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CLIENT ALERT

Just the (Same) Facts, Ma'am: ASBCA has Jurisdiction to Hear Contractor's Different Theories of Recovery Based on the Same Set of Operative Facts

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In ECC Int'l, LLC, ASBCA No. 60167 (Jan. 25, 2022), the Armed Services Board of Contract Appeals ("Board") held that it had jurisdiction to hear a contractor's alternate theories of recovery that arose from the same operative facts and sought the same relief requested in its claim. The contractor initially filed a certified claim for damages resulting from the Government's alleged breach of a design-build contract for construction of military facilities in Afghanistan. The claim alleged that the Government breached the warranty of specifications and the implied duty of good faith and fair dealing by knowingly awarding a construction contract with an impossible deadline. After the Government denied the claim, the contractor appealed to the Board and raised two additional theories of recovery in its complaint: breach of contract by failing to disclose superior knowledge; and commercial impracticability.

More than four years after a hearing on the merits was held, the Government moved to dismiss the appeal entirely, contending that the contractor's four alternative theories of relief were each supported by different sets of operative facts, and were therefore four separate claims. As separate claims, the Government contended, each had to independently meet the requirements of the Contracts Disputes Act ("CDA"), namely presentation to the contracting officer and separate sums certain.

The Board largely rejected the Government's arguments, holding that it had jurisdiction to hear three of the contractor's four theories of relief: the assertions of breach of the warranty of specifications; breach of the implied duty of good faith and fair dealing; and failure to disclose superior knowledge, because all "[arose] from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery." *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). The Board reiterated that within these constraints, the CDA permits contractors to assert new theories of relief during an appeal without having to present a new claim to the contracting officer. The Board noted that it expects the parties will add factual details learned through the formal discovery process, and these new factual details do not affect its jurisdiction. However, the Board dismissed the contractor's argument that it was entitled to relief based on a theory of commercial impracticability, finding that a key element of proof under that theory was never presented to the contracting officer for decision.

The Board's decision, coupled with the Federal Circuit's recent decision in *Tolliver Group, Inc. v. United States*, 20 F.4th 771 (Fed. Cir. 2021) (which we reported on here and here) serve as reminders to contractors to invest in thorough and thoughtful claims assessments to mitigate against potential procedural challenges later in litigation. This case is also another example of the occasional tension between the unique procedural requirements of the Contract Disputes Act, and the Act's purpose of providing for the fair and efficient resolution of disputes.

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