



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: October 23, 2026

CBCA 8498

TRUE EXCELLENCE GROUP, LLC,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

John M. Manfredonia of Manfredonia Law, LLC, Cresskill, NJ, counsel for Appellant.

Katlyn Har and Melissa Kopriva, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **GOODMAN**, and **KANG**.

GOODMAN, Board Judge.

Appellant, True Excellence Group, LLC (TEG), has filed this appeal from a contracting officer's final decision pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2024). Respondent, the Federal Emergency Management Agency (FEMA), acting through the Department of Homeland Security, has filed a motion to dismiss two counts of TEG's amended complaint for lack of jurisdiction. We deny the motion.

Background

The Contract and TEG's Claim

On November 21, 2018, FEMA awarded a contract to be performed in Puerto Rico, which stated in the Schedule of Supplies/Services:

PROVIDE ALL LABOR, MANAGEMENT, TRANSPORTATION, EQUIPMENT, PERMITS AND MATERIAL TO PROVIDE GENERATOR MAINTENANCE AND FUELING SERVICES PER SCHEDULE BELOW AND STATEMENT OF WORK.

Appeal File, Exhibit 4 at 1.¹

The Statement of Work stated in part:

2. STATEMENT OF WORK

This Statement of Work (SOW) is for (1) generator maintenance, (2) fueling and fuel delivery, (3) loading, unloading, handling, transportation, installation, de-installation, and Return to Storage or Retrograde and (4) emergency repair and service on Puerto Rico to include the islands of Vieques and Culebra.

Exhibit 5 at 1.

On December 18, 2024, TEG submitted a certified claim to the contracting officer requesting \$2,197,599.29 in additional compensation. Exhibit 75. The claim stated in part:

TEG seeks additional compensation totaling \$1,253,790.00 for providing fuel farms^[2] at three locations, i.e. Culebra, Ponce and Vieques. *When executing the contract, the parties reasonably assumed that TEG could utilize existing fuel farms at these locations. This fundamental assumption and bargain did not materialize.* These fuel farms were not available to TEG during contract performance. TEG had to spend significant resources to construct its own fuel farms at these locations.

¹ Exhibits refer to appeal file exhibits unless otherwise noted.

² Fuel farms “consist of stationary fuel tanks for storing bulk fuel and associated equipment for transferring fuel into installed generators.” Complaint ¶ 20.

Id. at 1 (emphasis added).

TEG's claim asserted four legal theories for additional compensation for providing fuel farms—constructive change, superior knowledge, mutual mistake, and material misrepresentation of facts. The claim stated with regard to constructive change:

When FEMA *directed* TEG to provide the fuel farms and then rejected TEG's invoices to pay for them on May 10, 2021, this constituted a breach of contract or *alternatively a constructive change to the contract*.

Exhibit 75 at 11 (emphasis added).

The claim stated with regard to superior knowledge:

[T]o the extent that FEMA knew before the contract award that the existing fuel farms would not be available to TEG during performance, FEMA failed to disclose this superior knowledge to TEG. Indeed, FEMA knew or should have known that the fuel farms would not be available given its discussions with [the United States Army Corps of Engineers] about the transitioning of the project to FEMA. FEMA's failure to disclose this superior knowledge to TEG establishes another reason to compensate TEG for constructing the fuel farms. *In fact, TEG entered into the contract without knowledge that the existing fuel farms would not be available during performance*; FEMA was aware that TEG had no knowledge of and had no reason to obtain such information; and FEMA failed to provide the relevant information.

Exhibit 75 at 11 (emphasis added).

The Contracting Officer's Final Decision (COFD)

The contracting officer issued a COFD dated April 30, 2025, denying the claim in its entirety. Exhibit 78. Regarding TEG's claim for compensation for additional fuel farms, the COFD stated:

TEG's December 18, 2024 Certified Claim seeks additional compensation for \$1,253,790.00 for providing fuel farms at Culebra, Ponce and Vieques. TEG states that when the contract was executed, the parties reasonably assumed that TEG could utilize existing fuel farms at these locations, that this fundamental assumption and bargain did not materialize, that fuel farms were not available to TEG during contract performance, and that TEG had to spend significant

resources to construct its own fuel farms at these locations consisting of external fuel tanks and associated equipment to maintain a 10-day fuel supply.

TEG's Claim fails to provide any support that the parties assumed that TEG could use existing fuel farms or that FEMA represented to TEG that it would have access to any existing fuel farms. The Solicitation, TEG's Proposal and the terms of the Contract all recognize that TEG would provide all services and equipment associated with the contract, including the services [for which] TEG is seeking additional payment. The SOW provided that the Contractor was required to provide fuel and fuel delivery to installed generators and that the Contractor would have fully executable fuel, fuel delivery, and/or fuel service contracts and contingency contracts for fuel and/or priority diesel wholesale access with one or more on-island fuel terminals to fuel generators and short notice contingency response generator installation requirements. The solicitation required that TEG's pricing would include, and TEG represented that its pricing did include, any and all labor, equipment, and material necessary to perform. The contract only separately reimbursed for the cost of fuel and repair parts under [contract line items (CLINs)] 0002 and 0003, which were cost reimbursement CLINs.

No language in the Contract or in the documentation submitted by TEG supports that existing fuel farms would be available to TEG. In fact, the Contract explicitly stated that the contractor is solely responsible for providing all equipment necessary to perform the requirements as outlined in the statement of work. Based on the above, TEG's claim for payment of \$1,253,790.00 for providing fuel farms at Culebra, Ponce and Vieques is denied.

Id. at 10.

TEG's Notice of Appeal and Complaint

TEG filed its appeal of the COFD on July 15, 2025. The notice of appeal stated that TEG sought a portion of the compensation in its claim for "providing fuel farms that were not part of the Contract." Notice of Appeal at 1.

On August 14, 2025, TEG filed its complaint at the Board. The complaint and amended complaint contain four identically-labeled counts. Respondent first moved to dismiss the two counts in the initial complaint relating to fuel farms—counts II (change or

constructive change) and count III (superior knowledge)—and subsequently moved to dismiss the same counts in the amended complaint.³

FEMA's Motion to Dismiss

On September 15, 2025, FEMA filed a motion to dismiss counts II and III of the complaint, alleging that these counts rely on “materially different factual and legal theories than what was originally presented to the contracting officer.” Respondent’s Motion to Dismiss (Motion to Dismiss) at 5, 9. FEMA’s motion focuses on one factual allegation in the complaint—paragraph 56, which stated that “TEG was not aware of the existence of fuel farms on mainland Puerto Rico at Pier 13, or the island of Vieques and Culebra.” FEMA asserts that this paragraph presents “a materially different factual or legal theory” in comparison with the factual statement in the claim that, “[w]hen executing the contract, the parties reasonably assumed that TEG could utilize existing fuel farms at these locations.” According to FEMA, the statement in TEG’s certified claim implies that TEG was aware that the fuel farms existed, while the statement in the complaint—alleging that TEG was not aware that the fuel farms existed—contradicts the claim.

FEMA states:

When determining whether the grounds for the appeal were sufficiently presented to the contracting officer or presents a new claim, the Board will look beyond the claims’ label and compare the factual and legal theories that support the claims for relief. “[P]resenting a materially different factual or legal theory . . . does create a different claim.” . . . “Notably, if the Board would have to review and rely on different evidence to make its decision on the claim presented to the Board compared to that presented to the contracting officer, then the claims are materially different.”

Motion to Dismiss at 3 (citations omitted).

As to count II of the complaint, Fuel Farms—Change or Constructive Change, FEMA in its motion contends that TEG “barely raised this constructive change in its certified claim.” Motion to Dismiss at 5-6. FEMA argues that the constructive change argument in the complaint “is still based on the narrative and factual assertion that *both* FEMA and Appellant

³ The complaint and amended complaint did not contain counts or allegations as to the theories of mutual mistake or material misrepresentation of fact, which were included in the certified claim.

mistakenly assumed fuel farms would be available for use prior to entering the contract.” *Id.* at 6.

In its motion, FEMA disputes TEG’s allegation in its complaint that TEG did not know of the existence of fuel farms and argues that TEG’s legal claims before the Board present “contradictory narratives” to those presented in its CDA claim to support its mutual mistake theory and introduce a “new set of facts” not considered by the contracting officer before the COFD was issued. Motion to Dismiss at 6, 8. As a result, FEMA argues that the Board would be required “to parse through materially different legal theories in support of these claims than those presented in front of the contracting officer.” *Id.* at 6. FEMA concludes that count II of the complaint for constructive change should be dismissed for lack of jurisdiction. *Id.* at 9.

FEMA makes similar arguments as to count III of the complaint, which alleges superior knowledge. FEMA states:

Although Appellant alleges a superior knowledge claim in both the certified claim and complaint, these are based on a materially different set of operative facts and must be dismissed.

Motion to Dismiss at 10.

FEMA argues that count III alleging superior knowledge should be dismissed because the allegation in paragraph 56 of the complaint was incorporated into this count. FEMA asserts that, as with count II, TEG has submitted a different factual narrative in count III than in its certified claim and presented additional evidence not previously submitted to the contracting officer. Motion to Dismiss at 10-14.⁴

TEG’s Opposition to the Motion to Dismiss

TEG’s opposition to the motion asserts that the Board has jurisdiction over claims if “they arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery.” Appellant’s Opposition to Respondent’s Motion

⁴ FEMA states that “[a]ssuming the Board does not dismiss the two counts, FEMA also contends that Appellant knew the basis for its constructive change and superior knowledge claim prior to December 18, 2018, meaning that both these claims accrued over six years ago and thus are time barred[,] . . . [and] preserves this ground for dismissal for future proceedings.” Motion to Dismiss at 14. We do not address FEMA’s contention here.

to Dismiss (Appellant's Opposition) at 2 (quoting *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003)).

TEG argues further:

[I]t is not improper to advance alternative grounds for relief, even if factually different. *Sage Western Inv[estments] v. General Services Administration*, CBCA 1680, 09-2 BCA ¶ 34,297] ["Appellant is therefore free to plead alternative and even inconsistent theories of recovery, as it has done in the instant case."]. In fact, it is not uncommon for Appellants to argue, in the alternative, constructive change, superior knowledge and mutual mistake. *Sage Acquisitions LLC v. [Department of Housing & Urban Development]*, CBCA 7319, 23-1 BCA ¶ 38,315] [constructive change, superior knowledge, and mutual mistake]; [] *Amentum Serv[ices], Inc.*, ASBCA 63250, et al., 24-1 BCA ¶ 38,521] [mutual mistake and constructive change]; [] *Chugach [Federal Solutions, Inc.]*, ASBCA 61320, 23-1 BCA ¶ 38,372] [superior knowledge, mutual mistake and constructive change].

Appellant's Opposition at 8.⁵

TEG's Clarification and First Amended Complaint

The Board reviewed FEMA's motion to dismiss and TEG's opposition, held a conference with the parties' counsel, and granted TEG leave to clarify paragraph 56 of the complaint. Board's Conference Memorandum and Order (Feb. 3, 2026).

On February 17, 2026, TEG filed a pleading containing a clarification of its complaint and a motion for leave to file a first amended complaint. In its clarification of the complaint, TEG stated:

Count II of Appellant's Complaint seeks compensation for providing fuel farms based on a constructive change. At issue is ¶ 56 of Count II, which states "[b]efore contract award TEG was not aware of the existence of fuel farms on mainland Puerto Rico at Pier 13, or the islands of Vieques and Culebra." This statement is accurate. *Because offerors, including Appellant,*

⁵ Appellant's opposition brief included, in brackets, parenthetical case explanations; in quoting appellant's brief, the Board revised case citations to conform with its publication guidelines and did so within additional brackets.

were strictly prohibited from visiting the project sites during the solicitation stage, Appellant lacked actual knowledge of the existing site conditions before contract award.

Given that Appellant did not know of the existence of fuel farms before award, Appellant's Complaint does not include a mutual mistake ground for relief. Rather, Appellant's Complaint seeks compensation for fuel farms based on constructive change and superior knowledge, both of which are alternative grounds for relief in [appellant's] CDA claim.

Further, ¶ 56 of Appellant's original Complaint is unnecessary to prove constructive change. What matters is whether the contract required Appellant to provide fuel farms, not Appellant's pre-award assumptions. To resolve any potential confusion and streamline the issues for the Board, Appellant has concurrently filed a Motion for Leave to File a First Amended Complaint. The proposed amendment removes the language in ¶ 56 and replaces it with the governing legal standard for a constructive change. Count II of the proposed First Amended Complaint also cites [appellant's] CDA claim's constructive change ground for relief:

As stated in the CDA Claim, "[w]hen FEMA directed TEG to provide the fuel farms and then rejected TEG's invoices to pay for them on May 21, 2021, this constituted a breach of contract or alternatively a constructive change to the contract." (Proposed Amended Complaint at 65).

The First Amended Complaint is in direct alignment with the CDA Claim and case law on constructive change. This should dispel any confusion caused by ¶ 56 of the original Complaint.

Appellant's Clarification of Complaint at 1-2 (emphasis added).

TEG's motion to amend its complaint, filed concurrently with its clarification, similarly stated:

Count II of Appellant's Complaint seeks compensation for providing fuel farms. It is based on constructive change. At issue here is Count II, ¶ 56, which states "[b]efore contract award TEG was not aware of the existence of fuel farms on mainland Puerto Rico at Pier 13, or the islands of Vieques and Culebra." *While this statement is accurate, Appellant's pre-award awareness*

is not pertinent to a construction [sic] change ground for relief. Thus, to properly align the pleadings with the required legal elements of constructive change, the proposed First Amended Complaint removes this statement and replaces it with the legal elements of constructive change theory of relief. . . . The First Amended Complaint thus revises Count II to focus strictly on the required legal and factual elements of constructive change.

Count III of Appellant's complaint is based on superior knowledge. Both the original and proposed amended complaints allege that Respondent possessed superior knowledge that the existing fuel farms could not be used and that TEG would have to provide them. The proposed Amended Complaint also cites the [appellant's] CDA claim's ground for relief based on superior knowledge:

As stated in the CDA claim, "FEMA's actions constituted a material misrepresentation of facts. FEMA knew or should have known that the existing fuel farms could not be utilized by TEG after the contract award. FEMA's failure to disclose this superior knowledge to TEG before award constitutes a material misrepresentation and FEMA is therefore estopped from refusing to pay TEG for the construction of the fuel farms now." (Proposed First Amended Complaint, ¶ 72).

The above amendment provides further support for Count III (Superior Knowledge), which is consistent with the CDA claim.

Appellant's Motion for Leave to File a First Amended Complaint at 2-3 (emphasis added).

FEMA's Renewal of Its Motion to Dismiss

FEMA did not respond to TEG's motion for leave to file its first amended complaint within the five-day period allowed by Board Rule 8(g) (48 CFR 6101.8(g) (published in eCFR)). The Board granted TEG's accompanying motion for leave to file its amended complaint as described in the clarification. On March 18, 2026, FEMA untimely filed its opposition after the Board granted TEG's motion and concurrently sought reconsideration of the Board's order granting leave to amend, which the Board denied. FEMA also renewed its motion to dismiss. On April 24, 2026, TEG filed an opposition brief to FEMA's renewed motion to dismiss, and respondent replied to TEG's opposition on May 11, 2026.

Discussion

Because TEG was granted leave to file its first amended complaint, we only consider FEMA's motion to dismiss counts II and III of the amended complaint. In count II of the amended complaint, TEG alleged that because the contract did not require TEG to provide fuel farms, FEMA's direction to TEG to provide fuel farms was a change or constructive change entitling TEG to additional compensation. Count III alleges that FEMA had superior knowledge that fuel farms were not available and that the awardee would have to supply fuel farms.

The certified claim asserted constructive change and superior knowledge as alternative theories entitling TEG to additional compensation for providing fuel farms. FEMA's initial and renewed motions to dismiss these counts of the complaint and amended complaint are based upon the inclusion of the allegation in paragraph 56 of the complaint, which stated that "TEG was not aware of the existence of fuel farms on mainland Puerto Rico at Pier 13, or the island of Vieques and Culebra." FEMA asserts that this allegation presents a materially different factual and legal theory in comparison with the factual statement in the certified claim that, "when executing the contract, the parties reasonably assumed that TEG could utilize existing fuel farms at these locations."

TEG deleted the allegation in paragraph 56 from the amended complaint. TEG explained that even though the allegation was deleted, it was accurate and not inconsistent with the certified claim because "offerors . . . were strictly prohibited from visiting the project sites during the solicitation stage, [and therefore] Appellant lacked actual knowledge of the existing site conditions before contract award." Appellant's Clarification of Complaint at 1. TEG asserts that this allegation is not necessary to prove constructive change, as "[w]hat matters is whether the contract required Appellant to provide fuel farms, not Appellant's pre-award assumptions." *Id.* at 2.

FEMA has renewed its motion to dismiss counts II and III of the amended complaint despite TEG's deletion of the allegation in paragraph 56 of the complaint. FEMA continues to argue that the contracting officer (CO) was not presented with and did not consider the allegation that TEG was not aware of the existence of fuel farms and, therefore, counts II and III of the amended complaint still present claims that differ from those considered by the CO.

With regard to count II (constructive change), FEMA argues:

The Amended Complaint and the CDA claim advance materially inconsistent factual theories regarding the fuel farms. In the CDA claim, Appellant asserted entitlement under a mutual mistake theory, alleging that both parties

shared the same mistaken assumption at award that existing fuel farms could be utilized and that the subsequent construction of replacement fuel farms was compensable “pursuant to the contract.” [Exhibit] 75 at 010. Thus, the CDA claim treated the fuel farm work as contemplated within the contract structure itself. Count II of the Amended Complaint, however, depends on the opposite factual premise, namely, that the Agency later directed Appellant to perform work outside the scope of the contract through a constructive change. These positions are fundamentally incompatible.

Respondent’s Reply to Appellant’s April 24, 2026, Opposition Brief (Respondent’s Reply) at 7, 8.

With regard to TEG’s superior knowledge count (count III), FEMA argues:

Yet, Appellant’s own CDA claim establishes that Appellant had already formed pre-award assumptions regarding the availability and use of the existing fuel farms. *See* [Exhibit] 75 at 010-11. If Appellant knew or assumed before award that existing fuel farms could be utilized during performance, then the Agency’s alleged failure to disclose information concerning those same fuel farms cannot simultaneously constitute withheld superior knowledge.

Respondent’s Reply at 11.

We do not find that the allegation in paragraph 56 of the complaint, subsequently deleted from the amended complaint, creates a different claim than that considered by the CO. The certified claim contained the theory of constructive change arising from FEMA’s direction to TEG to provide fuel farms, raising the threshold issue of whether the terms of the contract required the contractor to provide fuel farms. The theory of superior knowledge, offered in the alternative in the certified claim, also relates to this threshold issue. Responding to both theories in the COFD, the CO reviewed the terms of the contract and the certified claim and concluded that “[n]o language in the Contract or in the documentation submitted by TEG supports that existing fuel farms would be available to TEG.”

The primary issue in FEMA’s motion to dismiss counts II and III of the amended complaint—TEG’s pre-award knowledge of the existence of fuel farms—may ultimately not be relevant to whether TEG was required to supply fuel farms, as the requirement may possibly be determined solely by reviewing the terms of the contract. If TEG’s pre-award knowledge becomes relevant, conflicting factual statements can be probed in discovery. Ultimately, any incongruity will be resolved by the Board when the merits are addressed.

At this stage of the appeal, before the record has been developed, FEMA's extensive discussion in its motions and replies to TEG's briefings as to the possibility that the Board might ultimately review evidence that may differ from that reviewed by the CO is speculative and fails to recognize that the Board is not restricted to reviewing evidence that the CO considered in issuing the COFD. As the Board recently stated:

[S]pecific findings in the COFDs are not binding in any subsequent proceeding, such as this one. 41 U.S.C § 7103(e). The appeals will "proceed de novo, based on the evidentiary record before the Board and not the [CO's] reasoning or findings of fact."

Louis J. Blazy v. Department of State, CBCA 7992, et al., 26-1 BCA ¶ 38,997, at 189,858 (quoting *Department of Transportation v. Eagle Rock & Paving, Inc.*, 69 F.4th 1367, 1375 (Fed. Cir. 2023)). Similarly, we discussed, as follows, the de novo nature of our review in *CompuCraft, Inc. v. General Services Administration*, CBCA 5516, 17-1 BCA ¶ 36,662:

"The Board is not bound by the contracting officer's final decision in reaching its findings on appeal." *Bay Shipbuilding Co. v. Department of Homeland Security*, CBCA 54, et al., 07-2 BCA ¶ 33,678, at 166,743. To hold otherwise would violate the CDA's instruction that the Board conduct a de novo review. 41 U.S.C. § 7104(b)(4). Having rendered a final decision on [appellant]'s claim, the parties are before the Board on a "clean slate," *Wilner [v. United States]*, 24 F.3d 1397, 1402 (Fed. Cir. 1994)], and the Board will proceed to review the claim de novo.

Id. at 178,540.

FEMA has not presented a basis for dismissing counts II and III of the amended complaint. The Board will proceed to review TEG's claim de novo.⁶

⁶ The Board has considered all arguments presented by the parties in their submissions and has addressed those relevant to the resolution of FEMA's motions.

Decision

FEMA's motion to dismiss counts II and III of the amended complaint is **DENIED**.

Allan H. Goodman

ALLAN H. GOODMAN

Board Judge

We concur:

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge

Jonathan L. Kang

JONATHAN L. KANG

Board Judge