apply the "escalation and degradation factor" until Amec received the engineering documents in discovery. We will not dismiss this claim (whatever it should be labeled) as time barred at the prehearing stage.

DOI's contention that Amec could have asserted superior knowledge and negligent estimate claims as soon as it started work in 2012 implies that a contractor should consider asserting every conceivable legal theory of relief as soon as it encounters an unforeseen condition. We cannot endorse that view. As DOI acknowledges, Amec's claims at issue here differ in their operative facts from constructive change or differing site conditions claims. *Cf. Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1370-71 (Fed. Cir. 2017) (explaining that superior knowledge and misrepresentation claims differ in their operative facts from a claim of mutual mistake). A contractor cannot in good faith assert a claim based on withholding of superior knowledge or similarly misleading conduct unless the contractor has a solid evidentiary basis to allege such conduct.

Turning to DOI's position on the merits, the agency seeks dismissal of the superior knowledge count "because it is clear from the pleadings that the contract specifications were not misleading, or at the very least put Amec on notice to inquire about what load information would be provided." Suffice it to say this is not "clear from the pleadings," given the myriad technical issues involved. DOI's factual defense might prevail at the hearing. But as noted above, Amec's amended complaint alleges that the agency withheld from Amec specific, material information that only the agency knew and that a reasonable contractor in Amec's position would have expected the agency to share. In ruling on a motion to dismiss for failure to state a claim, we must accept those factual allegations as true. We may not draw opposite inferences based on factual or technical context that does not appear in the specifications or elsewhere in the pleadings. *See Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc*., 748 F.2d 774, 779 (2d Cir. 1984); *cf. Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974) (a document incorporated in the pleadings may trump the complaint's allegations and support dismissal if it "reveals facts which foreclose recovery as a matter of law").

DOI attacks the merits of Amec's negligent estimate count on multiple grounds. Again, we cannot embrace any of them on a motion to dismiss. DOI first argues that the estimates used to develop the solicitation were solely for the Government's benefit and were not incorporated in the task order. Amec does not allege, however, that NPS incorporated an estimate directly in the task order. It alleges that NPS used estimates to develop the statement of work, and that misuse of an estimate led to defects in the contract. As noted above, we are not sure that "negligent estimate" is what this allegation should be called, but the lack of express incorporation is not grounds to dismiss the claim. DOI further argues that the amended complaint "does not cite to a single estimated quantity that was deficient in the Solicitation." That is true, but Amec is not bringing a fraud or mistake claim that it must plead with particularity. *See* Fed. R. Civ. P. 9(b). Amec's broad-brush allegation that "estimated quantities" and "units of measure" in the contract were "inadequately prepared" to Amec's detriment is "sufficient to support the conclusion that there has been a breach of [a] contractual duty." *Bell/Heery*, 739 F.3d at 1330; *see generally Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1289 (Fed. Cir. 2000) (defective specifications constitute a "breach[of] the implied warranty" associated with the specifications).

DOI argues that Amec's allegations of damages in the amended complaint are conclusory. Again, that is true but not fatal to the claims. Amec alleges that it incurred money damages. DOI cites no authority, and we know of none, requiring further elaboration of breach damages in a complaint. *Cf. Bell/Heery*, 739 F.3d at 1330 (stating the "two components" of a breach claim). DOI cites appellate decisions analyzing damages claims after a grant of summary judgment or a trial. *E.g.*, *San Carlos Irrigation & Drainage District v. United States*, 877 F.2d 957 (Fed. Cir. 1989); *Commerce International Co. v. United States*, 338 F.2d 81 (Ct. Cl. 1964). Those decisions may be apposite after the hearing.

Finally, DOI urges us to dismiss counts one and two of the amended complaint in CBCA 6298 on the grounds that Amec could obtain the same relief under the change orders and constructive change theories that are at issue in CBCA 5168. The short answer is that Amec does not seem to think so and, as the claimant, is "master of its complaint." *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018). Indeed, Amec seeks more money in its amended CBCA 6298 complaint than in its CBCA 5168 complaint. DOI argues that the parties' "dispute will be resolved through the claims previously submitted in CBCA No. 5168." Maybe, maybe not. We will know after the hearing.

Decision

DOI's motion to dismiss counts one and two of the amended complaint in CBCA 6298 is **DENIED**.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge