



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO AMEND COMPLAINT GRANTED;
DISMISSED FOR FAILURE TO STATE A CLAIM: June 25, 2024

CBCA 8030

TRI VET CONTRACTING COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Kenneth J. Dubbs, Vice President and Chief Operations Officer of Tri Vet Contracting Company, Inc., Pine Grove, PA, appearing for Appellant.

Kathleen Ramos, Office of General Counsel, Department of Veterans Affairs, Arlington, TX, counsel for Respondent.

Before Board Judges **SHERIDAN**, **SULLIVAN**, and **CHADWICK**.

SHERIDAN, Board Judge.

In this appeal, Tri Vet Contracting Company, Inc. (Tri Vet or appellant) seeks to recover \$86,918.19, plus interest, from the Department of Veterans Affairs (VA) for alleged material price increases. Before the Board are two motions—one submitted by each party. First, the appellant seeks permission to amend its complaint. Second, the VA moves to dismiss for failure to state a claim for which relief may be granted, alleging that Tri Vet assumed the risk of price increases when it entered into a firm-fixed-price contract. For the foregoing reasons, we grant both motions and dismiss the appeal for failure to state a claim.

Background

On July 6, 2020, the VA issued solicitation 36C24421R0001, which required the successful bidder “to provide professional construction services in accordance with the Statement of Work (SOW), drawings, and specifications for the Renovate Building #22 Construction Project” at the Lebanon VA Medical Center and stated that a firm-fixed-price contract would be awarded to the offeror whose proposal was the “best value” to the Government. Exhibit 4 at 7, 59. The solicitation incorporated Federal Acquisition Regulation (FAR) clause 52.243-4 (Changes (JUN 2007)), 48 CFR 52.243-4 (2019) (FAR 52.243-4), but did not include an inflation or economic price adjustment clause. *See* Exhibit 4 at 18, 50. Furthermore, the terms required bidders to identify any exception to any solicitation requirements in an addendum to their proposal:

6. EXCEPTIONS: If the offeror takes exception to any of the requirements specified in this solicitation, the offeror shall clearly identify each exception and include a complete explanation of why the exception was taken and what benefit accrues to the Government. All exceptions to the solicitation requirements and supporting rationale shall be included in an addendum to the proposal and clearly labeled “Exceptions.” An addendum is only required if the offeror takes exception to any requirement in the solicitation. (The [a]ddendum does not have a page limitation but shall only include information relevant to exceptions taken to the solicitation requirements.) The Government will assume an offeror takes no exceptions to any solicitation requirement if the offeror does not submit an [a]ddendum identifying exceptions. Offerors are advised that solicitation requirements are not necessarily negotiable and such exceptions may render an offeror’s proposal unacceptable and ineligible for award.

Id. at 15-16.

Tri Vet submitted its proposal on August 31, 2020, but it did not attach an addendum. *See* Exhibits 6, 8 at 1 (award letter). On December 1, 2020, the VA notified Tri Vet that it accepted Tri Vet’s offer and awarded the appellant the contract in the amount of \$4,456,447. Exhibit 8 at 1. The Government issued the notice to proceed on January 11, 2021, and Tri Vet was to complete the contract work by July 10, 2022. Exhibit 10. During performance of the contract, Tri Vet encountered circumstances that required it to perform additional work that was not included in the original contract. *See* Exhibit 45; *see also* Complaint at 2. As a result, the parties executed a modification (modification P00004) on May 3, 2023, which added \$176,004.25 to the total contract price. Exhibit 45 at 1, 4. Modification P00004 was a “Combination of Change Orders Agreed Upon [and the Contracting Officer’s] Determination of Fair [and] Reasonable Pricing for disputed proposals where work is

required to be completed.” *Id.* at 2. However, the modification denied costs associated with price increases for certain materials. *Id.* at 4.

On October 20, 2023, Tri Vet submitted eight claims to the VA’s contracting officer, disputing the denial of the costs for certain materials.¹ Exhibit 49. The claimed costs totaled \$85,053.47 and represented increased prices for materials that resulted from various shortages caused by the COVID-19 pandemic. *Id.* (“Our Tri Vet Team has dedicated a great amount of time and energy attempting to have our affected subs/suppliers ‘made whole’ for materials increases due to our [Government] issuing a COVID-19 Pandemic Declaration.”).

The contracting officer denied Tri Vet’s claim in full on December 5, 2023, explaining that “Tri-Vet was awarded a firm-fixed-price contract, . . . a contract that is not subject to any adjustments on the basis of a contractor’s cost experience in performing the contract.” Exhibit 62 at 8. Tri Vet appealed to the Board on March 4, 2024, requesting the \$85,053.47 in denied costs. Complaint at 2. On April 3, 2024, the appellant, pursuant to Board Rule 6(a), designated its appeal as the complaint and amended the amount in controversy to \$86,918.19.²

On April 23, 2024, the VA filed a motion to dismiss the complaint on the grounds that Tri Vet failed to state a claim upon which relief may be granted, asserting that because the appellant entered into a firm-fixed-price contract it assumed the risk of increases in the price of materials. Subsequently, on May 22, 2024, the appellant moved for leave to amend its complaint, requesting to include the following statement:

Under the theory of constructive change as upheld in *American Line Builders[,] Inc. v. United States*, 26 Cl. Ct. 1155, 1179 (1992) (citing *Len Co. & Assocs. v. United States*, 181 Ct. Cl. 29, 39, 385 F.2d 438, 443 (1967)), and expanded in *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 678 (1994), and because the VA not only directed Tri Vet to continue with uninterrupted performance in the face of extraordinary circumstances but also neglected to

¹ The eight individual claims are: (1) \$5535 for “AFS Bar joists,” Exhibit 50 at 2, 5; (2) \$31,078.63 for simulated headwalls, pumps and accessories, AHU/RTU, convectors/VAVs, GRDs/Dampers, and fixtures, Exhibit 51 at 6-7; (3) \$15,393.34 for electrical panels, Exhibit 52 at 2, 5-7; (4) \$1026.08 for toilet partitions and accessories, Exhibit 53 at 2, 6-7; (5) \$4833.77 for flooring materials, Exhibit 54 at 2, 5; (6) \$6666 for an operable partition wall, Exhibit 55 at 2, 5; (7) \$10,289 for fire protection materials, Exhibit 56 at 2, 5; and (8) \$10,231.65 for wall and ceiling finishes, Exhibit 57 at 2, 5.

² Tri Vet explained that the increase in price was due to an error to the amount listed for Claim 2, which should have totaled \$32,943.35 instead of \$31,078.63.

work towards a more efficient or equitable solution with Tri Vet when the issues of unforeseeable, extreme price increases were promptly expressed to them, the government owes Tri Vet for actual material cost increases (*Appeal of Atherton Constr., Inc.*, ASBCA No. 56040, 08-2 B.C.A. (CCH) ¶ 34011 (Nov. 5, 2008) (citing *Celesco Indus. Inc.*, ASBCA No. 22251, 79-1 BCA [¶] 13,604 (1978)); *American Asphalt, Inc.*, ASBCA No. 44160, 95-2 BCA [¶] 27,614 (1995); and *American Line Builders, Inc. v. United States*, 26 Cl. Ct. at 1155.) incurred by its Subcontractors and/or suppliers for which requested adjustments were initially denied.

Appellant's Request to Amend Complaint at 1. We consider both of these motions below.

Discussion

Motion to Amend Complaint

Board Rule 6(c) permits a party to amend its complaint once without leave of the Board at any time "before a responsive pleading is filed." 48 CFR 6101.6(c) (2023); *see Zach Fuentes, LLC v. Department of Health & Human Services*, CBCA 7090, 22-1 BCA ¶ 38,091, at 184,980. Because Tri Vet has already amended its complaint once and the Government has filed responsive pleadings, Tri Vet may now amend its complaint "only by seeking the Board's permission." *Zach Fuentes, LLC*, 22-1 BCA at 184,980.

Generally, "absent a specific justifying reason such as prejudice to the opposing party or futility of amendment, leave to amend a complaint or an answer is to be freely given." *Zach Fuentes, LLC*, 22-1 BCA at 184,980 (quoting *Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539, at 178,003). Here, the VA does not object to the amendment nor do we find any reason to deny the amendment based on prejudice or futility. As a result, Tri Vet's motion for leave to amend its complaint is granted.

Motion to Dismiss for Failure to State a Claim

"When ruling on a motion to dismiss for failure to state a claim, the Board will apply 'the same standard as would a federal trial court.'" *MLB Transportation, Inc. v. Department of Veterans Affairs*, CBCA 7019, 21-1 BCA ¶ 37,919, at 184,159 (quoting *Williams Building Co. v. Department of Veterans Affairs*, CBCA 6559, et al., 20-1 BCA ¶ 37,492, at 182,160 (quoting *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272, at 181,366)). In so doing, we "must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the [appellant]." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009). A complaint must allege facts "plausibly suggesting (not merely consistent

with) a showing of entitlement to relief.” *Williams Building Co.*, 20-1 BCA at 182,160 (quoting *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007))).

FAR 16.202-1 explains that “[a] firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor’s cost experience in performing the contract.” As a result, “a contractor with a fixed price contract assumes the risk of unexpected costs not attributable to the Government.” *Matrix Business Solutions, Inc. v. Department of Homeland Security*, CBCA 3438, 15-1 BCA ¶ 35,844, at 175,283 (2014) (quoting *IAP World Services, Inc. v. Department of the Treasury*, CBCA 2633, 12-2 BCA ¶ 35,119, at 172,444-45). In this case, the contract is firm-fixed-price. Hence, Tri Vet assumed “maximum risk and full responsibility for all costs and resulting profit or loss.” FAR 16.202-1; see *Ace Electronics Defense Systems*, ASBCA 63224, 22-1 BCA ¶ 38,213, at 185,568.

Tri Vet contends that when the Government declared COVID-19 a public health emergency, FAR 16.202-1 was “overruled” or “superseded.” It argues that the Government “is directly responsible in creating these negative changes in a free and open market.” Here, Tri Vet submitted its response to the VA’s solicitation request in August 2020, almost six months after COVID-19 was first detected in the United States. Presumably, Tri Vet was aware that the pandemic could increase costs over time when it entered into the contract with the VA. However, neither the contract’s provisions excusing default nor any of its other terms shift the risk of cost increases generated by the pandemic to the Government. The law is clear that “[t]he normal risk of a fixed price contract is that the market will change,” *Seaboard Lumber Co. v. United States*, 41 Fed. Cl. 401, 415 (1998) (quoting *Langham-Hill Petroleum Inc. v. Southern Fuels Co.*, 813 F.2d 1327, 1330 (4th Cir. 1987)), *aff’d*, 308 F.3d 1283 (Fed. Cir. 2002), even when an unforeseen pandemic occurs. See *Lusk Mechanical Contractors, Inc. v. General Services Administration*, CBCA 7759, 24-1 BCA ¶ 38,569, at 187,462 (“Absent a special adjustment clause, this Board has held that an unforeseen pandemic does not shift the risk to the Government for any unexpected costs incurred under a firm, fixed-price contract.”); see also *Pernix Serka Joint Venture v. Department of State*, CBCA 5683, 20-1 BCA ¶ 37,589, at 182,522-23, *aff’d*, 849 F. App’x 928 (Fed. Cir. 2021). Tri-Vet’s suggestion that the Government’s declaration of a public health crisis countermands FAR 16.202-1 or the contract’s terms is not correct.

Next, Tri Vet alleges that “the actions of [the Government] and . . . the unforeseeable and extreme price increases absorbed by Tri Vet and its Subcontractors” changed “the scope of the performance of the contract.” The appellant first asserts that because the contract incorporates FAR 52.243-4, it is entitled to an equitable adjustment because the clause serves as a mechanism to “accommodate changes in the contractor’s actual costs of performance.” FAR 52.243-4 “gives the government the unilateral right to order changes in contract work

during the course of performance.” John Cibinic Jr., James F. Nagle & Ralph C. Nash, Jr., *Administration of Government Contracts* 345 (5th ed. 2016). As a general rule, change orders executed under FAR 52.243-4 must be in writing unless “the contracting officer orally orders a change and promised an equitable adjustment as soon as a fair amount can be determined.” *Id.* at 368. Here, the appellant has produced no evidence of a written change order that adjusts the contract’s price based on inflation caused by the COVID-19 pandemic nor any guarantee from the contracting officer that the Government agreed to a price adjustment.

Tri Vet also contends that a constructive change occurred. “A constructive change occurs where a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government.” *Pernix Serka Joint Venture*, 20-1 BCA at 182,524 (quoting *International Data Products Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007)). To recover under this theory, “a contractor must show that (1) it performed work beyond the contract requirements and (2) the Government ordered—expressly or implicitly—the contractor to perform the additional work.” *Id.* (citing *Bell/Heery v. United States*, 106 Fed. Cl. 300, 313 (2012), *aff’d*, 739 F.3d 1324 (Fed. Cir. 2014)). The appellant argues that because COVID-19 was “unforeseeable” and presented “extraordinary circumstances,” the material cost increases constituted a constructive change. While it is unfortunate that the COVID-19 pandemic caused the cost of the materials to increase, the materials were required to complete the original terms of the contract, and thus, no constructive change occurred. As discussed above, Tri Vet assumed the risk of these unexpected costs. Accordingly, the complaint does not contain any allegations that would entitle Tri Vet to relief.

Decision

Tri Vet’s motion for leave to amend is **GRANTED**. The VA’s motion to dismiss for failure to state a claim is granted, and the appeal is **DISMISSED**.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

We concur:

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge