



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO FILE SECOND ADDENDUM DENIED; MOTION TO COMPEL
DENIED; MOTION TO STAY AND OTHER REQUESTS DENIED:
November 9, 2022

CBCA 6149, 6396, 7071, 7082, 7083, 7085

ALARES CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Douglas L. Patin and Lee-Ann C. Brown of Bradley Arant Boult Cummings LLP, Washington, DC, counsel for Appellant.

Jennifer L. Hedge, Office of General Counsel, Department of Veterans Affairs, Pittsburgh, PA; and Kathleen Ellis Ramos, Office of General Counsel, Department of Veterans Affairs, Batavia, NY, counsel for Respondent.

Before Board Judges **RUSSELL**, **DRUMMOND**, and **ZISCHKAU**.

DRUMMOND, Board Judge.

Appellant, Alares Construction, Inc., without first seeking leave, submitted a document titled "Second Addendum to Claim for Extended General Conditions Costs dated April 2, 2018" (claim addendum). Attached to appellant's submission were an updated claim certification and two schedule analyses. According to appellant, the claim addendum is only a revision of its extended general costs on its claim filed in 2018. In the submission, appellant alleges that respondent surreptitiously blamed appellant for delays and refused requests for equitable adjustments to avoid exceeding strict funding limitations. Appellant

asserts respondent breached its duty of good faith and fair dealing and ultimately delayed the project by wrongfully denying appellant's requests for equitable adjustment, refusing to grant time extensions, forcing appellant to absorb extended general conditions costs, and unreasonably interfering with appellant's work and ability to manage the project. Appellant seeks to revise its 2018 claim to include the claim addendum and attachments. Appellant also filed a motion seeking to compel respondent's responses to interrogatories and document requests regarding itemized accounting of expenditures relating to the project.

Respondent opposes appellant's claim addendum and motion to compel. Respondent notes that in the 2018 claim appellant sought \$1,039,693 due to alleged differing site conditions and critical path delays relating to electrical power issues, unforeseen subsurface conditions, and the need for a second generator. Respondent asserts the claim addendum alleges new facts and legal theories not presented before and therefore is improper as it constitutes a new claim. Respondent alleges it will be prejudiced if appellant is allowed to raise a new claim at this late date and without a contracting officer's final decision. Respondent also opposes appellant's motion to compel and contends it is improper because it seeks funding information not relevant to issues before the Board.

Appellant, in a reply to respondent's oppositions, states it has now submitted to the contracting officer its claim addendum, recertified it, and demanded a final decision. Appellant moves for a short postponement of the current hearing dates in December 2022 to provide respondent additional time to "review and properly adjudicate the claim as well as significant additional discovery." Appellant requests that the Board: (1) deny respondent's objections as moot, (2) vacate the current hearing dates, (3) grant appellant leave to file an amended complaint, and (4) order that the parties confer to propose a joint discovery schedule limited to the issues raised in appellant's claim addendum and to propose new hearing dates in 2023. Respondent opposes the requests.

The discovery period has expired, and the hearing for these consolidated appeals is scheduled to commence in December 2022.

Motion to File Claim Addendum

The Contract Disputes Act, 41 U.S.C. §§ 7101–7109 (2018), defines the jurisdiction of the Board, but it does not define the term "claim." Regulations address the authority of the Board. The Federal Acquisition Regulation specifies that the word "claim" "means 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(b) (2021). Without a final decision by a contracting officer or a deemed denial, the Board lacks jurisdiction over a claim. While an appellant may increase the amount of its claim, it may

not “raise any *new* claims not presented and certified to the contracting officer.” *Lee’s Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017) (quoting *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 1000, 1006 (Fed. Cir. 2015); see *Ketchikan Indian Community v. Department of Health & Human Services*, CBCA 1053-ISDA, et al., 13-1 BCA ¶ 35,436, at 173,809.

Here, appellant attempts to “amend its 2018 claim to include the following: The VA’s Breach of the Duty of Good Faith and Fair Dealing[.]” Claim Addendum at 1. The thrust of appellant’s allegation that respondent breached its duty of good faith and fair dealing is that:

To keep the increasing costs from exceeding the approaching Minor Construction Project Threshold, the VA unreasonably forced Alares into absorbing additional costs by wrongly withholding equitable adjustments; seeking credits for out-of-scope work; threatening to terminate for default; and refusing to extend the contract performance period to avoid paying the extended general conditions to which Alares was clearly entitled.

Id.

Appellant’s legal theory of breach of the duty of good faith and fair dealing relies upon the idea that respondent attempted to keep project costs from exceeding the \$10,000,000 construction project threshold. According to appellant, the project budget reached \$9,975,000 on September 11, 2017, without including other contract modifications that would increase the project costs. Claim Addendum at 1. Appellant’s theory continues that the added costs would have taken the project over its project threshold, which the appropriation disallowed. *Id.* In short, appellant argues that respondent purposely delayed this contract because of funding deficiencies, thus constituting a breach of the duty of good faith and fair dealing.

In the 2018 claim, appellant alleged differing site conditions and critical path delays due to electrical power issues, unforeseen conditions, and the need for a second generator. Appellant now attempts to add the legal theory that respondent breached its duty of good faith and fair dealing and to offer new facts to support this claim. The Board finds this to be a new claim. Appellant offers no legal support for the Board to accept its new claim of breach of the duty of good faith and fair dealing at this time. While appellant represents it has submitted the claim addendum to the contracting officer, the record includes no contracting officer’s final decision on the new claim nor does appellant allege a deemed denial. We only have jurisdiction if a claim is the subject of a contracting officer’s final

decision. See *Securiforce International America, LLC v. United States*, 879 F.3d 1354, 1362-63 (Fed. Cir. 2018); *M. Maropakis Carpentry, Inc. v. United States*, 84 Fed. Cl. 182, 195-96 (2008), *aff'd*, 609 F.3d 1323 (Fed. Cir.). Absent a contracting officer's final decision or a deemed denial, the Board lacks jurisdiction under the Contract Disputes Act to hear this new claim. *Id.*; *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987); *Anglin Consulting Group, Inc. v. Department of Homeland Security*, CBCA 6926, 21-1 BCA ¶ 37,918, at 184,157. Accordingly, appellant's request to include its claim addendum and attachments into the record is **DENIED**.

Motion to Compel

Appellant's motion to compel seeks information related to appellant's claim addendum. As the Board has ruled it lacks jurisdiction over appellant's claim addendum, appellant has no legitimate need to pursue discovery related to the new claim of breach of the duty of good faith and fair dealing. Thus, there is no need for discovery on an itemized accounting of all expenditures related to the project to prove appellant's theory. Therefore, appellant's motion to compel respondent's response to interrogatories and document requests is **DENIED**.

Motion To Stay and Other Requests

Appellant has requested that the proceedings be stayed pending a contracting officer's final decision on the new claim. Respondent opposes a stay. Respondent argues the existing schedule should not be delayed by appellant's belated new claim. The Board agrees. "The power to stay proceedings is incidental to the power inherent in every [tribunal] to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 229 U.S. 248, 254 (1936). "How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254-55.

"The burden is on the party seeking [a] stay," or seeking to continue a stay, "to clearly demonstrate that it will suffer real hardship if the proceedings are not stayed." *Aerospatiale Helicopter Corp.*, DOT BCA 1905, et al., 89-2 BCA ¶ 21,770, at 109,540. "The burden is a heavy one," and "the hardship must be more than mere inconvenience." *Id.* We find no reason to stay the proceedings based on the possibility of a new appeal. Appellant's motion to stay proceedings is **DENIED**.

Appellant's other requests are **DENIED** as moot.

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

We concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge