2023-1909

United States Court of Appeals for the Federal Circuit

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellant,

– v. –

UNITED STATES,

Defendant-Appellee.

On Appeal from the United States Court of Federal Claims in No. 1:22-cv-00339-CNL, Honorable Carolyn N. Lerner, Judge

BRIEF FOR PLAINTIFF-APPELLANT

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JULY 18, 2023

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 23-1909

Short Case Caption Hawaiian Dredging Construction Company, Inc. v. US

Filing Party/Entity Hawaiian Dredging Construction Company, Inc.

Instructions:

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
4. Please do not duplicate entries within Section 5.
5. Counsel must file an amended Certificate of Interest within seven days after any information on this form changes. Fed. Cir. R. 47.4(c).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 05/31/2023

Signature: Michael C. Zisa

Name: Michael C. Zisa

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ None/Not Applicable
Hawaiian Dredging Construction Company, Inc.		HDCC is a wholly owned subsidiary of Kajima International, Inc. (Atlanta, GA). Kajima International, Inc., in turn, is a wholly owned subsidiary of Kajima USA, Inc. (Atlanta, GA.)

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Peckar & Abramson, P.C. Michael C. Zisa, Michael A. Branca		
Erik D. Eike - Attorney at Law		

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☐ Yes (file separate notice; see below) ☑ No ☐ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable ☐ Additional pages attached

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FEDERAL CIRCUIT RULE 47.5 STATEMENT OF RELATED CASES

There is no other appeal in or from the same civil action or proceeding in the originating tribunal that was or is before this or any other appellate court. There is no other case known to counsel to be pending in this or any other tribunal that will directly affect or be directly affected by this court's decision in the pending case.

I. JURISDICTIONAL STATEMENT

The United States Court of Federal Claims ("Claims Court") had jurisdiction of this case pursuant to 28 U.S.C. § 1491(a)(1) as the dispute is a claim against The United States founded upon an express contract, and express and implied warranties, not sounding in tort.

Under 28 U.S.C. § 1295(a)(1), the Federal Circuit has jurisdiction over HDCC's appeal of the Claims Court's: (1) Opinion and Order dated February 14, 2023 granting the Appellee's Motion to Dismiss; (2) Judgment dated February 14, 2023 dismissing HDCC's Amended Complaint without prejudice; and (3) Order dated April 24, 2023 denying HDCC's Motion for Reconsideration of and/or Relief from Order of Dismissal and Motion for Leave to Amend. This appeal is from a final order or judgment that disposes of all of HDCC's claims.

HDCC timely filed a Notice of Appeal to this Court on May 16, 2023.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Claims Court erred in dismissing the Complaint which contained well plead facts sufficient to support HDCC's claims?

2. Whether the Claims Court erred in dismissing portion of HDCC's claims that were not subject to the Motion to Dismiss and not addressed by the parties or the Claims Court?

3. Whether the Claims Court erred in denying the Motion for Reconsideration of and/or Relief From Order of Dismissal and Motion for Leave to Amend, when the proposed Amended Complaint addressed the perceived deficiencies in the Complaint?

III. STATEMENT OF THE CASE

1. Statement of Facts

a. HDCC and the Government Entered a Contract for the Lahaina Bypass Project.

The project at issue is the Lahaina Bypass 1B-2 design-build highway project which generally consisted of a new bypass highway and the widening of Honoapiilani Highway in West Maui between Honokowai to the north and Launiupoko to the south in Lahaina, Maui, Hawaii (the "Project"). (Appx28-29)

The Project was constructed to alleviate congestion on the Honoapiilani Highway, through Lahaina. The new roadway was approximately 2.7 miles of four-lane highway. The design-build contract required two lanes to be paved. The Project relocated the terminus of the Lahaina Bypass to provide a solution to shoreline erosion and coastal hazards and addresses the potential increase in traffic congestion, while achieving transportation goals for the area. (Appx29)

In addition to utilizing portions of existing State-owned rights-of-way and the Honoapiilani Highway, the Project traversed several large parcels of land owned and/or controlled by Makila Land Co., LLC and the County of Maui which

would ultimately require subdivision and dedication to the State of Hawaii. Also, the Project alignment crossed the Launiupoko Gulch and three unnamed drainage gulches which were deemed to be Jurisdictional Waters of the United States administered by the U.S. Army Corps of Engineers pursuant to Section 404 of the Clean Water Act. (Appx39)

On October 1, 2015, the Central Federal Lands Highway Division of the Federal Highway Administration (the "Government"), in partnership with the State of Hawaii's Department of Transportation ("HDOT") issued a Request for Qualifications ("RFQ") soliciting potential design build contractors to participate in the Phase-One or the pre-qualification phase for the Project. (Appx39)

In the RFQ, the Government stated: "There are two (2) right-of-way acquisitions required within the limits of this project; one private landowner and Maui County (sic). The right-of-way acquisition is expected to be complete prior to issuance of the RFP." (Appx39)

On or around December 7, 2015, HDCC was invited to participate in Phase Two of the solicitation, and thereafter HDCC received a Request for Proposal ("RFP") from the Government. On page A-11 of the RFP under the heading "Government Furnished Information," the following files were identified:

- Right of Way Dedication of Deed documentation (sic)
- Final Environmental Assessment/ Finding of No Significant Impact
- Survey Data

- Alternative No. 3 Profile ("Alternative No. 3")

Alternative No. 3 was a map depicting a roadway alignment which was included as part of HDOT's Final Environmental Assessment/Finding of No Impact (December 2015) covering the Project. (Appx39)

In addition to other requirements, the RFP specifically required that:

(1) each proposal include "[t]he plan and profile of the roadway alignment, including typical sections" and the "[p]roposed alignment and maintenance limits as it relates to available right-of-way" and

(2) the Contractor locate and identify all utilities within the project area and "cooperate with utility owners to expedite the relocation and adjustment of their utilities to minimize interruption of service, duplication of work, and delays if relocations or adjustments are needed" and "prepare utility agreements for CFLIID, to be executedby HDOT."

(Appx39) The RFP also stated:

> **111.05. Geometric Requirements.** Fully design the highway and construction limits to fit within the designed right of way (ROW) and future dedication of deed. Design the roadway in accordance with Chapter 9 – Highway Design, 2005 Project Development and Design Manual. An initial alignment has been provided. The alignment, vertical and horizontal, may be altered as long as the construction limits remain within the ROW described for Alternate 3 and meets the AASHTO design criteria for a Principal Rural Arterial Roadway …

(Appx398)

On April 26, 2016, HDCC submitted its Price Proposal and its Technical Proposal for the Project to the Government. In its Price Proposal, HDCC offered to

design and construct the Project for $38,671,000.00 based on the information contained in the RFP including Alternative No. 3. HDCC's Technical Proposal included a detailed roadway plan and repeatedly and unequivocally stated that the basis for the proposed roadway alignment was Alternative No. 3. (Appx40)

On June 3, 2016, the Government advised HDCC that it had been awarded the Project and subsequently, the parties entered a design-build contract for the Project. Under the Contract, the Government was required to provide the final right-of-way ("ROW") for the Project. (Appx728) On June 29, 2016, the Government issued the Notice to Proceed with performance of the Contract (the "NTP") which was directing HDCC to proceed with the Alternative No. 3 alignment. (Appx40)

b. HDCC is Impacted and Delayed by the Actions and Inactions of the Government.

From the very outset of the Project, HDCC experienced numerous impacts and delays that were caused by the Government. (Appx29, Appx40) HDCC timely submitted notices of delay and increased costs throughout the course of its performance, which were ignored or rejected by the Government. (Appx30)

c. HDCC Submitted a Certified Claim Seeking Time and Costs Associated with Government Caused Impacts and Delays.

As a result, on July 17, 2020, HDCC submitted a certified claim to the Contracting Officer requesting both time and money from the Government (the

"Certified Claim"). (Appx30, Appx38-52) In the Certified Claim, HDCC provided a detailed explanation of each of its claims which included the following:

1. Late Issuance of NTP;
2. Failure to Timely Secure and Provide Final ROW ;
3. Government Changes to the Final ROW;
4. 404 Permit Delay;
5. Overhead Utility Delays at the Southern Terminus and Hokiokio;
6. Maui Electric Wall & Kai Ilclc Ku Wall Delays (time only); and
7. Constructive Acceleration.

(Appx38-52)

On March 30, 2021, the Contracting Officer issued a final decision on HDCC's Certified Claim (the "Final Decision"). (Appx30, Appx53-146) Other than agreeing that HDCC was entitled to a 12-day extension of time for the late issuance of the NTP, the Contracting Officer denied all of HDCC's claims in the Certified Claim. (Appx145)

Additionally, in the Final Decision, the Contracting Officer concluded that the Government erred when it included Line Items A0350 for $391,726.76 and A0360 for $500,426.31 and made full payment for these items in Progress Estimate #26. Therefore, the Contracting Officer determined that the Contract needed to be adjusted to recover the total sum of $892,153.05 from HDCC. (Appx145)

Upon receipt of the Final Decision, HDCC retained the Sage Group to evaluate the Certified Claim and Final Decision and the Sage Group prepared the

136-page Sage Report. On or about November 17, 2021, HDCC provided the Sage Report to the Government and invited further discussion of HDCC's claim. The Government did not respond. (Appx32)

d. HDCC Filed an Action with the Claims Court.

On March 29, 2022, HDCC filed a Complaint with the Claims Court challenging the propriety of the Contracting Officer's Final Decision. (Appx24, Doc. 1, Compl.) On July 22, 2022, HDCC voluntarily filed an Amended Complaint and attached the following Exhibits: Ex. A - Certified Claim; Ex. B - Final Decision; and Ex. C - Sage Report (the "Complaint"). (Appx27-282) In support of its claims, HDCC specifically alleged, *inter alia*, the following:

1. The Government unforeseeably failed to timely secure and provide the final ROW over the Makila Land Company and County of Maui Lands which delayed roadway design and commencement of construction activities entitling HDCC to an excusable and compensable time extension and additional costs. (Appx31-32, Appx42-44, Appx189-193)

2. Four months after the NTP, the final ROW provided by the Government was materially and unforeseeably different from Alternative No. 3 upon which HDCC based its design which resulted in substantial redesign and other compensable costs and delays entitling HDCC to an excusable and compensable time extension and additional costs. (Appx31-32, Appx44-46, Appx189-193, Appx229-230, Appx601)

3. The Government's failure to timely secure the final ROW over the Makila Land Company and County of Maui Lands resulted in unforeseen changes to the permitting requirements/standards from those reasonable anticipated by HDCC at the time of bidding which caused delays and increased costs entitling

HDCC to an excusable and compensable time extension and additional costs. (Appx31-32, Appx46-47, Appx193-196, Appx229-230)

4. The Government's failure to timely execute agreements with public utility companies resulted in delays in HDCC's completion the final roadway configurations and additional costs entitling HDCC to an excusable and compensable time extension and additional costs. (Appx48-49, Appx196-206)

5. The Government caused delays associated with changes to the work involving adjacent property owner retaining walls, which resulted in excusable delays. (Appx31-32, Appx49-50, Appx206-215)

6. The Government's failure to grant HDCC's proper requests for time extensions forced HDCC to accelerate its performance. (Appx30, Appx50-51, Appx248-249)

7. The Final Decision purported to rescind a previously approved contract modification without proper authority or procedure. (Appx31, Appx145)

Based upon the allegations in the Complaint, HDCC sought damages in the amount of $6,576,968 along with 190 compensable and excusable days of delay and an additional 482 days of excusable delay and a determination that the Government was not entitled to a repayment of the $829,753.05. (Appx35-37)

e. The Claims Court Dismissed HDCC's Complaint.

On August 5, 2022, the Government filed a Motion to Dismiss the Complaint pursuant Rule 12(b)(6). (Appx24, Doc. 14, Mot. to Dismiss) In the Motion to Dismiss, the Government generically argued HDCC's claims must fail because in a firm fixed price contract, HDCC "assumed the risk of any delays or

increased costs, including the risk of contractually specified liquidated damages in the event HDCC failed to fulfill its obligations in the time required." (Appx24, Doc. 14, Mot. to Dismiss, p. 6) The Government also argued that HDCC's claims under FAR 52.243-4, Changes, must fail because HDCC did not allege an "change in the form of a 'written or oral order…from the Contracting Officer that causes a change.'" (Appx24, Doc. 14, Mot. to Dismiss, p. 7)

HDCC opposed the Motion to Dismiss on the basis that: (1) under a firm fixed price contract, a contractor is entitled to increased costs and delays that are the result of the Government's directed or constructive changes; and (2) the factual allegations contained in the Complaint and the attachments when taken in the light most favorable to HDCC were sufficient to support HDCC's claims that the Government's actions and inactions constitute constructive changes for which HDCC is entitled to additional time and compensation. (Appx25, Doc. 18, pp. 8-15)

In the alternative, HDCC asked the Claims Court for leave to amend the Complaint if the Court found that "HDCC's Complaint does not state sufficient facts to support any portion of its claims against the Government." (Appx25, Doc. 18, p. 15)

On February 14, 2023, the Claims Court granted the Motion to Dismiss and dismissed HDCC's Complaint *without* prejudice (the "Dismissal Opinion").

(Appx1-15) The basis for the Claims Court's decision was that the Complaint "fails to state a claim that the Government required HDCC to perform work outside of its contractual requirements." (Appx8) To support this conclusion, the Claims Court made the following findings:

- "Plaintiff does not allege facts that demonstrate either that HDCC performed work outside of the contract requirements or that HDCC experienced unforeseeable, excusable delay caused by the Government's acts or omissions." (Appx9)

- "While the Contract assigns the Government responsibility to obtain title to ROWs, it does not specify a date by which the Government was required to do so. Thus, HDCC is wrong to allege that the Government caused unforeseeable, and therefore excusable, delays in contravention of its express duties under the Contract." (Appx9) (internal citations omitted).

- "Nor does [HDCC] offer facts showing that the Government engaged in a lack of diligence and interference with or failure to cooperate in [HDCC's] performance. (Appx10)

- "Plaintiff would need to plausibly allege that the late ROWs changed the Contract or resulted in excusable delay. It failed to do so." (Appx11)

- "Plaintiff does not credibly allege that the contract requirements or site conditions were materially different from the ROW information in the RFP." (Appx11)

- "The need to adjust the ROW design to fit within the final ROW was foreseeable under the RFP's and Contract's requirements for ROW design and facilitation services." (Appx11)

- "The Amended Complaint fails to state a claim under the Changes clause for recovery of increased costs due to delay in these utility relocations. It does not allege facts demonstrating that these delays

were excusable due the Government's acts or omissions…" (Appx12)

- With regard to HDCC's Maui Electric and Castleton Wall delay claims, "HDCC does not plead sufficient facts to demonstrate excusable delay. The alleged facts, even when taken as true, indicate that HDCC intentionally contributed to the delay and that HDCC did not continue to perform the contract despite its pending dispute with the Agency…" (Appx14)

On February 14, 2023, the Clerk issued a judgment dismissing the Complaint *with* prejudice. (Appx16) On March 15, 2023, after HDCC filed a Motion for Relief pursuant to Rule 60(a) noting the discrepancy between the Dismissal Opinion and the Judgment, the Clerk corrected the Judgment to dismiss the Complaint without prejudice. (Appx26, Doc. 32; Appx16)

f. HDCC Filed a Motion for Reconsideration of and/or Relief from Order of Dismissal and Motion for Leave to Amend.

On March 14, 2023, HDCC filed a Motion for Reconsideration of and/or Relief from Order of Dismissal (the "Motion for Reconsideration") and Motion for Leave to Amend which attached a proposed Amended Complaint (the "Motion to Amend"). (Appx26, Doc. 33) Specifically, HDCC indicated that (1) the statute of limitations rendered the dismissal without prejudice to be a dismissal with prejudice, and therefore, resulting in a manifest injustice; (2) HDCC included in its Opposition to the Motion to Dismiss a request for leave to amend, which should be considered; and (3) because the proposed Amended Complaint remedied any alleged pleading failures outlined by the Court in its Order, and because leave to

amend shall be freely granted, that the Court should permit HDCC to file its proposed Amended Complaint. (Appx26, Doc. 33, pp. 5-10)

On April 24, 2023, the Claims Court denied the Motion for Reconsideration and Motion to Amend finding that there was no manifest injustice and further finding that the amendment was futile (the "April 24, 2023 Opinion"). (Appx17-22)

2. Procedural History and Rulings Presented for Review.

On May 16, 2023, HDCC filed a Notice of Appeal of the Claims Court's: (1) Opinion and Order dated February 14, 2023 granting the Appellee's Motion to Dismiss; (2) Judgment dated February 14, 2023 dismissing HDCC's Amended Complaint without prejudice; and (3) Order dated April 24, 2023 denying HDCC's Motion for Reconsideration of and/or Relief from Order of Dismissal and Motion for Leave to Amend.

IV. SUMMARY OF ARGUMENT

The Claims Court rushed to judgment in dismissing HDCC's Complaint without giving HDCC an opportunity to amend. In rushing to judgment, the Claims Court made several errors. First, the Claims Court erred by effectively finding that HDCC assumed all risks under a firm fixed-price contract. The Claims Court's finding ignored the bedrock of government contracting that even under a fixed-price contract, a contractor is entitled to a change by written or oral order or a

constructive change when the Government's failure resulted in additional work that increased the contract price and/or time to perform. In its Complaint and attachments, HDCC alleged that the Government's delay in fulfilling its contractual obligations and other actions and inactions resulted in additional work and increased costs and time of performance, which allegations are sufficient to state a plausible action.

Second, contrary to the well-settled law, the Claims Court did not accept HDCC's well plead allegations as true or construe the allegations in the light most favorable to HDCC. In its Complaint and the attachments, HDCC alleged facts that when taken as true state a plausible cause of action against the Government. Specifically, HDCC alleged that the Government unforeseeably failed to timely provide the final ROW for the Project; when the Government finally provided the final ROW four months after issuing the NTP, it was materially and unforeseeably different from the ROW that was included in the RFP and upon which HDCC had based its bid and developed its design; the Government failed to timely execute contractually required agreements with utility owners; and the Government failed to issue contract modifications for additional work. HDCC alleged that the Government's failures resulted in additional work and delays that increased HDCC's costs for performance and forced HDCC to constructively accelerate its performance. In dismissing HDCC's Complaint, the Claims Court improperly

rejected these well plead allegations. Compounding its error, the Claims Court made factual findings regarding foreseeability, materiality, and other potential defenses to HDCC's claims all of which are improper when ruling on a Rule 12(b)(6) Motion to Dismiss.

Finally, the Claims Court erred by denying HDCC's Motion for Reconsideration because the Claims Court's dismissal *without* prejudice was tantamount to a dismissal *with* prejudice, which created a manifest injustice to HDCC. Further, the Court erred in denying HDCC's Motion for Leave to Amend on the basis of futility since the proposed Amended Complaint addressed all of the alleged deficiencies in HDCC's Complaint and stated plausible causes of action against the Government.

V. STANDARDS OF REVIEW

1. Motion to Dismiss for Failure to State a Claim under Rule 12(b)(6).

The Court reviews "decisions to dismiss complaints under Rule 12(b)(6) de novo." *Zafer Constr. Co. v. United States*, 40 F.4th 1365, 1367 (Fed. Cir. 2022) (citing *Dehne v. United States*, 970 F.2d 890, 892 (Fed. Cir. 1992)). "Whether the Claims Court properly dismissed a complaint for failure to state a claim is a question of law" reviewed by the Court "independently and without deference." *Fishermen's Finest, Inc. v. United States*, 59 F.4th 1269, 1274 (Fed. Cir. 2023) (quoting *Conti v. United States*, 291 F.3d 1334, 1338 (Fed. Cir. 2002)).

When reviewing a dismissal for failure to state a claim, the Court must take "all factual allegations in the complaint as true and construe the facts in the light most favorable to the non-moving party." *Jones v. United States*, 846 F.3d 1343, 1351 (Fed. Cir. 2017). The Court also "draws all reasonable inferences in the claimant's favor." *Lindsay v. United States*, 295 F.3d 1252 (Fed. Cir. 2002). A factual allegation is well-plead where it is more than a legal conclusion, deduction, or opinion. *Figueroa v. United States*, 57 Fed. Cl. 488 (2003), aff'd, 466 F.3d 1023 (Fed. Cir. 2006).

A motion to dismiss for failure to state a claim cannot be granted where the Plaintiff has asserted facts which, when accepted as true, "state a claim to relief that is plausible on its face." *Ground Improvement Techniques, Inc. v. United States*, 108 Fed. Cl. 162 (2012), *aff'd*, 618 F. App'x 1020 (Fed. Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim is plausible on its face when the asserted facts support a "reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. This plausibility standard does not rise to the level of a probability requirement and "does not require detailed factual allegations." *Id*. Nor is a plaintiff "required to conclusively prove that it is entitled to a legal remedy. 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556(2007)). In fact, the Federal Circuit has recognized that, in the context of a motion to dismiss, notice pleading under Rules of the United States Court of

Federal Claims ("RCFC") RCFC 8(a)(2) merely requires "a short and plain statement of the claim that will give the defendant fair notice of what the claim is and the grounds upon which it rests." *Gould, Inc. v. United States*, 935 F.2d 1271 (Fed. Cir. 1991). "Rule 12(b)(6) does not countenance … dismissals based on a judge's disbelief of a complaint's factual allegations." *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)); *see also Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11 (2014) (Federal Rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.").

Moreover, when determining a Rule 12(b)(6) motion to dismiss, the Court must consider not only the allegations contained in the complaint, but also exhibits attached to the complaint. *Terry v. United States*, 103 Fed. Cl. 645, 652 (2012) ("documents appended to a motion to dismiss 'are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim."); *see also* RCFC 10 ("[a] copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes."); *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014) (the Court may also look "matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record.").

2. Motion for Reconsideration of and/or Relief from Order of Dismissal and Motion for Leave to Amend.

A ruling by the Court of Federal Claims denying a motion for reconsideration is reviewed for an abuse of discretion. *See Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1379 (Fed. Cir. 2007) (internal citations omitted). "An abuse of discretion occurs when a court misunderstands or misapplies the relevant law or makes clearly erroneous findings of fact." *Renda Marine, Inc.*, at 1379.

While a ruling by the Court of Federal Claims denying a motion for leave to amend is also reviewed for an abuse of discretion, when the decision is made to deny leave to amend based on futility, then that is a legal conclusion reviewed de novo. *See Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1236 (11th Cir. 2008). "Futility" means that the complaint, as amended, would fail to state a claim upon which relief could be granted. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1433 (3d Cir. 1997). In assessing "futility," the District Court applies the same standard of legal sufficiency as applied under Rule 12(b)(6). *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000); *see also Keweenaw Bay Indian Community v. State*, 11 F.3d 1341, 1348 (6th Cir. 1993) (When a district court denies leave to amend a complaint because of futility, we review de novo).

VI. ARGUMENT

1. The Claims Court Erred in Dismissing the Complaint Which Contained Well Plead Facts Sufficient to Support HDCC's Claims Against the Government and Instead Made its Own Factual Findings Contrary to the Well Plead Facts.

The Claims Court erred in dismissing the Complaint, which contained well plead facts sufficient to support HDCC's claims against the Government. Specifically, in its decision, the Claims Court improperly found that the Complaint "fails to state a claim that the government required HDCC to perform work outside of its contractual requirements" and improperly found that the "setbacks HDCC alleges it encountered during contract performance—problems with the timing and content of finalized ROWs, obtaining necessary permits, relocating utilities, and negotiating work on several retaining walls—were both HDCC's sole responsibility under the firm fixed-price Contract and reasonably foreseeable." (Appx8)

As demonstrated below, a contractor is entitled to increased costs and additional time if it is forced to perform additional work or is delayed because of the Government's failures. HDCC's Complaint alleged sufficient facts, when taken as true and construed in the light most favorable to HDCC, to support HDCC's claims that the Government's actions and inactions forced HDCC to perform additional work and delayed HDCC's performance.

A. Under a Fixed Price Contract, HDCC is Entitled to Increased Costs and Delays that are the Result of the Government's Directed or Constructive Changes.

Under a fixed price contract, HDCC is entitled to increased costs and time that are the result of the Government's directed or constructive changes. In a fixed price contract, the contractor bears the risk that its actual costs of performance may exceed the contract price, but this does not mean that a contractor is not entitled to a change to the contract price or time. Indeed, it is well-settled that under a fixed price contract, a contractor is entitled to additional compensation and time that result from a government directed and/or constructive change to the work. FAR 52-243-4; *Zafer Taahhut Insaat v. Ticaret A.S. v. United States*, 833 F.3d 1356, 1361-62 (Fed. Cir. 2016) (noting that an equitable adjustment is permissible in a fixed-price contract when a change occurs, whether formal or constructive); *American Line Builders, Inc. v. United States*, 26 Cl. Ct. 1155, 1180-81 (1992). Additionally, "[u]nder the Changes clause, plaintiff can recover delay damages as compensation for extended performance due to the change." *Pathman Constr. Co. v. United States*, 227 Ct. Cl. 670, 673 (Cl. Ct. 1981).

A change can be supported by a "written or oral order…from the Contracting Officer" but the law also recognizes constructive changes. FAR 52.243-4. "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." *Agility Defense & Government Services, Inc. v. United States*, 115 Fed. Cl. 247, 251 (Fed. Cl. 2014) (quoting *Int'l Data Products Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007)). In other words, "if additional work was necessitated by the Government's failures, then such work *was* outside the scope of the contract giving rise to a constructive change claim." *M.A. DeAtley Const., Inc. v. United States*, 71 Fed. Cl. 370, 376 (2006); *Aydin Corp. (West) v. Widnall*, 61 F.3d 1571, 1577 (Fed. Cir.1995) (stating that "[w]here it requires a constructive change in a contract, the Government must fairly compensate the contractor for the costs of the change") (citations omitted); *Flink/Vulcan v. United States*, 63 Fed. Cl. 292, 303 (2004) (stating that "if the Government otherwise caused the contractor to incur additional work, a constructive change arises for that work performed outside of the scope of the contract"). In sum, "[w]hen the Government compels work 'above and beyond that in the contract,' it must compensate the contractor for the costs of the additional work through an equitable adjustment." *Agility Defense*, 115 Fed. Cl. at 251.

B. HDCC's Complaint Alleged Facts Sufficient to Support HDCC's Constructive Change Claim.

The allegations in HDCC's Complaint exceed the notice pleading requirements of RCFC 8(a)(2) and "state a claim to relief that is plausible on its face." *Ashcroft*, 556 U.S. at 678. Below is a discussion of HDCC's claims, which

demonstrates that HDCC plead sufficient facts in the Complaint to state a claim for which relief can be granted.

1. The Government's Failure to Timely Secure and Provide the Final ROW.

In the Dismissal Opinion, the Claims Court found that HDCC "does not allege facts that demonstrate either that HDCC performed work outside of the contract requirements or that HDCC experienced unforeseeable, excusable delay caused by the Government's acts or omissions." (Appx9) The Claims Court went on to state "[n]or does [HDCC] offer facts showing that the Government engaged in a lack of diligence and interference with or failure to cooperate in [HDCC's] performance." (Appx10) In doing so, the Court ignored and rejected well plead allegations in the Complaint and made improper factual findings that are contrary to HDCC's well plead allegations.

As alleged in the Complaint, the Government was required to obtain the final ROW for the Project but failed to do in the timely manner. (Appx728, Appx31-32, Appx42-44, Appx189-193, Appx229-230) Specifically, the Government was required to obtain property rights from adjacent property owners so that it could establish the final boundaries for the Project and provide the final ROW. (Appx31-32, Appx42-44, Appx189-193, Appx229-230) The Government did not secure these rights and obtain the final ROW until November 7, 2016 – over four months after the NTP was issued. (Appx190) HDCC alleged that this

delay was unforeseeable. (Appx31) The Government's delay in providing the final ROW had two impacts on HDCC, both of which are identified in the Complaint and support HDCC's claims. First, without the final ROW and "the land being vested to the State of Hawaii, HDCC was unable to enter the Makila Parcels and the County Parcels to undertake preparatory work (such as surveying) necessary to commence roadway design" which forced HDCC to wait for the Government to secure ROWs from the owners of the affected lands. (Appx43-44, Appx229-230) In other words, HDCC did not have access to the full Project site.

Second, because the Government had not obtained the final ROW at the time it issued the NTP, HDCC based its design of the roadway on Alternative No. 3 as specified in the RFP, and as HDCC was directed by the Government when it issued the NTP. Specifically, the Contract stated that HDCC should "[d]esign the roadway to fit within the designated ROW and future dedication of deed…" (Appx229) Consistent with the Contract, HDCC's design chose a baseline that allowed the roadway to be fully designed within the ROW shown in Alternative No. 3. By the time the Government provided the final ROW, HDCC's design of the roadway was 80% complete. (Appx190) However, as alleged in the Complaint, the final ROW secured and provided was materially different from Alternative No. 3. (Appx44-46, Appx190, Appx229-230, Appx601) The differences "required redesign of significant portions of the roadway and improvements which resulted

in delays, additional engineering costs, and substantial increases in HDCC's construction costs." (Appx44-46; Appx229-230)

In short, the Government's failure to timely secure and provide the final ROW constituted a constructive change because it forced HDCC to perform additional work and caused delays to HDCC's performance. *See M.A. DeAtley*, 71 Fed. Cl. at 376. Therefore, HDCC stated a constructive change claim that is plausible on its face.

Notwithstanding, the Claims Court decided that "HDCC is ***wrong to allege*** that the Government caused unforeseeable, and therefore excusable, delays in contravention of its express duties under the Contract" because the Contract "does not specify a date by which the Government was required to do so." (Appx9) (emphasis added) The Claims Court's decision was improper for several reasons.

First, the Claims Court's apparent disbelief of HDCC's allegations at the Rule 12(b)(6) stage is improper. HDCC properly alleged facts and the Claims Court must accept those facts as true and construe them in the light most favorable to HDCC. *See Jones*, 846 F.3d at 1351. Not only did the Claims Court fail to do so, but the Claims Court chose to disbelieve HDCC's allegation, which it is not at liberty to do. *See Twombly*, 550 U.S. at 556.

Second, the Claims Court's conclusion that the delay alleged by HDCC could not have been unforeseeable because the Contract did not specify a date by

which the Government was to provide the final ROW is wrong. When a contract does not specify the period in which the government must act, "the law imposes an obligation to act within a reasonable period of time." *Specialty Assembling & Packing Co. v. United States*, 174 Ct. Cl. 153, 355 F.2d 554, 565 (Ct. Cl. 1966); *Franklin Pavkov Constr. Co. v. Roche*, 279 F.3d 989, 997 (Fed. Cir. 2002) ("The time, place and manner of delivery, if not specified in the contract or by subsequent agreement of the parties, should be a reasonable time, place and manner that enables the contractor to perform under the contract."). Indeed, "the government ha[s] a continuing obligation not to delay [contractor]'s performance." *Essex Electro Eng'rs v. Danzig*, 224 F.3d 1283, 1291 (Fed. Cir. 2000). HDCC alleged that it did not foresee the Government delay to timely secure and provide the final ROW. HDCC specifically stated "[t]he delayed ROW final acquisition…[was] unforeseen." (Appx31, Appx191) HDCC's allegations, when taken as true and in the light most favorable, supports HDCC's claim, and the Claims Court was wrong to disbelieve HDCC's allegation as this stage.

Finally, questions of foreseeability and reasonableness are inherently factual questions. *See Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311, 1321 (Fed. Cir. 2011) ("foreseeability of an event is a traditional issue of fact."); *Int'l Prod. Specialists, Inc. v. Schwing Am., Inc.*, 580 F.3d 587, 595 (7th Cir. 2009) ("What constitutes a reasonable time for performance given the facts of the case is again a

question of fact..."). In evaluating a Rule 12(b)(6) motion, the Claims Court is not at liberty to decide factual questions or make factual findings. *See Coop. Entm't, Inc. v. Kollective Tech., Inc.*, 50 F.4th 127, 133 (Fed. Cir. 2022) ("Determining [elements of a claim] is a question of fact that cannot be resolved at the Rule 12(b)(6) stage, and the district court erred in resolving this factual issue."). Therefore, the Claims Court erred when it made findings of fact regarding foreseeability and reasonableness that are inconsistent with HDCC's allegations.

2. The Government's Changes to the Design Parameters After Award of the Contract.

In the Dismissal Opinion, the Claims Court found that "Plaintiff does not credibly allege that the contract requirements or site conditions were materially different from the ROW information in the RFP" and that "[t]he need to adjust the ROW design to fit within the final ROW was foreseeable under the RFP's and Contract's requirements for ROW design and facilitation services." (Appx11)

In doing so, the Claims Court again improperly ignored and chose to disbelieve HDCC's well plead allegations and made improper factual findings about materiality and foreseeability. As demonstrated above, in the Complaint, HDCC alleged that it relied upon Alternative No. 3 that was included in the RFP to prepare the roadway design and specifically prepared the roadway design to fit within the designated ROW in Alternative No. 3. (Appx31-32, Appx44-46, Appx189-193, Appx229-230) HDCC also alleged that four months after issuing

the NTP and after HDCC's roadway design was 80% complete, the Government provided the final ROW which was materially different from Alternative No. 3. (Appx31-32, Appx44-46, Appx190, Appx230) The material differences "required redesign of significant portions of the roadway and improvements which resulted in delays, additional engineering costs, and substantial increases in HDCC's construction costs." (Appx45-46) In short, HDCC alleged that the Government's action – making materials changes to the contract documents upon which HDCC based its design – constituted an actual and/or a constructive change for which HDCC may seek an equitable adjustment to compensate for increased costs and delay of performance. *See M.A. DeAtley Const.*, 71 Fed. Cl. at 376.

Further, by ignoring or disbelieving HDCC's allegations, the Claims Court effectively made its own factual findings regarding foreseeability and materiality, which is not proper on a Rule 12(b)(6) motion. *See Micron*, 645 F.3d at 1321; *Int'l Tech. Corp. v. Winter*, 523 F.3d 1341,1349 (Fed. Cir. 2008) ("[C]ontractor must prove that the conditions differed materially from those represented" … "which is again a fact question."); *see also Kollective Tech.*, 50 F.4th at 133.

3. The Government's Failure to Timely Provide the Final ROW Impacted the Permit Process.

The Claims Court improperly found that Contract's Permits and Responsibilities clause prevented HDCC from pursuing a claim for additional costs and delays associated with the permitting process that were caused by the

Government's failure to timely provide the final ROW. (Appx11) In dismissing HDCC's claim, the Claims Court relies upon the Permits and Responsibilities Clause of the Contract that states the "Contractor shall, without additional expense to the Government, be responsible for obtaining necessary licenses and permits…" and goes onto hold that "Plaintiff would need to plausibly allege that the late ROWs changed the Contract or resulted in excusable delay. It failed to do so." (Appx11)

The Claims Court's analysis is wrong. The Permits and Responsibilities Clause allocates risk for obtaining licenses and permits to the contractor *unless* the contractor alleges a "countervailing contractual duty on the Government that contradicts or renders ambiguous the express allocation of risk to [the contractor]." *Bell/Heery v. United States*, 739 F.3d 1324, 1334 (Fed Cir. 2014).

In *Bell/Heery*, the contractor entered into a contract with the Government for the design-build construction of correctional institute in New Hampshire. *Bell/Heery,* 739 F.3d at 1326. The project involved a "cut-to-fill" site and required that the cut-to-fill operations be in compliance with the applicable state rules and regulations including obtaining an Alteration of Terrain ("AOT") permit. 739 F.3d at 1326. In preparing its bid for the Project, the contractor assumed the state would approve the AOT permit with the "one-step-cut-to-fill construction plan." *Id*. at 1328. However, the contractor's assumption was wrong – the state did not approve

the "one-step-cut-to-fill construction plan." *Id*. As result, the contractor had to undertake a more expensive and time-consuming method of performing the work. The contractor submitted a claim for these costs which the contracting officer rejected, and the contractor filed a lawsuit with this Court. *Id*. at 1328-30. The Court granted the Government's Motion to Dismiss, and the contractor appealed to this Court who affirmed the decision. *Id*.

The important distinction between *Bell/Heery* and the current case is that the contractor in *Bell/Heery* did not allege that the Government's action caused the state's rejection of the "one-step-cut-to-fill construction plan." Indeed, the Federal Circuit found that the contractor's "complaint does not identify any countervailing contractual duty on the Government that contradicts or renders ambiguous the express allocation of risk to [the contractor] for compliance with the [] AOT permit." *Id*. at 1334.

In the Complaint, HDCC alleged that the Government's failure to timely acquire the final ROW impacted HDCC's ability to commence and complete the survey and design work, which in turn delayed HDCC's ability to complete the permit applications. Specifically, HDCC could not apply for permits until the design was complete. (Appx31-32, Appx46-47, Appx193-196) As a result of the delay caused by the Government's failure, the permitting conditions and requirements changed from those that were in place at the time that HDCC

submitted its proposal. (Appx31-32, Appx46-47, Appx193-196) The change in the permitting conditions increased the amount of time and HDCC's costs necessary to obtain the 404 permits. (Appx31-32, Appx46-47, Appx193-196) In short, HDCC alleged that the Government's actions caused a change to the Contract requirements. These allegations, if proven true, support HDCC's claim.

4. Government Caused Delays Associated with Overhead Utility at the Southern Terminus and Hokiokio.

The Claims Court again ignored the allegations in the Complaint in ruling that "[t]he Amended Complaint fails to state a claim under the Changes clause for recovery of increased costs due to delay in these utility relocations. It does not allege facts demonstrating that these delays were excusable due the Government's acts or omissions…" (Appx12)

To the contrary, in the Complaint, HDCC alleged facts demonstrating that the Government's failure to timely execute agreement with utility companies as required by the Contract caused delays to HDCC's performance. (Appx48-49, Appx196-206) HDCC alleged that the Contract required HDCC to locate and identify all utilities within the Project area that could impact construction operations and to "[c]ooperate with the utility owner to expedite relocation or adjustment of their utilities to minimize interruption." (Appx197) HDCC also alleged that the Contract required HDCC to prepare the agreements with the utility companies for the Government to execute to perform the necessary utility

relocation. (Appx197) However, HDCC alleged that the Government failed to timely execute the agreements which resulted in delays in HDCC's completion of the final roadway configurations and additional costs. (Appx48-49, Appx196-206) Specifically, HDCC alleged that it provided the required utility agreements to the Government on August 3, 2017 but the Government did not return the executed agreements until February 28, 2018 – 209 days later. (Appx199-200)

The Government's failure caused a delay and constituted a breach of its express obligation under the Contract but also breached the duty of good faith and fair dealing. *See Metcalf Constr. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement. Failure to fulfill that duty constitutes a breach of contract…"); *see also Kiewit-Turner, A Joint Venture v. Dept. of Veteran Affairs*, CBCA No. 3450 (Dec. 9, 2014) (citing *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1542 (Fed. Cir. 1993)) ("The duty of good faith and fair dealing requires the Government, as well as other parties to contracts, not only to avoid actions that unreasonably cause delay or hindrance to contract performance, but also to do whatever is necessary to enable the other party to perform."). Therefore, HDCC stated sufficient facts to support its claim.

