UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION TO DISMISS
FOR LACK OF JURISDICTION DENIED: June 8, 2026

CBCA 8448

SANALIL CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Timothy J. Turner and Jonathan Perrone of Centre Law & Consulting, Tysons, VA, counsel for Appellant.

Brian A. Quint, Office of the Solicitor, Department of the Interior, Washington, DC; and Paul Sax, Office of the Solicitor, Department of the Interior, Lakewood, CO, counsel for Respondent.

Before Board Judges **KULLBERG**, **ZISCHKAU**, and **O'ROURKE**.

KULLBERG, Board Judge.

Respondent, the Department of the Interior (DOI), has filed a motion to dismiss this appeal for lack of jurisdiction. DOI contends that appellant, Sanalil Construction, Inc. (SCI), did not appeal the contracting officer's final decision (COFD) denying SCI's first claim for increased material and labor costs incurred while performing a contract for the National Park Service (NPS), a bureau within DOI. Instead, SCI submitted a second claim for the same increased material and labor costs, alleging new grounds for recovery. The contracting officer (CO) rejected the new grounds asserted in SCI's second claim and declined to

reconsider the denial of SCI's first claim. SCI appealed the second COFD to the Board. DOI filed a motion to dismiss the appeal as untimely because the first COFD, which SCI did not appeal, was final and precluded SCI from appealing the denial of its second claim for the same increased costs. SCI contends that this appeal alleges different grounds for recovery than those asserted in its first claim. For the reasons stated below, DOI's motion is denied.

Background

On September 17, 2020, NPS awarded contract 140P2020C0072 (contract) to SCI for the repair or replacement of building roofs in the Everglades National Park damaged by Hurricane Irma. Exhibit 2 at 1.[1] The contract performance period was 365 days, and the total value of the awarded contract was $3,401,876.67. *Id*. at 1, 6. Through a series of contract modifications, P00001 through P00005, the CO extended, for excusable delay, the period of performance to February 24, 2023, and increased the contract value to $3,937,310.06. *Id*. at 668-82.

By email dated July 25, 2024, SCI submitted to the CO a certified claim in the amount of $610,186.54 for increased costs incurred under the contract (first claim).[2] Exhibit 5 at 1, 5. SCI stated the following:

> [SCI] bid on the project, received the contract award, and undertook performance in good faith. However, the procurement process occurred during the early stages of the Covid-19 outbreak. At the time [SCI] submitted its bid, the extraordinary, once-in-a-lifetime impact of the pandemic on the supply chain and materials costs remained unforeseen. For example, supply chain issues and unprecedented global shortages in materials due to Covid-19 saw an increase in materials costs of more than 200% in many categories. Due to the pandemic, the Agency extended the Contract performance date and then instructed [SCI] to submit a claim after the close of the Contract for costs it absorbed due to unforeseen materials and labor costs caused by the pandemic.

Id. at 6. In addition, SCI contended that "[w]ithout a proportionally reasonable increase in price, the original Contract would [have been] impracticable." *Id*. at 6. Although SCI

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[1] All exhibits are in the appeal file, unless otherwise noted. The page numbers cited are those imprinted by respondent.

[2] On July 16, 2024, SCI initially submitted its claim without a certification of the claim or exhibits. Exhibit 5 at 3-4. DOI received the exhibits on July 18, 2024, and the signed certification of the claim on July 25, 2024. *Id*. at 1-3.

alleged that it could have ceased performing the contract, it completed contract performance in reliance on the CO's instruction "to complete contract performance and then to file this subject claim." *Id*. at 8. SCI sought payment of $610,186.54 as a result of its increased costs. *Id*.

On August 21, 2024, the CO issued the first COFD, forwarded by email on that same date, denying SCI's first claim. Exhibit 4.[3] The CO noted in the first COFD that the contract was a "Firm-Fixed Price contract, which means the price is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract." *Id*. at 2. Additionally, the CO noted in the COFD that the contract had "no contractual clause that would allow the [CO] to adjust the price for material escalations." *Id*. at 3. With regard to SCI's assertion in its claim that the COVID-19 pandemic caused an increase in costs, the first COFD stated that "[n]o additional details [were] provided as to how cost increases related to the COVID-19 pandemic were unforeseen and could not have been known at the time of contract award, which occurred 6 months after the COVID-19 pandemic began." *Id*. Finally, the CO in the first COFD found no merit in SCI's contention that contract performance was impractical because SCI completed the contract "after receiving no-cost time extensions under the excusable delay clause." *Id*. The first COFD advised SCI of its right to appeal either to the "agency board of contract appeals" within ninety days of receipt of the decision or the United States Court of Federal Claims within twelve months of receipt of the decision. *Id*. at 4. The first COFD also provided the address and website for the Civilian Board of Contract Appeals (CBCA). *Id*. SCI did not appeal the first COFD.

On January 2, 2025, SCI submitted to the CO a claim in the amount of $610,186.54 (second claim). Exhibit 3 at 1. SCI presented several grounds for relief, including: (1) "NPS Acted in Bad Faith when it Induced [SCI] to Work Under False Promises of Equitable Adjustment"; (2) "NPS has Breached the Contract's Implied Duty of Good Faith and Fair Dealing"; and (3) "[t]he Agency Changed the Contract When it Ordered [SCI] to Work on the Contract Despite Unprecedented Increases in the Labor and Material Costs." *Id*. at 5-7. Additionally, SCI stated:

> [The COR] made multiple promises to pay [SCI] its COVID-19-related costs although only upon project completion, promises that were echoed by [the CO] when he assured [SCI] that funds would be set aside to appropriately compensate [SCI] for its losses. In reasonable reliance on those promises,

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[3] The heading on the first page of the COFD shows a date of August 2, 2024, but the CO's digital signature is dated August 21, 2024. Exhibit 4 at 2, 5. One of the attorneys who signed SCI's claim was also a recipient of the August 21, 2024, email.

> [SCI] completed its work on the project. When [SCI] sought to enforce the COR's promises, NPS summarily declined any adjustment to the Contract price, determining that [SCI] bore the full risk of labor and material cost increases. This determination was contrary to the promises made by [the COR and CO]. Thus, NPS personnel made promises they never intended to keep. False promises of contract price modification designed only to induce [SCI's] continued performance are bad faith Contract administration.

Id. at 6.

On March 6, 2025, the CO issued a decision denying SCI's second claim (second COFD). Exhibit 1. In the second COFD, the CO advised SCI that the first COFD "was final and is not being reconsidered," and SCI's constructive change theory was "based on the same facts alleged in the previous claim." *Id*. at 3. The CO also stated in the second COFD that "[t]his [second] final decision only addresses the arguments based on the newly alleged operative fact that NPS 'induced [SCI] to work under false promises of equitable adjustment.'" *Id*. at 4. The CO denied SCI's allegation that the CO or COR promised to increase the contract price and stated that even if such a promise had been made, "the result was merely that [SCI] performed the contract in accordance with its terms." *Id*.

SCI appealed the second COFD to the Board, and SCI filed a complaint and amended complaint. In lieu of filing a responsive pleading, DOI filed a motion to dismiss the appeal for lack of jurisdiction. SCI filed an opposition to DOI's motion to dismiss (Appellant's Opposition), DOI filed a reply to SCI's response (Respondent's Reply), and SCI filed a response to DOI's reply (Appellant's Surresponse).[4]

Discussion

At issue is whether SCI has appealed the denial of a claim that is time-barred or the denial of a new claim. DOI argues that SCI failed to appeal the first COFD, which became "final and conclusive," and SCI "now seeks to appeal its time-barred claim(s) and obtain the same relief by asserting alternative or 'new' legal theories based on the same operative facts." Respondent's Motion to Dismiss at 1-2. DOI also argues that SCI's "constructive changes and breach inducement/misrepresentation theories are not based on new facts or conduct, but rather reframes the same factual narrative already considered and denied."

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[4] A surresponse is "[a] second response by someone who opposes a motion." *Surresponse*, Black's Law Dictionary (12th ed. 2024).

Respondent's Reply at 9-10. For that reason, "the CBCA cannot fashion any remedy without impermissibly disturbing the finality of the August 2024 COFD." *Id*. at 16.

In opposition to DOI's motion, SCI argues that "[t]he First Claim relies on a breach of contract defense (i.e., commercial impracticality), while the Second Claim raises three affirmative claims for relief: bad faith contract administration, breach of the duty of good faith and fair dealing, and constructive change." Appellant's Opposition at 7. In addition, SCI distinguishes between its first and second claims in that "the Second Claim's allegations of bad faith, breach of the implied duty of good faith and fair dealing, and constructive change, focus on what the Agency said and did, not COVID-19-related market impacts." Appellant's Surresponse at 5.

The Contract Disputes Act provides that "[a] contractor, within 90 days from the date of receipt of a contracting officer's decision . . . , may appeal the decision to an agency board." 41 U.S.C. § 7104(a) (2024). If a contractor does not bring a timely appeal, "[t]he contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency." *Id*. § 7103(g). The Board has recognized the following:

> [A]n "appellant's failure to file its notice of appeal within ninety days following its receipt of the contracting officer's final decision is a jurisdictional defect that precludes us from entertaining the appeal." *RAKS Fire Sprinkler, LLC v. General Services Administration*, CBCA 6095, 18-1 BCA ¶ 37,122, at 180,676 (citing *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982)). "The ninety day deadline is thus part of a statute waiving sovereign immunity, which must be strictly construed." *Cosmic Construction Co.*, 697 F.2d at 1390.

Outside the Box, LLC v. General Services Administration, CBCA 8335, 25-1 BCA ¶ 38,854, at 189,053. "Once the Board determines that it lacks jurisdiction to hear an appeal, it can only dismiss the appeal, and it does not reach the merits of the appeal." *Id*. (citing *MINACT, Inc. v. Department of Labor*, CBCA 7575, 23-1 BCA ¶ 38,243, at 185,701 (2022)).

DOI contends that SCI's second claim only "reframes" its first claim, but SCI argues that the first and second claims are distinct. It is well established that "we should treat requests as involving separate claims if they *either* request different remedies (whether monetary or non-monetary) *or* assert grounds that are materially different from each other factually or legally." *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1005 (Fed. Cir. 2015). The Board has distinguished a new claim from a reiteration of an old claim as follows:

> The established test for what constitutes a "new" claim is whether "claims are based on a common or related set of operative facts. If the court will have to review the same or related evidence to make its decision, then only one claim exists." *Environmental Safety Consultants, Inc.*, ASBCA 54995, 06-1 BCA ¶ 33,230, at 164,666 ([quoting] *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)).

Kenneth W. Battley v. Social Security Administration, CBCA 1063, 08-2 BCA ¶ 33,896, at 167,768. As the Board has stated, "[t]he introduction of additional facts that do not alter the nature of the original claim, a dollar increase in the amount claimed, or the assertion of a new legal theory of recovery, when based on the same operative facts as included in the original claim, do not constitute new claims." *JRS Management v. Department of Justice*, CBCA 3053, 13-1 BCA ¶ 35,235, at 172,996 (citing *Trepte Construction Co.*, ASBCA 38555, 90-1 BCA ¶ 22,595, at 113,385-86).

In light of the above discussion, the Board's inquiry turns to whether SCI has presented a new claim in this appeal. Such an inquiry requires an examination of the operative facts and legal theories presented in both the first and second claims and whether the second claim is materially different either factually or legally from the first claim. SCI has asserted materially different facts and legal theories in its second claim insofar as it has alleged that it was induced to continue contract performance with promises of compensation for its increased costs. Although DOI argues that the first COFD has determined with finality those questions of whether SCI was induced to continue contract performance, the Board does not find such to be the case because the first claim made no such allegations. The Board cannot, as DOI has urged, simply dispose of SCI's appeal by concluding that SCI "performed the contract in accordance with its terms." At this stage of the proceedings, the Board can make no determination as to the credibility of SCI's allegations which DOI disputes, and the resolution of such a dispute requires further proceedings.

Decision

Respondent's motion to dismiss is **DENIED**.

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

We concur:

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

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