UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON APRIL 25, 2022

MOTIONS TO DISMISS AND FOR A MORE DEFINITE STATEMENT DENIED:
April 19, 2022

CBCA 7155

HPM CORPORATION,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

David S. Panzer of Whiteford, Taylor & Preston L.L.P., Washington, DC, counsel for Appellant.

Andrew J. Unsicker and Anissa L. Siefken, Office of the General Counsel, Department of Energy, Richland, WA, counsel for Respondent.

Before Board Judges **GOODMAN**, **SHERIDAN**, and **O'ROURKE**.

O'ROURKE, Board Judge.

In this government claim case, appellant, HPM Corporation (HPMC), has moved to dismiss the complaint on the grounds that respondent, the Department of Energy (DOE), has failed to state a claim upon which relief can be granted. In the alternative, appellant moves for a more definite statement. Because we find that the complaint contains sufficient facts to state a plausible claim, we deny both motions.

Background

In June 2012, DOE awarded HPMC a six-year contract in the amount of $98,687,733 for occupational medical services at DOE's Hanford, Washington, site. These services were solicited and awarded under a hybrid contract structure, which included the firm fixed-price requirement at issue in this case. The contract contained a provision for records management that required HPMC to maintain the medical records of DOE patients on a Government-furnished electronic medical records (EMR) system. Included in this provision was the requirement to integrate legacy records into the EMR system. Approximately 1200 cubic feet of medical records and 300 cubic feet of x-rays existed in paper format. The contract required HPMC to digitize these legacy records. Notwithstanding the legacy integration requirement, HPMC did not perform it, and near the end of the contract, DOE requested an impact proposal from HPMC to remove the task from the scope of the contract.

In response to DOE's request, HPMC stated that as a result of DOE's failure to furnish a functional EMR system, as well as the increased burden on HPMC of managing the paper records, removal of this scope would be a zero-dollar impact to DOE. In another instance, HPMC asserted that DOE owed it payment for additional work related to the records management requirement. Although HPMC did not submit a request for equitable adjustment for that work, HPMC asserted that its actual performance costs related to the records management task exceeded the proposed costs in its bid. In subsequent negotiations, HPMC offered DOE a credit for the deleted scope. DOE rejected these proposals and unilaterally modified the contract on September 21, 2018, removing the legacy integration task from the contract and identifying a definitization schedule for the purpose of finalizing the costs associated with the reduced scope. Efforts to definitize the modification were unsuccessful, however, so DOE conducted its own cost analysis using all available information to price the legacy integration work, including HPMC's original bid and a pricing proposal that HPMC submitted to digitize medical records for a separate task. DOE ultimately valued the deleted work at $1,292,528 and issued to HPMC a repayment demand to recover those funds.

In response to the demand, HPMC submitted additional data and performed digital scanning demonstrations to support its position on labor hours. Despite these efforts, DOE remained unpersuaded that there were no cost savings that could be passed onto the Government by deleting this task, and on March 31, 2021, the contracting officer issued a final decision on the repayment demand. HPMC timely appealed the decision to the Board, arguing that DOE should have terminated the work for the convenience of the Government rather than deleted it under the contract's Changes clause. HPMC then moved to compel DOE to file the complaint since the case involved a government claim. The Board granted the motion, and DOE filed the complaint. In lieu of filing an answer, HPMC moved to dismiss the appeal for failure to state a claim or, in the alternative, moved for a more definite statement.

Discussion

According to the Board's rules, a complaint shall be filed and state "in simple, concise, and direct terms the factual basis for each claim and the amount in controversy." Rule 6(a) (48 CFR 6101.6(a) (2020)). Alternatively, the Board "may designate as a complaint . . . a claim submission, or any other document containing the information required in a complaint." *Id.* The Board's rules also allow a party to move to dismiss all or part of a claim if the claim fails to state grounds on which the Board could grant relief. Rule 8(e). In deciding such a motion, "we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *Kiewit-Turner, a Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 14-1 BCA ¶ 35,705, at 174,846 (quoting *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 556 (2009)). This means that the complaint must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. We review DOE's complaint consistent with these standards and precedents.

DOE in its complaint alleges that it paid HPMC to integrate the legacy records into the EMR system in accordance with the contract's requirements but that HPMC did not perform the required work. The complaint seeks an equitable adjustment under the Changes clause for the unperformed work, which DOE valued at $1,292,528. In its motion to dismiss, HPMC asserts that it "still has no idea on what basis the Government is asserting (or could assert) entitlement to the amount sought in the [contracting officer's final decision]." According to HPMC's motion:

> [T]he Government's position seems to be that it can unilaterally and retroactively change the scope of work to be done as part of a firm-fixed-price, and do so at the end of the contract, and then demand money back from the contractor for the reduced scope going all the way back to the first day of the contract . . . . [T]he Government's approach is simply not cognizable under the Federal Acquisition Regulation.

We find this argument, and others that HPMC raises,[1] to be arguments on the merits. Here, we need only decide whether the complaint sets forth sufficient information to state a claim that HPMC owes DOE a credit for the deleted scope. We believe that it does.

There is no dispute that the contract required HPMC to integrate the legacy records into the EMR system. There is also no dispute that HPMC did not integrate them. Matters that are in dispute include the following: (1) the value of the unperformed work, (2) whether the work was impossible to perform, (3) whether the deducted work was severable from other records management tasks priced under the same firm fixed-price line item, and (4) the propriety of using the Changes clause to delete the work rather than the Termination for Convenience clause. At this stage of the appeal, we need not decide whether HPMC's failure to perform the task was legally justified or the value of the deletion was negligible. The only question we must answer is whether DOE has alleged a set of facts in support of its repayment claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Icenogle Construction Management, Inc.*, VABCA 7534, 06-2 BCA ¶ 33,325, at 165,271. Based upon the information contained in the complaint, we find that respondent has established its right to relief beyond the speculative level, and as such, we deny appellant's motion to dismiss.

In the alternative, appellant moved for a more definite statement. Under Rule 6(d), "[t]he Board may allow a party to file a dispositive motion or to move for a more definite statement in lieu of filing an answer." Under the Federal Rules of Civil Procedure, which we look to for guidance, a motion for a more definite statement is appropriate where a pleading is "so vague or ambiguous that the party cannot reasonably prepare a response." Federal Rule of Civil Procedure 12(e). HPMC posits that a more definite statement in this case should include information about the method and information used to calculate the dollar amount the Government seeks. Given the history of performance between the parties, not only under the contract at issue in this appeal, but also HPMC's previous work as a subcontractor on a similar contract, as well as past negotiations and discussions regarding this claim, and the well-documented record, we find that appellant can reasonably prepare a response based on the complaint as written. Furthermore, HPMC will have the opportunity to make these inquiries through discovery, including through depositions of individuals who performed the calculations. For these reasons, appellant's motion for a more definite statement is denied.

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[1] These arguments include that: (1) a modification under the Changes clause cannot retroactively amend the description of services *to be performed*, since such a modification is forward-looking; (2) a modification cannot amend the description of services "that had (or had not) been performed in the prior six years;" and (3) the modification is nothing more than an attempt to re-price a firm fixed-price task six years after the contract began in order to avoid paying convenience termination costs to HPMC.

Decision

Appellant's motion to dismiss and motion for a more definite statement are **DENIED**.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge