



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: May 12, 2020

CBCA 6621

ITS GROUP CORP,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Porcia Hopkins, President of ITS Group Corp, Southaven, MS, appearing for Appellant.

Jennifer McVey Thomas, Office of the General Counsel, Department of Agriculture, Juneau, AK, counsel for Respondent.

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

SOMERS, Board Judge.

The Department of Agriculture (USDA) asks us to dismiss ITS Group Corp's (ITS Group) claim for progress payments because appellant allegedly failed to "plausibly allege facts to support its claim or justify any payment by the Government under this contract." We deny the motion.

Background

We base this summary on the complaint's factual allegations, which we treat as true for this purpose, and on contract documents attached to or integral to the complaint.¹

The Government awarded ITS Group a firm, fixed-price contract to paint eight buildings near Kenai Lake, a remote location in Alaska's Chugach National Forest. The contract incorporated by reference several standard clauses, such as Federal Acquisition Regulation (FAR) 52.246-12 (Inspection of Construction), FAR 52.236-3 (Site Investigation and Conditions Affecting the Work), FAR 52.236-2 (Differing Site Conditions), and FAR 52.232-5 (Payments Under Fixed-Price Construction Contracts). The contract stated that payment would be made in "[l]ump sum quantities," with payment for each building constituting a lump sum.

The eight buildings to be painted consisted of cedar-sided structures. The contract provided detailed specifications describing the methods and materials to be used in preparing, painting, and finishing the buildings. The contract solicitation encouraged potential bidders to visit the site before bidding. ITS Group elected not to visit the site prior to submitting its bid on June 21, 2019.

The USDA awarded the contract to ITS Group on July 18, 2019. The contracting officer issued a notice to proceed to ITS Group on August 5, 2019. ITS Group employees arrived at the job site for the first time on August 8, 2019, for an initial walkthrough and to pick up samples of the required paint colors. ITS Group began work on the contract the following day, a Friday. While the Government's inspector remained on site during the first day of contract performance, no government representative observed the work performed by ITS Group over the weekend of August 10–11. ITS Group completed three buildings by the end of the weekend.

¹ ITS Group is not being represented by an attorney, and, "although we may not necessarily give a corporate representative handling a corporation's appeal the same kind of procedural latitude and leniency as we would a pro se appellant representing his or her own personal interests, *see 1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, we recognize that a corporate representative is less likely than an attorney to be fully versed in the Board's rules and procedures." *Woolery Timber Management Inc. v. Department of Agriculture*, CBCA 6031, 18-1 BCA ¶ 37,096. Pursuant to CBCA Rule 6(a) (48 CFR 6101.6(a) (2019)), we designate the notice of appeal and the supplements to the notice of appeal to be ITS Group's complaint.

On August 13, 2019, ITS Group contacted the contracting officer for an inspection of the work performed so that it could submit an invoice and receive progress payments. The contracting officer responded that, based on photographs and communication with government representatives on site, “the work is not acceptable as of yesterday.” ITS Group’s representative at the site also requested a formal walkthrough. When the contracting officer’s representative (COR) arrived at the work site on August 15, 2019, he inspected the site and reported that “[t]he work [was] woefully inadequate on all three buildings . . . Every wall of every building had some form of deficiency falling short of the contract requirements.” The COR concluded that “[t]he defects on all buildings are so numerous that a progress payment is not recommended since there is not a single wall among the three buildings that fully meets the Specification requirements; most fall far short of meeting the requirements.” The representative also observed that ITS Group appeared to have demobilized from the site, removing all supplies from the storage location.

On August 16, 2019, the contracting officer sent ITS Group a cure notice and notice of noncompliance, based upon its failure to fulfill the specifications and its demobilization from the work site. The contracting officer updated the cure notice on August 19, 2019, requesting a schedule for completion of the work and also requesting that ITS Group correct defective work.

ITS Group responded, asserting that ITS Group had completed the three buildings per the specifications and sought progress payments before it would return to complete the remaining buildings. ITS Group noted that it had informed the inspectors on site that the buildings to be painted were too degraded to make painting effective, and that the siding would need to be replaced, stating that the parties “knew from the beginning we were dealing with a rotten damaged wooden structure.” ITS Group submitted a written claim to the contracting officer, seeking \$46,250, “for the cost impact of the below described changes . . . we are asking to be paid for honest work done and following the solicitation 100%.” ITS did not specifically respond to the cure notices.

The contracting officer denied ITS Group’s claim on September 27, 2019. The final decision cited three contract clauses. First, the contracting officer cited to the provision that encouraged bidders to conduct a site visit, concluding simply that “ITS Group did not visit the site.” Second, the contracting officer cited to FAR 52.236-2, Differing Site Conditions, and stated that ITS Group did not provide notice as required. Third, citing to FAR 52.236-3, Site Conditions and Conditions Affecting the Work, the contracting officer determined that,

“[b]y submission of quote, ITS Group acknowledged its responsibility for estimating properly the difficulty and cost of successfully performing the work.”²

ITS Group appealed the contracting officer’s final decision. ITS Group generally alleges in its notice of appeal and supplements to that notice that it performed the work required, that it did not receive payment for the work, that the contracting officer had promised progress payments, and that ITS Group should be paid.

Discussion

The Board looks to Rule 12(b)(6) of the Federal Rules of Civil Procedure for guidance in deciding a motion to dismiss for failure to state a claim. Rule 8(e). Thus, in considering this motion, “we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant.” *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006)). Under this standard, ITS Group’s claim must be “plausible on its face” when drawing “all reasonable inferences in favor of the [appellant].” *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)); see also *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272.

USDA contends that ITS Group “fails to plausibly allege, and cannot plausibly allege” entitlement to progress payments under the contract. Arguing that we should reject ITS Group’s claims that its work had been accepted, USDA points out that only the contracting officer or the COR can accept the work. Because neither accepted the work, USDA concludes that ITS Group is not entitled to progress payments.

The issue here, however, is that ITS Group does allege entitlement to progress payments. ITS Group claims that it completed work on three buildings and that a government representative approved the work. ITS Group also claims that it did complete the work as required under the contract but that, due to the severe wood decay of the

² The appeal file contains a second document which documents the reasons for the contracting officer’s final decision in what appears to be her own words. Dated September 25, 2019, and entitled “Final Decision on ITS Group Claim,” the memorandum provides a narrative of the contracting officer’s specific reasons for denying the claim. This memorandum stated that “after reviewing the scope of work (SOW) I do not have grounds to pay this contractor anything.” The record is unclear as to whether ITS Group received this document prior to this appeal.

buildings, even when it followed the specifications, it was impossible to achieve a perfect result.

We accept ITS Group’s allegations as true for determining the sufficiency of the complaint. There is no dispute that ITS Group painted three buildings at the job site. However, at this early stage of the litigation, we cannot resolve the issues of whether a government representative accepted the work, as alleged, or whether it would be impossible to perform the contract under the conditions found. ITS Group’s “claim has facial plausibility” because it alleges “factual content that allows” us to conclude that ITS Group may be entitled to recover. *Iqbal*, 556 U.S. at 678; see *Disc Disease Solutions Inc. v. VGH Solutions, Inc.*, 888 F.3d 1256, 1260 (Fed. Cir. 2018).

Decision

The government’s motion to dismiss for failure to state a claim upon which relief can be granted is **DENIED**. The Government must file its Answer within thirty days from the date of this opinion.

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

We concur:

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Kyle Chadwick
KYLE E. CHADWICK
Board Judge