5. Government Caused Delays Associated with the MECO and Castleton Walls.

HDCC alleged sufficient facts to support its claim that the Government caused delays associated with changes to the work involving the Maui Electrical Company ("MECO") and Kai Hele Ku ("Castleton") retaining walls. (Appx31-32, Appx49-50, Appx206-215) Specifically, HDCC alleges that while the Project achieved actual Substantial Completion on July 24, 2018, there was additional change order work associated with the neighboring Castleton and MECO properties. The first item was for the Castleton property which the Government was negotiating with the neighboring landowner over its request for a different, terraced junction to its property. The second item related to Government requested changes to the MECO wall work for another adjacent property. The work associated with these items constituted additional change order work and could not proceed until the Government issued approved contract modifications. HDCC submitted its pricing proposals for these changes, but the Government delayed approval of the modifications which kept HDCC on standby for 482 days. Ultimately, the Government instructed HDCC not to perform the Castleton wall work (and the Government awarded the work to another contractor), and HDCC was forced to perform the Government's changes to the MECO wall work without an approved change order at HDCC's expense. (Appx49-50, Appx206-215) These facts, when taken in the light most favorable to HDCC, support HDCC's claim for

an excusable delay. *See* 48 C.F.R. § 52.249-10 ("[t]he delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor.").

Notwithstanding, the Claims Court found that "HDCC does not plead sufficient facts to demonstrate excusable delay. The alleged facts, even when taken as true, indicate that HDCC intentionally contributed to the delay and that HDCC did not continue to perform the contract despite its pending dispute with the Agency…" (Appx14) In support of this finding, the Claims Court quotes findings of fact from the Contracting Officer's Final Decision. (Appx13-14) The Claims Court's findings are improper for several reasons.

First, the Claims Court ignored HDCC's well plead factual allegations. Specifically, HDCC alleged that the Government's delay in approving changes delayed HDCC's performance of the work. (Appx49-50, Appx206-215) These allegations, when taken as true and in the light most favorable to HDCC, support its claim for an excusable delay.

Second, the Claims Court made factual findings in its decision by weighing different factual allegations made by the parties and deciding which allegations to accept. For example, the Claims Court accepted the Contracting Officer's statement in the Final Decision that the MECO wall "was part of HDCC's original scope of work and was entirely unrelated to the Castleton Terrace Wall issue…"

(Appx12-13) HDCC disputes this fact. (Appx206) HDCC alleged that the approved design at the MECO wall was grading only and it was not until the Government decided to add the new Castleton wall that the Government changed the road grading which impacted the MECO wall work. (Appx49-50, Appx206-215) In short, the changes to the MECO wall work resulted from the Government directing the new Castleton wall work which was recognized by the Government as change order work. (Appx49-50, Appx206-215) The Claims Court's factual findings at this stage are improper. *See Kollective Tech.*, 50 F.4th at 133. Moreover, whether HDCC contributed to the delay may serve as a defense to HDCC's claim but must not serve as a basis for dismissal of the claim at the Rule 12(b)(6) stage.

Ultimately, the question is whether HDCC pled facts which if proven true would support a claim against the Government. As demonstrated above, the answer is yes.

6. Government Imposed Constructive Acceleration.

As an initial matter, other than generally stating the standard, the Claims Court does not address HDCC's constructive acceleration claim so the basis for the Claims Court's dismissal as it relates to the constructive acceleration claim is unclear. (*See* Appx7) Regardless, in the Complaint, HDCC alleges sufficient facts to support its claim for constructive acceleration. "Constructive acceleration

'occurs when the government demands compliance with an original contract deadline, despite excusable delay by the contractor.'" *Nova Grp./Tutor-Saliba v. United States*, 159 Fed. Cl. 1, 51 (2022) (quoting *Zafer Taahhut Insaat ve Ticaret A.S. v. United States*, 833 F.3d 1356, 1362 (Fed. Cir. 2016) (citing *Fraser Constr. Co. v. United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004)). The Federal Circuit in *Fraser* defined the elements of constructive acceleration as follows:

> (1) that the contractor encountered a delay that is excusable under the contract; (2) that the contractor made a timely and sufficient request for an extension of the contract schedule; (3) that the government denied the contractor's request for an extension or failed to act on it within a reasonable time; (4) that the government insisted on completion of the contract within a period shorter than the period to which the contractor would be entitled by taking into account the period of excusable delay, after which the contractor notified the government that it regarded the alleged order to accelerate as a constructive change in the contract; and (5) that the contractor was required to expend extra resources to compensate for the lost time and remain on schedule.

Fraser, 384 F.3d at 1361; *see also Zafer*, 833 F.3d at 1362.

In the Complaint, HDCC alleged that: (1) it encountered excusable and compensable delays; (2) it made proper requests for extensions of time; (3) the Government failed to grant HDCC's proper requests for extensions of time; (4) the Government insisted on completion by the original completion date and assesses liquidated damages; and (5) it was forced to accelerate its performance and incur additional costs. (Appx30, Appx50-51, Appx248-249) These allegations, if proven, are sufficient to support HDCC's claim for constructive acceleration.

2. The Claims Court Erred in Dismissing Portions of HDCC's Claims that Were Not Subject to the Motion to Dismiss and Not Addressed by the Parties or the Claims Court.

The Claims Court erred by dismissing HDCC's claims that were not subject to the Motion to dismiss. First, although not included in HDCC's Certified Claim, in the Final Decision, the Contracting Officer rendered a final decision that the Government erred when it included Line Items A0350 for $391,726.76 and A0360 for $500,426.31 and erred when it made full payment for these items in Progress Estimate #26. Therefore, the Contracting Officer determined that the Contract needed to be adjusted to recover the total sum of $892,153.05 from HDCC. (Appx145)

In the Complaint, HDCC challenged the Government's determination. Specifically, HDCC alleged that the Final Decision "for punitive purposes, wrongly purported to rescind a previously approved and paid contract modification in breach of contract without proper authority or procedure." (Appx31) The sum demanded from the Government was included in a bilateral contract modification. Other than the statement in the Final Decision, there has been no change to the Contract and this sum remains part of the Contract price.

This claim was not raised by the Government in its Motion to Dismiss nor was it addressed by the Claims Court in its decision. Notwithstanding, the Dismissal Opinion and Judgment dismissed this claim leaving HDCC with no

recourse to resolve this issue. This severely prejudicial to HDCC since the Government is assessing interest on the principal sum and has sent the matter to a third-party collection agency who is aggressively pursuing collection of the disputed amount.

Similarly, in the Certified Claim, HDCC sought a 12-day extension of time resulting from the Government's late delivery of the NTP. Although the Final Decision agreed to this extension, a modification has not been issued by the Government. Therefore, HDCC was pursuing this claim in its action. However, this claim was dismissed by the Claims Court.

3. The Claims Court Abused its Discretion in Denying HDCC's Motion for Reconsideration and Motion for Leave to Amend.

The Claims Court erred in denying the Motion for Reconsideration and Motion for Leave to Amend when (1) the Claims Court's dismissal without prejudice was akin to a dismissal with prejudice; (2) when the Claims Court determined that HDCC's request to amend the Complaint was not before the Court; and (3) when the proposed Amended Complaint addressed the alleged deficiencies in the Complaint.

A. The Court Abused its Discretion in Denying HDCC's Motion for Reconsideration.

The Claims Court abused its discretion when it denied HDCC's Motion for Reconsideration because the dismissal without prejudice was tantamount to a

dismissal with prejudice and was manifestly unjust. The Claims Court's justification in the April 24, 2023 Opinion for denying the Motion for Reconsideration reads like a self-fulfilling prophecy — the Claims Court decided on an outcome and reached backwards, cherry-picking various procedural facts to support the arbitrary decision to deny the Motion for Reconsideration. Indeed, the Claims Court states that "[n]either this Court nor the United States Court of Appeals for the Federal Circuit have addressed whether a dismissal without prejudice where the statute of limitations has expired is akin to a dismissal with prejudice," meaning the decision to deny HDCC's request is necessarily an arbitrary decision and a misapplication of non-existent law, thereby evidencing the Claims Court's clear abuse of discretion. (Appx20)

Further, as demonstrated below, HDCC satisfied the elements of RCFC 59 and 60, specifically, that the dismissal with prejudice is manifestly unjust. RCFC 59(a)(1)(C) provides the court with discretion to grant a motion for reconsideration on all or some of the issues "upon a showing of satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States." RCFC 59(a)(1)(C); *see also Matthews v. United States*, 73 Fed. Cl. 524, 525 (Fed. Cir. 2006) (reconsideration may be granted "'to all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the

United States.'"); *see also Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir.1990) ("The decision whether to grant reconsideration lies largely within the discretion of the district court.").

Moreover, the court, "in its discretion, 'may grant a motion for reconsideration when there has been an intervening change in the controlling law, newly discovered evidence, or a need to correct clear factual or legal error or prevent manifest injustice.'" *Biery v. United States*, 818 F.3d 704, 711 (Fed. Cir. 2016) (internal citations omitted). To prevail, the party seeking reconsideration on the ground of manifest injustice must demonstrate that the injustice is apparent to the point of being almost indisputable, (i.e., apparent or obvious). *See Stueve Bros. Farms, LLC v. United States*, 107 Fed. Cl. 469, 475 (Fed. Cl. 2012). Similarly, RCFC 60(a) allows the Court to "vacate judgments whenever such action is appropriate to accomplish justice." RCFC 60(b)(6) (citing six reasons for granting such a request, including "any other reason that justifies relief.").

The Dismissal Opinion granted the Government's Motion to Dismiss and dismissed HDCC's Complaint without prejudice. (Appx15) The implied result of, and in fact the definition of, a dismissal without prejudice is the ability to re-file your complaint after the case has been dismissed. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001) (Black's Law Dictionary (7th ed.1999), defines '"dismissed without prejudice' as 'removed from the court's docket in such

a way that the plaintiff may refile the same suit on the same claim,' []and defines 'dismissal without prejudice' as '[a] dismissal that does not bar the plaintiff from refiling the lawsuit within the applicable limitations period…'"). However, the dismissal without prejudice of a complaint does not toll the running of the statute of limitations. *See Kenney Orthopedic, LLC v. U.S.*, 88 Fed. Cl. 688, 699 (2009) ("[A] court's dismissal without prejudice does not toll the statute of limitations"). Therefore, if a complaint is dismissed without prejudice but the re-filing of the complaint would be barred because the statute of limitations has now expired, the dismissal without prejudice is tantamount to a dismissal with prejudice. *See Burden v. Yates*, 644 F.2d 503, 505 (5th Cir. 1981). The Court in *Burden v. Yates* explained the collateral effect of a dismissal without prejudice when the statute of limitations would prevent re-filing the case after it has been dismissed:

> Difficulty arises, however, because this dismissal, while made without prejudice, has the effect of precluding appellant from refiling his claim due to the running of the statute of limitations. The dismissal was thus tantamount to a dismissal with prejudice, "a drastic remedy to be used only in those situations where a lesser sanction would not better serve the interests of justice." *Brown v. Thompson*, 430 F.2d 1214, 1216 (5th Cir. 1970).
>
> In a directly analogous situation, *Boazman v. Economics Laboratory, Inc.*, 537 F.2d 210, 213 (5th Cir. 1976), we noted that "(w)here … the statute of limitations prevents or arguably may prevent a party from refiling his case after it has been dismissed, we fail to see how a dismissal without prejudice is any less severe a sanction than a dismissal with prejudice," and ruled:

> Dismissal with prejudice is such a severe sanction that it is to be used only in extreme circumstances.... In the past, we have found that lesser sanctions would suffice in all but the most flagrant circumstances.

Burden, 644 F.2d at 505. While the case *Burden v. Yates* analyzes a dismissal without prejudice as a sanction for failure to obey court directives, the overall considerations are the same: a dismissal with prejudice is a severe sanction, and as here, creates a manifest injustice to HDCC, warranting reconsideration.[1]

The Supreme Court defines "manifest" as "clearly apparent or obvious." *Ammex, Inc. v. United States,* 52 Fed. Cl. 555, 557 (2002) (discussing RCFC 59). Ultimately, "[w]here a party seeks reconsideration on the ground of manifest injustice, it cannot prevail unless it demonstrates that any injustice is 'apparent to the point of being almost indisputable.'" *Griffin v. United States,* 96 Fed. Cl. 1, 7 (Fed. Cir. 2010) (internal citations omitted).

The statute of limitations on HDCC's ability to appeal the Final Decision denying HDCC's Certified Claim ran on March 30, 2022. (*See* Appx26, Doc. 33, p. 2, ¶¶ 3-5) Therefore, in this case, the result of the Claims Court's Dismissal

[1] *cf. Jones v. United States,* 477 Fed. Appx. 980 (4th Cir. 2012) (holding that the Court abused its discretion in denying plaintiff's motion for reconsideration, even though dismissal was without prejudice, where plaintiff was precluded by the statute of limitations from re-filing complaint).

Opinion and Judgment dismissing HDCC's Complaint without prejudice is clear, obvious, and indisputable – HDCC is barred from refiling its claims.

In its April 24, 2023 Opinion, the Claims Court determined "HDCC's statute of limitations problem is of its own making and does not present extraordinary circumstances as Rule 60(b)(6) contemplates." (Appx20) However, the expiration of the limitations period is not one of HDCC's "own making." First, HDCC filed its Complaint within the one-year limitations period. Therefore, its Complaint was timely. If plaintiffs were required to file actions far enough in advance to avoid a potential expiration of the limitation period while Rule 12 motions are filed and pending it would create an untenable and unfair system where plaintiffs would have to immediately file to avoid this potential scenario. Indeed, even if a plaintiff were to immediately file, more than a year could lapse while Rule 12 motions are pending.

Further, HDCC did not immediately file because it was trying to resolve the dispute without the need to file an action with the Claims Court. Specifically, after the Contracting Officer issued the Final Decision on HDCC's Certified Claim, HDCC retained the Sage Group to evaluate the Certified Claim and Final Decision and prepare the Sage Report. (Appx30, Appx53-146) On November 17, 2021, HDCC provided the Sage Report to the Government and invited further discussion of HDCC's claims. (Appx32) The Government did not respond. (Appx32) When it

became apparent that the Government was not going to respond, HDCC filed its Complaint with Claims Court. HDCC was not idly sitting on its hands.

The Claims Court further stated in its April 24, 2023 Opinion that HDCC "also never objected to any of the Government's several motions for extension of time." (Appx21) How the Claims Court could possibly use the Government's time extensions against HDCC in this scenario is inexplicable and it is also irrelevant to the analysis as HDCC's objection would not have impacted the limitation period. Further, it is punitive for the Claims Court to penalize HDCC for not battling with the Government's counsel over their requests for more time to respond to the Complaint.

The Claims Court stated that "[f]ollowing HDCC's logic…the only way to prevent said injustice is to allow infinite amendments." (Appx20-21) This is not what HDCC suggested. Rather, HDCC was simply stating that it should not be severally penalized by the passage of time when its claim was timely filed and pending and HDCC was acting in good faith.

Ultimately, "[a]n abuse of discretion occurs when a court misunderstands or misapplies the relevant law or makes clearly erroneous findings of fact." *PPG Indus., Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1571-72 (Fed. Cir. 1988)." Here, the Court arbitrarily decided on an outcome and reached backwards to find facts to fit the narrative, which is an abuse of discretion. There

can be no dispute that the dismissal without prejudice here is a tantamount to a dismissal with prejudice and HDCC suffers an incredible prejudice as a result (*i.e.*, denial of the right to try their case on the merits).

Therefore, HDCC respectfully requests that the Federal Circuit vacate the Claims Court's April 24, 2023 Opinion.

B. The Claims Court Abused its Discretion in Denying HDCC's Motion in the Alternative for Leave to Amend on the Basis that the Request was not Properly Before the Claims Court and Erred as a Matter of Law in Denying HDCC's Motion for Leave to Amend on the Basis of Futility.

The Claims Court in its April 24, 2023 Opinion denied HDCC's Motion in the Alternative for Leave to Amend on two bases: (1) because HDCC's initial request for leave to amend was not properly before the Court; and (2) "amendment would be futile because the Proposed Amended Complaint also fails to state a claim." (Appx21) As stated in Section V.2, *supra*, the Claims Court's denial of the Motion in the Alternative for Leave to Amend based on HDCC's alleged failure to state its request for leave to amend with particularity is reviewed on an abuse of discretion standard but the denial of the Motion in the Alternative for Leave to Amend on the basis of futility is reviewed de novo. For the reasons stated below, the Claims Court's denial of HDCC's Motion not to grant HDCC's Motion for Leave to Amend was in error and should be reversed.

1. The Court Abused its Discretion in Denying HDCC's Motion in the Alternative for Leave to Amend on the Basis that the Request was not Properly Before the Court.

In the Court's April 24, 2023 Opinion, the Court stated that there was "No manifest injustice [in denying HDCC's request] because HDCC's initial request for leave to amend was not properly before the Court." (Appx21) The Court further stated that "HDCC's threadbare request for leave to amend as an alternative to dismissal did not 'state with particularity the grounds for seeking the order' as Rule 7(b)(1)(B) requires." (Appx21) The Claims Court's decision runs afoul of Rule 15.

Pursuant to Rule 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave. The Court should freely give leave when justice so requires." RCFC 15(a)(2). Denial of leave to amend is warranted for "reasons such as undue delay, bad faith or dilatory motives, prejudice to the opposing party, or futility." *Alfa Laval Separation, Inc. v. United States*, 47 Fed. Cl. 305, 312 (2000) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Claims Court's reliance on RCFC 7(b)(1) and *United Cmtys., LLC v. United States*, 157 Fed. Cl. 19, 22 (2021) for the proposition that a request for leave to amend a complaint raised in one sentence in an opposition to a motion to dismiss is not properly raised is wrong. First, that case does not forbid the Claims Court from granting a request in this manner. To the contrary, the standard for granting a request for leave to amend is set forth in RCFC 15, which states that a

party may amend with the opposing party's consent "or the court's leave" and that "the court should freely give leave when just so requires." Rule 15 does not *require* a motion; it only requires that a party request "the court's leave." In the case, *Wagner v. Daewoo Heavy Industries America Corp.*, 314 F.3d 541, 544 (11th Cir. 2022) the Court contemplated the two ways a party may amend their complaint, either with leave or by motion. *Id*. (denying the plaintiff's request for leave "when he never filed a motion to amend nor requested leave to amend before the district court."). The Court ultimately ruled "[a] district court is not required to grant a plaintiff leave to amend his complaint *sua sponte* when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Id*. Hence, there are two methods by which a party can seek to amend a complaint - file a motion or seek leave.[2] Here, HDCC sought leave in its opposition to the Government's Motion to Dismiss, in HDCC's Motion for Reconsideration, and in HDCC's Motion to Alter or Amend Judgment. The Court's contention that "a party seeking leave to amend its complaint must move in writing during a hearing or trial, state its argument with particularity, and state the relief sought" is not applicable here where there has been no trial. (Appx20)

[2] Compare RCFC 15(a)(2) with RCFC 15(d) as it relates to supplemental pleadings, the Court specifically requires a motion: "On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading…." No such language exists in RCFC 15(a)(2).

It is further inconceivable that a non-movant is required to file a separate motion anticipating potential un-pled facts in order to preserve its right to amend on the chance that the Court dismisses its case. Even if a formal motion was required, "'[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" *Foman,* 371 U.S. at 181–82. Thus, the requested leave should have been freely given because justice so required.

Finally, the Claims Court states that "because a further amended complaint would be futile, the interests of justice do not require that this Court grant leave to amend." (Appx17) The Claims Court's conflation of the Rule 59 and 60 standards to that of the Rule 15 amended standard is inappropriate. The hurdles of RCFC 59 and 60 need not apply. *See Katyle v. Penn Nat. Gaming, Inc.*, 637 F.3d 462, 471 (4th Cir. 2011) ("To determine whether vacatur is warranted, however, the court need not concern itself with either of those rules' legal standards. The court need only ask whether the amendment should be granted, just as it would on a prejudgment motion to amend pursuant to Fed.R.Civ.P. 15(a).").

As discussed herein, the general rule under Rule 15(a)(2) is that the trial court should freely grant leave where justice so requires, a standard interpreted by the Supreme Court to mean that the trial court should grant leave to amend unless

there is a good reason to deny leave even after an order to dismiss (but before entry of judgment). The Court is not compelled to treat a motion to amend as a motion to reopen, and, therefore, the manifest injustice requirements in RCFC 59 and 60 need not necessarily apply to a RCFC 15 request to amend. *See generally Katyle*, 637 F.3d at 471; *see also Lee v. United States*, 130 Fed. Cl. 243, 251 (Fed. Cir. 2017) ("The Federal Circuit 'has not determined the standard to be applied when a party moves to amend its pleadings after judgment has been entered' pursuant to the Rules of the Court of Federal Claims;" indicating that other circuits are split on whether to apply the more lenient Rule 15 standard or to determine whether the amendment is appropriate under Rule 59 or 60) (citing *Stueve Bros. Farms, LLC v. U.S.*, 107 Fed. Cl. 469 (Fed. Cir. 2012) (indicating that the more lenient standard need not concern itself with Rule 59 or Rule 60's legal standards and need only ask whether the amendment should be granted as it would on a prejudgment motion) (internal citations omitted).

2. The Court Erred as a Matter of Law in Denying HDCC's Motion in the Alternative for Leave to Amend on the Basis of Futility.

In denying the Motion for Leave to Amend, the Claims Court determined that allowing an amended complaint "would be futile." (Appx22) The Claims Court went on to state that the proposed Amended Complaint "simply makes conclusory assertions that the Government's acts or omissions were

'unreasonable.'" (Appx22) The Claims Court provides as a single example that the "Proposed Amended Complaint baldly asserts that the delay in obtaining the ROWs or utility relocation was unreasonable and unforeseeable…[and that] The Proposed Amended Complaint does not explain why it was unforeseeable that project components which relied on third parties might culminate in delays." (Appx22) The Claims Court's determination was in error.

The five factors to be considered when determining whether leave to amend a complaint should be granted are: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of amendment. *See Foman*, 371 U.S. at 182.

First, granting HDCC leave to amend its Complaint will not result in undue delay. HDCC filed its Complaint on March 29, 2022, and its First Amended Complaint on July 22, 2022. (Appx24, Doc. 1 and 14) On August 5, 2022, the Government filed a Motion to Dismiss, to which HDCC filed an Opposition, the Government filed a Reply, and HDCC filed a Surreply. (Appx24-25, Doc. 15, 18, and 23) Upon the Court's request, in December 2022, the parties submitted additional documentation and supplemental briefing to address the Government's Motion to Dismiss. (Appx25, Doc. 27, 28, and 29) As of the date of the dismissal,

no discovery had been initiated or exchanged, and no scheduling order had been issued. Based on the early stage of the action, there could be no finding of delay.

Next, at the time of filing the proposed Amended Complaint, or anytime thereafter, there had been no allegations of bad faith or dilatory motive, nor had there been any repeated failures to cure deficiencies.

Third, at the time of filing the proposed Amended Complaint there had been no "repeated failures" to cure deficiencies in previously amended complaints. HDCC filed an Amended Complaint but did so with consent of the Government and primarily did so to attach and incorporate the contents of the Certified Claim, Final Decision and Sage Report.

Regarding the fourth factor of prejudice, undue prejudice would be impressed upon, and has been impressed upon HDCC, not the opposing party, therefore, this factor also weighs in favor of HDCC.

Finally, contrary to the Claims Court's decision, HDCC's amendment of the Complaint is not futile. The appropriate test for futility, when there is a question as to whether the proposed amended complaint states a claim upon which relief may be granted, is whether allegations in the proposed amended complaint states a plausible claim for relief. *See Campbell v. United States,* 137 Fed. Cl. 54, 57 (Fed. Cir. 2018). A discussed in Section V.1, *supra*, "[u]nder this test, the allegations of the proposed amended complaint must state a plausible claim for relief." *Ashcroft*,

556 U.S. at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'").

The proposed Amended Complaint states a claim for relief that is plausible on its face. The proposed Amended Complaint included two well-pled Counts: Count I – Breach of Contract (FAR 52.243-4–Changes) and Count II – Breach of Contract (Implied Covenant of Good Faith and Fair Dealing) (Appx1606-1621). To state a claim for breach of contract, a party must allege four elements: (1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach. *See Century Explor. New Orleans, LLC v. United States*, 110 Fed. Cl. 148, 163 (Fed. Cir. 2013). The Complaint as amended alleges as follows:

- There was a valid contract between the parties (Appx1617 at ¶¶ 19, 65, 71)
- If the Government directs and/or causes constructive changes to the work, then the Government is obligated, and HDCC is entitled to, additional time and/or compensation (Appx1617 at ¶ 66)
- Implied in every contract is the duty of good faith and fair dealing (Appx1619 at ¶¶ 72, 73)
- The Government breached is duties and obligations by, *inter alia*:
    - Failing to make the necessary land acquisitions and provide the final ROW timely manner (Appx1610-1612 at ¶¶ 21-37);

- Providing a final ROW that was materially and unforeseeably different from Alternative No. 3 which the RFP indicated HDCC could rely upon to develop its design for the roadway alignment (Appx1608-1609 at ¶¶ 13-16; Appx1611-1612 at ¶¶ 34-36);

- Failure to timely provide the final ROW caused changes to the permitting requirements for the Project (Appx1612 at ¶¶ 37-39);

- Failing to execute and enforce utility agreements in a reasonable time (Appx1612-1613 at ¶¶ 40-43);

- Failing to execute change orders for additional work associated with the Castleton Wall and MECO Wall in a reasonable time (Appx1613-1614 at ¶¶ 44-51);

- Failing to grant HDCC's proper claims for time extensions which forced HDCC to constructively accelerate (Appx1614 at ¶¶ 62-64); and

- Improperly attempting to reverse a previously approved Contract modification (Appx1616 at ¶¶ 62-63); and

- HDCC has been damaged as a result of the Government's alleged breaches (Appx1615-1616 at ¶ 58)

The above allegations, and the others detailed in the proposed Amended Complaint and the referenced attachments including the Certified Claim and Sage Report, surpass any question of futility – the facts, which must be read in the light most favorable to the Plaintiff, support the causes of action alleged by HDCC, and fully address any alleged pleading failures as stated in the Dismissal Opinion and the April 24, 2023 Opinion.

Notwithstanding, the Claims Court stated "[t]he Proposed Amended Complaint does not explain why it was unforeseeable that project components

which relied on third parties might culminate in delays. It also does not present any facts suggesting that the Government, in bad faith, failed to prudently pursue these agreements with third parties." (Appx22) The Claims Court's conclusion is wrong for several reasons.

First, under the Claims Court's decision, HDCC would have to prove its entire case and plead every potential variable in support of their claim on the face of HDCC's Complaint. This is not the standard for pleading. Rule 8 only requires "a short and plain statement of the claim showing that the pleader is entitled to relief." RCFC 8(a)(2); *see also*, Section V.1, *supra*.

Second, HDCC's allegations are not legal conclusions or bald allegations as suggested by the Claims Court. (Appx21-22) Rather, HDCC makes specific factual allegations about the Government's action and inactions to support its claims, and about reasonableness, foreseeability, and materiality all of which are factual questions that are not appropriate to be decided on a Rule 12 motion. *See Micron*, 645 F.3d at 1321 ("foreseeability of an event is a traditional issue of fact."); *Int'l Prod. Specialists*, 580 F.3d at 595 ("What constitutes a reasonable time for performance…is again a question of fact..."); *Kollective Tech.*, 50 F.4th at 133 (factual questions cannot be resolved at the Rule 12(b)(6) stage).

Finally, the proposed Amended Complaint contains explanations to support its allegations. For example, in support of its allegation that the Government failed to perform its obligations in a reasonable amount of time HDCC alleged:

> 27. At the time the NTP was issued, the Government still had not obtained the ROWs. While it was not unreasonable for the Government to award the Contract when it had not yet secured the ROWs, it was unreasonable and unforeseeable for it to issue the NTP which started the finite clock on performance with potential liquidated damages when the Government knew its failure to obtain the ROWs prevented and delay[ed] HDCC's ability to proceed with its performance.
>
> 28. At the time of submitting its Proposal, HDCC reasonably anticipated that the Government would make the necessary land acquisitions and provide HDCC with the ROWs for the Project within a reasonable time."
>
> 29. However, for reasons outside of HDCC's control, the Government failed to make the necessary land acquisitions and provide the ROWs for the Project within a reasonable time.
>
> 30. Indeed, through no fault of HDCC, the Government did not obtain the ROWs until November 7, 2016 – over four months after the NTP was issued.

(Appx1610-1611 at ¶¶ 27-30) Similarly, in support of its claim that the Government made unforeseeable and material changes to the final ROW, HDCC alleged:

> 34. Further, by the time the Government provided the ROWs, HDCC's design (based on Alternative No. 3 Profile) was 80% complete. The ROWs provided by the Government was materially different from the Government Furnished Information in the RFP including "Alternate No. 3" upon which HDCC had based its Proposal and was using to develop its designs.

> 35. The material differences between "Alternate No. 3" and the ROWs obtained by Government were not foreseeable and required HDCC to re-work its design and caused delays and additional costs.
>
> 36. On November 23, 2016, HDCC notified the Government that HDCC was being impacted because the ROWs provided by the Government was materially different from Alternate No. 3 Profile included with the RFP.

(Appx1611-1612 at ¶¶ 34-36) These allegations regarding materiality are further bolstered by the statements contained in the Certified Claim and Sage Report. (Appx44-46, Appx190, Appx229-230) HDCC also factually supported its claim that the Government did not timely execute the utility agreement as required by the Contract by alleging that "HDCC presented the Government the utility agreements for execution on August 8, 2017, but the Government did not execute the agreements until February 28, 2018 – 209 days later." (Appx1612, ¶ 42)

The detailed factual assertions clearly provide support for HDCC's claims. However, instead of accepting these allegations as true, the Claims Court ignored these allegations in finding futility, which was in error. Therefore, HDCC should be granted leave to amend its complaint, and be permitted to file proposed Amended Complaint with the Claims Court and be afforded the opportunity to test its claim on the merits.

VII. CONCLUSION

The Claims Court's Opinion and Order dated February 14, 2023 granting the Government's Motion to Dismiss and Judgment should be vacated, and this matter remanded to the Claims Court to proceed on the merits.

Alternatively, the Claims Court's April 24, 2023 Opinion denying HDCC's Motion for Reconsideration and Motion for Leave to Amend should be vacated and this case should be remanded and HDCC should be granted leave to file its proposed Amended Complaint.

Dated: July 18, 2023

Respectfully submitted,

/s/ Michael C. Zisa

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ADDENDUM

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ADDENDUM

In the United States Court of Federal Claims

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. 22-339
(Filed: February 14, 2023)

Michael Charles Zisa, Washington, DC, for Plaintiff.

Jimmy S. McBirney, Civil Division, United States Department of Justice, Washington, DC, for Defendant.

OPINION AND ORDER

LERNER, *Judge*.

This is a case under the Contract Disputes Act ("CDA"), 41 U.S.C. § 7101, involving a firm fixed-price, design-build contract (the "Contract") between Plaintiff Hawaiian Dredging and Construction Company ("HDCC") and the United States Department of Transportation, acting through the Federal Highway Administration, Central Federal Lands Highway Division ("CFLHD" or the "Agency"). HDCC seeks review of the contracting officer's final decision ("COFD") denying its claim for an equitable adjustment. It believes that it is entitled to an equitable adjustment to the Contract "to compensate HDCC for delays and increased costs incurred as a result of changes in the work." Am. Compl. ¶ 30, ECF No. 14.

The Government moves to dismiss the Amended Complaint under Rule 12(b)(6) of the United States Court of Federal Claims ("RCFC"). It argues that Plaintiff fails to state a claim upon which relief may be granted because it "bore the risk of increased costs" under the Contract, and "does not plausibly allege any directed or constructive contract changes, or that HDCC performed any uncompensated work outside the scope of its contractually mandated responsibilities." Def.'s Mot. to Dismiss ("Def.'s Mot.") at 1, ECF No. 15.

For the reasons set forth below, the Motion to Dismiss is **GRANTED**, and the case is **DISMISSED without prejudice**.

I. Factual Background[1]

A. The Project

HDCC was the general contractor for the Lahaina Bypass 1B-2 design-build construction project in Lahaina, Maui, Hawaii (the "Project" or "Lahaina Bypass"). Am. Compl. ¶ 4. This was a fixed-unit-price, design-build highway project in the amount of $38,671,000. *Id.* The goal of the Project was to relocate the terminus of the Lahaina Bypass to stop shoreline erosion, coastal hazards, and traffic congestion on the Honoapiilani Highway. *Id.* at ¶ 6. The Project anticipated extending the existing road on both sides, constructing an overpass and box culverts, grading for drainage, and installing road and bridge safety features. *Id.* at ¶ 7. To do this work, HDCC alleges it required final Rights of Way ("ROWs") from landowners near the highway, relocation of overhead utilities, and local, state, and federal permits. *Id.* at ¶¶ 8–9. On May 25, 2018, the Project opened to the public, and by July 24, 2018, HDCC's Contract work was substantially complete. *Id.* at ¶ 10.

B. The Solicitation and Competition

On October 1, 2015, CFLHD, in partnership with the Hawaii Department of Transportation ("HDOT"), issued a Request for Qualifications ("RFQ") seeking potential contractors to participate in the pre-qualification phase of the Project. Def.'s App. at 166–68, ECF No. 15-1. Plaintiff alleges that CFLHD "represented that it would acquire the necessary ROWs prior to issuance of the [notice to proceed]." Pl.'s Resp. to Mot. to Dismiss ("Pl.'s Resp.") at 10, ECF No. 18 (citing Pl.'s Ex. A at 5-6, ECF No. 14-1); *see also* Am. Compl. ¶ 35. Plaintiff quotes from the RFQ:

> There are two (2) right-of-way acquisitions required within the limits of this project; one private landowner and Maui County (*sic*). The right-of-way acquisition is expected to be completed prior to the issuance of the RFP [Request for Proposals].

Pl.'s Ex. A at 2 (quoting Def.'s App. at 167) (emphasis removed).

On December 7, 2015, HDCC was short-listed to participate in Phase Two of the solicitation. *Id.* On December 18, 2015, CFLHD, in partnership with HDOT, issued a Request for Proposals ("RFP" or "Solicitation"). *Id.* The "Government Furnished Information" section of the RFP stated:

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[1] This section does not set forth factual findings. Rather, it describes the case in terms of the facts alleged in the Amended Complaint, which must be taken as true, with all reasonable inferences construed in Plaintiff's favor on a motion to dismiss. *See Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007).

Due to their size these files will be placed on CD and sent to each firm.

- Right of Way Dedication of Deed documentation
- Final Environmental Assessment/finding of No Significant Impact
- Survey Data
- Alternative No. 3 Profile

Id.; Pl.'s Ex. 1 at A-11, ECF No. 28-1 (RFP). The RFP also required that:

> (1) Each proposal include "the plan and profile of the roadway alignment, including typical sections" and the "proposed alignment and maintenance limits as it relates to available right-of-way"; and
>
> (2) The Contractor locate and identify all utilities within the project area and "cooperate with utility owners to expedite the relocation and adjustment of their utilities to minimize interruption of service, duplication of work, and delays if relocations or adjustments are needed" and "prepare utility agreements for [CFLHD], to be executed by HDOT."

Pl.'s Resp. at 4 (quoting Pl.'s Ex. A at 3) (cleaned up); *see also* Pl.'s Ex. 1 at A-14, E-11 (RFP). HDCC alleges that the Alternative No. 3 Profile was a "map depicting a roadway alignment which had been previously prepared for, and included as part of, HDOT's Final Environmental Assessment/Finding of No Impact . . . covering the Project." Pl.'s Ex. A. at 2.

On April 26, 2016, HDCC submitted its Price Proposal and a Technical Proposal. Pl.'s Ex. A at 3. HDCC alleges that its Technical Proposal "included a detailed roadway plan and repeatedly and unequivocally stated that the basis for the proposed roadway alignment was Alternative No. 3 as described in the Finding of No Impact furnished by CFLHD at the time of issuance of the RFP." *Id.* at 3 (cleaned up). Plaintiff states that when it submitted its bid, it believed that CFLHD had already secured the required ROW documents and permits—or would at least do so prior to issuing the notice to proceed—and that neither the Government nor HDCC were required to obtain grading permits from the County of Maui. Pl.'s Ex. A at 6. In fact, these requirements were not completed until after contract performance commenced. *Id.*

C. The Contract

On June 3, 2016, CFLHD awarded HDCC the Contract. Pl.'s Ex. A at 3. CFLHD issued notice to proceed on June 29, 2016. *Id.* The Contract incorporated Federal Acquisition ("FAR") 52.236-7, Permits and Responsibilities, which states:

> The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work.

Def.'s App. at 38 (Contract). The Contract contemplated that the Government would execute final ROWs, but also required HDCC to "[p]repare right of way plans and any legal descriptions documents to facilitate the final acquisition of the design and permanent right of way to accommodate the maintenance and operation of the facility by . . . HDOT"; "[p]repare the documents according to HDOT standards and specifications"; and "[o]btain any required title work and field work to complete a boundary study if required by HDOT." *Id.* at 96 (Contract clause 111.11, Right of Way). The Contract also required the contractor to "prepare utility agreements for CFLHD, to be executed by HDOT," and "[c]ooperate with utility owners to expedite the relocation or adjustment of their utilities to minimize interruption of service, duplication of work, and delays if relocations or adjustments are needed." *Id.* at 80 (Contract clause 107.02, Protection and Restoration of Property and Landscape).

D. The CDA Claim

On July 17, 2020, HDCC filed a CDA claim requesting an equitable adjustment for various delays and increased costs during its Contract performance. Pl.'s Ex. A at 1–15. HDCC alleges that the Government's failure to secure the ROWs in a timely manner caused delays in obtaining Clean Water Act permits and relocating utilities. *Id.* at 5–7, 9–12. HDCC also alleged that it suffered delays and increased costs due to differences between the final ROWs and the preliminary ROW documents provided in the Solicitation. *Id.* at 7–9. Finally, it argued that it experienced excusable delays between Substantial Completion and Final Completion of the Project because the Government ordered changes and additions to the Contract work relating to a retaining wall owned by Maui Electric Company ("MECO wall"), grading work fronting "the Castleton Property" on Kai Hele Ku Street, and a retaining wall on a different part of the Castleton Property. *Id.* at 12–13. According to HDCC, these various delays, in turn, led to critical path delay on the Project. Am. Compl. ¶¶ 21, 23.[2] On March 30, 2021, the contracting officer issued its COFD denying HDCC's CDA claim.[3] Am. Compl. ¶ 16.

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[2] "Critical path" refers to work items in a construction schedule which, if delayed, will cause delay in reaching Substantial Completion of the project.

[3] The CDA claim also requested a twelve-day extension of time and remission of liquidated damages for the Agency's delay in issuing the Notice to Proceed. *See* Pl.'s Ex. A at 4–5. The COFD granted this request but denied all other claims. Pl.'s Ex. B at 23–24, ECF No. 14-2.

E. Procedural History

On March 29, 2022, Plaintiff filed its Complaint in this Court, followed on July 22, 2022, by its First Amended Complaint. Plaintiff requests an equitable adjustment, monetary damages, and time extensions for changed work and breach of contract. It seeks a range of damages and specific costs totaling $6,576,968; 190 compensable and excusable days of delay; 482 days of excusable delay; interest; and attorneys' fees and costs. Am. Compl. ¶ at 11.

II. Jurisdiction

The Tucker Act grants this Court "jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under" the CDA. 28 U.S.C. § 1491(a)(2); *see also* 41 U.S.C. § 7102(a) (providing that the CDA applies to "any express or implied contract . . . made by an executive agency for . . . the procurement of services"). "If a plaintiff meets the jurisdictional requirements of the Tucker Act, the plaintiff also must demonstrate compliance with the mandatory requirements of the [CDA]." *Crewzers Fire Crew Transp., Inc. v. United States*, 111 Fed. Cl. 148, 153 (2013), *aff'd*, 741 F.3d 1380 (Fed. Cir. 2014). The CDA requires that a contractor bring an action in federal court "within 12 months from the date of receipt of a contracting officer's decision." 41 U.S.C. § 7104(b)(3). Further, this Court's jurisdiction over a CDA claim "requires both a valid claim and a contracting officer's final decision on that claim." *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010). The Court has jurisdiction over Plaintiff's Amended Complaint under the Tucker Act and CDA because the case arises from a contract between HDCC and the United States, there was a valid claim and COFD, and Plaintiff filed its Complaint in this Court within 12 months of receiving the COFD.

III. Discussion

The Amended Complaint alleges that the Contract's Changes clause entitles Plaintiff to an equitable adjustment (Count I) and damages for breach of contract (Count II). Read together, the Amended Complaint and CDA Claim constitute several distinct claims which Plaintiff argues entitle it to relief.[4] Plaintiff only relies on the Changes clause as grounds for either an equitable adjustment or the basis for breach of contract. *See* Am. Compl. ¶¶ 18–20, 30. It also alleges that the Government breached its implied duty of good faith and fair dealing. Pl.'s Ex. A at 13–14. In claiming breach of contract, the Amended Complaint does not specify any other contract provision, express or implied warranty, or law that the Government allegedly breached or violated. Instead, it broadly asserts that "[t]he Final Decision is in breach of the Contract, breach of CFL[HD]'s express and implied warranties to HDCC, and in violation of the FAR and other

[4] The Amended Complaint originally incorporated the CDA Claim's request for a 12-day extension of time and remission of liquidated damages for the Agency's delay in issuing the notice to proceed. *See* Am. Compl. ¶¶ 32, 36; Pl.'s Ex. A at 4–5. The COFD granted this request, Pl.'s Ex. B at 23–24, and Plaintiff clarified in its supplemental brief that this claim is not at issue, Pl.'s Supp. Br. at 4, ECF No. 28.

applicable law." Am. Compl. ¶ 20. And it largely relies on an attachment to the Complaint for the substantive details of its claim. Am. Compl. ¶¶ 15, 30; Pl.'s Ex. A.

The Government requests that the Court dismiss Plaintiff's Amended Complaint pursuant to RCFC 12(b)(6). *See* Def.'s Mot. at 1. It argues that the Amended Complaint fails to state a claim upon which relief may be granted because HDCC bore the risk for increased contract costs as a matter of law under this fixed-price contract, Plaintiff does not plausibly allege any directed or constructive changes to the Contract, and no other Contract provision justifies relief. For the reasons set forth below, this Court agrees.

A. Legal Background

1. Standard of Review

To survive a motion to dismiss, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Erickson v. Pardus*, 551 U.S. at 93–94.

2. Firm Fixed-Price Contracts

At its center, this case involves responsibilities and liabilities under a firm-fixed price design-build contract. Am. Compl. ¶ 4; Def.'s App. at 13, 170, 218. It is a "well-settled rule that in a fixed-price contract, the contractor bears the risk that its actual cost of performance might exceed the contract price." *Agility Def. & Gov't Servs., Inc. v. United States*, 115 Fed. Cl. 247, 249 (2014). Firm fixed-price contracts "provide[] for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract." FAR 16.202-1. "Because fixed-price contracts do not contain a method for varying the price of the contract in the event of unforeseen circumstances, they assign the risk to the contractor that the actual cost of performance will be higher than the price of the contract." *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed. Cir. 1996).

Plaintiff assumed the risk of delays, increased costs, and the assessment of liquidated damages associated with the failure to timely complete contract performance. Absent plausible factual allegations indicating the Government changed the Contract requirements—or that Plaintiff is entitled to compensation under another specified contract provision—HDCC cannot obtain an equitable adjustment to recover these losses as a matter of law. *See Zafer Taahhut Insaat ve Ticaret A.S. v. United States*, 833 F.3d 1356, 1361 (Fed. Cir. 2016).

3. Equitable Adjustments Under the Changes Clause

Under the Contract's Changes clause, a contractor can obtain an equitable adjustment for an "increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under [the] contract" when the Government orders a change to the work. FAR 52.243-4(d). In general, to receive an equitable adjustment under the Changes clause, a

plaintiff must "demonstrate first that any increased costs arose from conditions differing materially from those indicated in the bid documents, and that such conditions were reasonably unforeseeable in the light of all the information available to the contractor." *Sterling Millwrights, Inc. v. United States*, 26 Cl. Ct. 49, 72 (1992) (citations omitted). A plaintiff "must also show that its contract costs actually increased, and that the cost increases were the direct and necessary result of the change." *Id.*

Typically, "[i]n order for the Changes clause to apply, there must have been a change in the form of a 'written or oral order . . . from the Contracting Officer that causes a change.'" *Bell/Heery v. United States*, 739 F.3d 1324, 1334 (Fed. Cir. 2014) (quoting FAR 52.243-4). Here, the Amended Complaint does not plausibly allege that the Government made any written or oral order for changes to the work. Rather, Plaintiff seeks relief under the constructive change doctrine. *See* Pl.'s Resp. at 9; Pl.'s Ex. A at 9 n.10. "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." *Int'l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007); *see also Bell/Heery*, 739 F.3d at 1335; *Zafer Taahhut*, 833 F.3d at 1361 (quoting *NavCom Def. Elecs., Inc. v. England*, 53 Fed. App'x 897, 900 (Fed. Cir. 2002)).

Many of Plaintiff's claims depend upon the theory of constructive acceleration. Constructive acceleration is a type of constructive change that "arises when the government requires the contractor to adhere to the original performance deadline set forth in the contract even though the contract provides the contractor with periods of excusable delay that entitle the contractor to a longer performance period." *Fraser Const. Co. v. United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004). A contractor must show, among other things, that it "encountered a delay that is excusable under the contract." *Id.* at 1361. An excusable delay "'arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor,' including 'acts of the Government in either its sovereign or contractual capacity.'" *E.g. Nova Grp./Tutor-Saliba v. United States*, 159 Fed. Cl. 1, 53 (2022) (quoting FAR 52.249-10(b)(1)). Notwithstanding the excuse, a plaintiff must "prove that it took reasonable action to perform the contract." *Int'l Elecs. Corp. v. United States*, 646 F.2d 496, 510 (Ct. Cl. 1981) (citing *United States v. Brooks-Callaway Co.*, 318 U.S. 120 (1943)).

4. Breach of Contract

Plaintiff contends that the Government breached the Changes clause when the contracting officer denied its CDA claim for an equitable adjustment. *See* Am. Compl. ¶¶ 18–20. "A breach of contract claim requires two components: (1) an obligation or duty arising out of the contract and (2) factual allegations sufficient to support the conclusion that there has been a breach of the identified contractual duty." *Bell/Heery*, 739 F.3d at 1330. On a motion to dismiss, this Court interprets a contract's provisions to determine whether the factual allegations in the complaint, if true, would establish a breach of contract. *Id.*; *see also S. Cal. Edison v. United States*, 58 Fed. Cl. 313, 321 (2003) ("Contract interpretation is a matter of law and thus may be addressed by the Court in resolving a motion to dismiss."). When interpreting a contract, this Court gives clear and unambiguous contract terms their plain and ordinary meaning and construes the contract "in

a manner that gives meaning to all of its provisions and makes sense." *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996).

5. Implied Duty of Good Faith and Fair Dealing

In part, Plaintiff supports its claims under the Changes clause in Count I—in particular, the "government fault" element—and its breach of contract claims in Count II with allegations that the Government breached the implied duty of good faith and fair dealing by causing unreasonable delay. *See* Pl.'s Ex. A at 13–14. As the United States Court of Appeals for the Federal Circuit explains, "[t]he covenant [of good faith and fair dealing] imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party." *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). Both the "duty not to hinder and the duty to cooperate are aspects of the implied duty of good faith and fair dealing." *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 820 n.1 (Fed. Cir. 2010). "What is promised or disclaimed in a contract helps define what constitutes 'lack of diligence and interference with or failure to cooperate in the other party's performance.'" *Solaria Corp. v. United States*, 123 Fed. Cl. 105, 119–20 (2015) (quoting *Metcalf Constr. Co., Inc. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014)).

B. Analysis

The Amended Complaint fails to state a claim that the Government required HDCC to perform work outside of its contractual requirements. The setbacks HDCC alleges it encountered during contract performance—problems with the timing and content of finalized ROWs, obtaining necessary permits, relocating utilities, and negotiating work on several retaining walls—were both HDCC's sole responsibility under the firm fixed-price Contract and reasonably foreseeable. HDCC does not allege that the Government directed it to obtain permits or gather ROWs that were not contemplated by the Contract. Nor does it allege that it incurred overtime premiums caused by accelerating construction. Moreover, nothing in the Amended Complaint implies that representatives of CFLHD or HDOT acted unfairly or bad faith. Accordingly, the Amended Complaint must be dismissed.

1. Claims for Delays in Securing the Final Rights of Way and for Changes to the Rights of Way

Plaintiff gives myriad reasons it believes the Government was responsible for the delays and increased costs HDCC experienced during contract performance:

- "The Government failed to secure the necessary ROWs prior to issuing the notice to proceed, "which delayed final road design, preparation and execution of appropriate

Rights of Entry agreements and commencement of construction activities" Pl.'s Resp. at 6 (citing Pl.'s Ex. A at 5–6).

- The Government's failure to timely secure the ROWs "result[ed] in changes to the permitting requirements/standards from those reasonabl[y] anticipated by HDCC at the time of bidding which in turn caused delays and increased costs associated with the permitting process." Pl.'s Resp. at 6 (citing Pl.'s Ex. A at 9–10).

- In addition to failing to secure ROWs in a timely manner, "[t]he Government made changes to ROWs upon which HDCC based its bid which resulted in delays and additional design and other compensable costs." Pl.'s Resp. at 6 (citing Pl.'s Ex. A at 7–9).

The Court construes these claims as constructive change arguments, as the Amended Complaint does not allege that the Government gave a written or oral change order that caused delay or changed the ROW specifications. *See Agility Def.*, 115 Fed. Cl. at 251. These allegations fail to state a claim upon which relief may be granted under the Changes clause. Plaintiff does not allege facts that demonstrate either that HDCC performed work outside of the contract requirements or that HDCC experienced unforeseeable, excusable delay caused by the Government's acts or omissions.

HDCC vaguely asserts that CFLHD and HDOT made "verbal and written representations" during the procurement process that the Agency would secure title to ROWs prior to issuing the notice to proceed. Pl.'s Ex. A at 6. It relies on language in the October 1, 2015 RFQ, which stated that "[t]he right-of-way acquisition is expected to be complete prior to the issuance of the RFP." Def.'s App. at 167; Pl.'s Resp. at 3; Pl's Ex. A at 2. However, the RFP issued on December 18, 2015, informed bidders that the Contract would require the contractor to "[p]repare right of way plans and any legal descriptions documents to facilitate the final acquisition of the design and permanent right of way to accommodate the maintenance and operation of the facility by . . . HDOT"; "[p]repare the documents according to HDOT standards and specifications"; and "[o]btain any required title work and field work to complete a boundary study if required by HDOT." Pl.'s Ex. 1 at E-27, ECF No. 28-1. By including this language in the RFP, it was clear the Government had not yet secured final ROWs. Similarly, the RFP contemplated that final ROWs would not be obtained until after the contract award, as the contractor's assistance was required to facilitate ROW design and acquisition.

While the Contract assigns the Government responsibility to obtain title to ROWs, it does not specify a date by which the Government was required to do so. *See* Pl.'s Ex. A at 5–6. Thus, HDCC is wrong to allege that the Government caused unforeseeable, and therefore excusable, delays in contravention of its express duties under the Contract. Because the Contract required HDCC's participation in securing ROWs, it was entirely foreseeable that the Government would not have finalized ROWs prior to awarding the Contract or issuing the notice to proceed. Pl.'s Ex. 1 at E-27; Def.'s App. at 96. This was a firm fixed-price, design-build contract that

unambiguously included ROW design and facilitation services as part of the contractor's scope of work. Thus, HDCC bore the risk of increased costs and delays related to designing ROWs, securing ROWs, and adjusting construction designs based on preliminary ROW approximations in order to fit final ROWs. Pl.'s Ex. 1 at E-27; Def.'s App. at 96.

Plaintiff also fails to allege facts that the Government's acts or omissions caused the delays, thereby violating the implied duty of good faith and fair dealing. *See* Pl.'s Ex. A at 14. Nor does it offer facts showing that the Government engaged in a "lack of diligence and interference with or failure to cooperate in [HDCC's] performance" to suggest that the Government was responsible for the delays. *Metcalf*, 742 F.3d at 991. HDCC makes only conclusory assertions that the Government caused various delays. Without more, these allegations are insufficient for this Court to find that the Agency's acts or omissions were in bad faith. *Figueroa v. United States*, 57 Fed. Cl. 488, 497 (2003), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006) ("[L]egal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." (quoting *Blaze Constr., Inc. v. United States*, 27 Fed. Cl. 646, 650 (1993)) (cleaned up)).

Moreover, Plaintiff cites inapposite cases to support its claim that it is entitled to an equitable adjustment where the Government issued late ROWs. In these cases, courts found contractors entitled to an equitable adjustment because the government failed to furnish ROWs by an explicit deadline. *See Am. Line Builders, Inc. v. United States*, 26 Cl. Ct. 1155, 1163, 1205 (1992) (finding entitlement where the government missed an agreed-upon deadline to provide ROWs); *see also Appeal of Erickson Air Crane Co. of Washington, Inc.*, EBCA No. 50-6, 83-1 B.C.A. (CCH) ¶ 16145, 1983 WL 9353 (E.B.C.A. Sept. 30, 2982) (involving a contract that also specified a deadline for the government to provide the ROW). Here, however, the parties never agreed upon a specific date. Moreover, the Government did not represent that the ROW documents provided in the RFP—the Declaration of Future Dedication Commitment and Alternative No. 3 Profile—were final ROWs. *See* Pl.'s Ex. 1 at E-27 (RFP clause 111.11); Def.'s App. at 96 (Contract clause 111.11); *see also* Pl.'s Ex. A at 6 n.7 (when asked at the Q&A stage of the procurement process whether "all right-of-way acquisition has been obtained," the Agency referred bidders to the Contract language regarding "ROW engineering required by contractor" and stated that the "[f]uture dedication allows construction to commence concurrently").

HDCC also blames the delays and increased costs to obtain Clean Water Act Section 404 permits ("404 permits") on the Government's alleged failure to timely secure final ROWs. Pl.'s Ex. A at 9. Specifically, HDCC alleges that it was not able to submit its 404-permit application in line with its preferred schedule because the permit application required details that could only be found in the final ROWs. *Id.* Before HDCC was able to obtain the ROWs and submit its permit application, the local regulations governing the 404-permit requirements expired and new, more stringent regulations were put in place. *Id.* at 10. HDCC claims that it suffered delays and increased costs to comply with the heightened permitting requirements, which it would not have experienced had it been able to submit its permit application under the old regulations. *Id.*

Under the Contract's Permits and Responsibilities clause, HDCC was, "without additional expense to the Government, . . . responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work." FAR 52.236-7. While this clause "can be constrained by other contractual provisions that specifically limit the scope of the contractor's obligations for permitting requirements," *see Bell/Heery*, 739 F.3d at 1331, Plaintiff would need to plausibly allege that the late ROWs changed the Contract or resulted in excusable delay. It fails to do so. Thus, the Changes clause does not relieve HDCC of its obligations under the Permits and Responsibilities clause.

Additionally, Plaintiff does not credibly allege that the contract requirements or site conditions were materially different from the ROW information in the RFP. *See Sterling Millwrights*, 26 Cl. Ct. at 72. It is clear that these were not the final ROWs. *See* Pl.'s Ex. 1 at E-27 (RFP clause 111.11); Def.'s App. at 96 (Contract clause 111.11); *see also* Pl.'s Ex. A at 6 n.7. The need to adjust the ROW design to fit within the final ROW was foreseeable under the RFP's and Contract's requirements for ROW design and facilitation services. *Sterling Millwrights*, 26 Cl. Ct. at 72 (providing that an equitable adjustment for differing site conditions requires the materially different conditions to be reasonably unforeseeable); Pl.'s Ex. 1 at E-24 (RFP clause 111.05. Geometric Requirements); E-27 (RFP clause 111.11); Def.'s App. at 93 (Contract clause 111.05. Geometric Requirements), 96 (Contract clause 111.11).

In its CDA claim, Plaintiff invokes the *Spearin* doctrine, under which a contractor is entitled to compensation and additional time for changes caused by defective plans or specifications. *United States v. Spearin*, 248 U.S. 132 (1918). That doctrine concerns the "implied warranty that if the specifications are followed an acceptable result will be produced," which arises only in cases where "a government contract contains detailed design specifications, as opposed to performance specifications." *Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1344 (Fed. Cir. 2008). Here, the *Spearin* doctrine does not apply because the instant design-build contract contains only performance specifications. *See* Def.'s App.; Pl.'s Ex. B at 52. In sum, Plaintiff has not identified any legal or factual basis that entitles it to recover on its ROW claims.

2. Utility Relocation Delay Claim

Plaintiff asserts that the Contract required the Government "to timely execute and enforce its agreements with public utility companies" to relocate utilities, and its failure to do so "resulted in delays in HDCC's completion [of] the final roadway configurations at the Southern Terminal and Hokiokio and additional costs entitling HDCC to an excusable and compensable time extension and additional costs." Pl.'s Resp. at 6 (citing Pl.'s Ex. B at 40–49). Plaintiff alleges that it notified the utility company that owned telephone lines at the Project's Southern Terminus that its poles and overhead lines had to be relocated by October 2017. Pl.'s Ex. A at 11. Plaintiff also allegedly notified the utility companies that owned conflicting utilities at the

Hokiokio Street portion of the Project that their poles and overhead lines had to be relocated no later than August 4, 2017. *Id.* at 12. However, the Southern Terminus utility was not relocated until May 11, 2018, and the Hokiokio Street utilities were not relocated until July 11, 2018. *Id.*

The Amended Complaint fails to state a claim under the Changes clause for recovery of increased costs due to delays in these utility relocations. It does not allege facts demonstrating that these delays were excusable due to the Government's acts or omissions in violation of the contract's express terms or the implied duty of good faith and fair dealing. HDCC points to no contractual provision or authority obligating the Government to compel third-party utility companies to complete utility relocations within HDCC's preferred schedule. The Contract required the contractor to "prepare utility agreements for CFLHD, to be executed by HDOT," but made no assurances that CFLHD or HDOT would ensure the utility companies' adherence to HDCC's schedule. Def.'s App. at 80 (Contract clause 107.02, Protection and Restoration of Property and Landscape). The Contract specifies that HDCC was responsible for "[c]ooperat[ing] with utility owners to expedite the relocation or adjustment of their utilities to minimize interruption of service, duplication of work, and delays if relocations or adjustments are needed." *Id.* The firm fixed-price nature of the Contract assigned HDCC the risk of utility relocation delays. Thus, Plaintiff's claim must fail.

3. Maui Electric Company Wall and Castleton Wall Excusable Delay Claim (Time Only)

HDCC's final claim is a request for excusable days of delay and remission of liquidated damages, but not increased costs. Pl.'s Resp. at 20; Pl.'s Ex. A at 12–13. It alleges that "the Government caused delays associated with changes to the work involving the Maui electrical and Kai Hele Ku [Castleton] retaining walls." Pl.'s Resp. at 6; *see also* Pl.'s Ex. A at 12–13. Specifically, HDCC asserts:

> [W]hile the Project achieved actual Substantial Completion on July 24, 2018, there remained two forms of wall work associated with neighboring properties. The first was for the Castleton property which the Government was negotiating with the neighboring landowner over its request for a different, terraced [wall] to its property [as opposed to the graded slopes HDCC had already completed under the Contract]. The second were Government requested changes to the MECO [Maui Electric Company] wall work for another adjacent property. HDCC priced both of these changes to the wall work to be performed at the same time, but the Government delayed and kept HDCC on standby for 482 days and then it instructed HDCC not to perform the Castleton [terrace] wall work [because it decided to give that work to another contractor], and HDCC was forced to perform the Government's changes to the MECO wall work without an approved change order.

Pl.'s Resp. at 15; *see also* Pl.'s Ex. A at 12–13. It is unclear—and the parties disagree about—whether the MECO wall work was part of HDCC's original scope of work. *Compare* Pl.'s Ex. C

at 49 *with* Pl.'s Ex. B at 72. Consequently, they disagree as to whether HDCC's need to make changes to the MECO wall after Substantial Completion constituted a change to the Contract requirements. *Compare* Pl.'s Ex. C at 49 *with* Pl.'s Ex. B at 72. Neither party cites to any RFP or contract provision to support its position on what work relating to the MECO wall was included in the base Contract.[5]

HDCC argues that the MECO wall work changed the contract requirements because "only grading [for the MECO utility boxes] was included in the base Contract," but "[t]he approved grading change to the Castleton driveway [associated with the terraced wall construction] required construction of a block wall at the utility boxes per MECO requirements." Pl.'s Ex. C at 62. Based on this assumption, HDCC argues that it "could not proceed with the changed work without a contract modification" and "[t]he reason the MECO wall was delayed was because CFL[HD] would not provide an approved change modification to proceed." *Id.* HDCC further explains that the "additional wall work at the MECO location . . . used the same block as the proposed [Castleton terraced] wall construction," and it believed both of these work items "would be covered under the same contract modification." Pl.'s Ex. C at 63. Therefore, HDCC decided to complete this work simultaneously. *Id.* It states that "[w]hile awaiting direction from CFL[HD]," a survey revealed an issue with a different retaining wall on another part of the Castleton property and HDCC began "work[ing] on a minor redesign" to increase the wall height. *See id.* It chose to complete the work to increase the height of the other Castleton retaining wall "in conjunction with the pending Contract Modification [i.e. MECO wall and Castleton terraced wall] work." *Id.*

Because HDCC had various work—and additional anticipated work—to complete in close geographic proximity, "HDCC recommended, and CFL[HD] accepted that this remaining base work be delayed:" (1) "[s]o that all work is completed at the same time, or pacing the work to complete when the change order work finishes"; (2) "[t]o efficiently use [HDCC's] resources"; and (3) "[t]o manage and reduce the cost of equipment mobilization and use." Pl.'s Ex. C at 63. HDCC states that this arrangement "was an economic decision that was beneficial to both HDCC and CFL." *Id.*

The COFD claims that the MECO wall "was part of HDCC's original scope of work and was entirely unrelated to the Castleton Terrace Wall issue, other than the fact that the MECO wall was in the same vicinity as the Castleton Terrace Wall. HDCC's failure to complete the MECO Wall work is unrelated to the Castleton Terrace Wall, which both parties had agreed was added work." Pl.'s Ex. B at 67. The COFD further explains that the work to increase the other

[5] It is unclear whether Plaintiff's claim for excusable delay encompasses a claim that the MECO wall work was changed work, either under a traditional or constructive change analysis. However, the Court interprets Plaintiff's claim for time only as a claim for excusable days associated with its negotiation of the various wall work items with the Agency. Because Plaintiff does not appear to request compensation for the "additional" or "changed" work to the MECO or Castleton walls, the Court does not address whether the MECO wall work was, or was not, a base Contract requirement.

Castleton retaining wall's height after HDCC discovered issues with the wall during a survey was original Contract work. *Id.* The Agency argues that "HDCC did not diligently pursue this work to complete the original Contract requirements. . . . This delay in completing Contract requirements is concurrent with the MECO Wall delay." *Id.* The Government contends that Plaintiff's "unilateral" decision to delay both the base Contract work and the added work "while waiting to see if it would obtain a separate contract to also complete" the Castleton terraced wall was a "business decision." Def.'s Reply at 9. Thus, it concludes that "HDCC cannot state a claim for relief against the Government as a result of HDCC's own business decision." *Id.*

HDCC does not plead sufficient facts to demonstrate excusable delay. The alleged facts, even when taken as true, indicate that HDCC intentionally contributed to the delay and that HDCC did not continue to perform the contract despite its pending disputes with the Agency as required under the Contract's Disputes clause. Pl.'s Ex. C at 52–54; FAR 52.233-1, Disputes (July 2002) – Alternate I (Dec. 1991) ("The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action rising under or relating to the contract, and comply with any decision of the Contracting Officer."); *see also Int'l Elec. Corp.*, 646 F.2d at 510; *Nova Grp./Tutor-Saliba*, 159 Fed. Cl. at 53. HDCC indicates that it submitted multiple proposals and requests for contract modification orders, equitable adjustments, and excusable delay associated with the various wall work issues. Pl.'s Ex. C at 52–54. However, it admits that it chose to delay performance of certain items dependent upon resolution of these requests to the Agency, or in order to benefit itself and the Agency economically. *See* Pl.'s Ex. C at 52. HDCC had control over the schedule in this design-build Contract. Finally, it fails to allege facts suggesting that the Government acted in bad faith in taking time to make decisions regarding the additional Castleton wall work or to resolve HDCC's various requests.

IV. Conclusion

As explained above, Plaintiff has failed to plausibly allege that there were Government directed changes to the Contract. What HDCC interprets as changes are, in fact, obstacles that arose during contract performance which deviated from assumptions HDCC held at the time of its bid. Under the Contract, HDCC was solely responsible for the costs associated with addressing these obstacles. Therefore, the Amended Complaint does not state a claim for an equitable adjustment under the Changes clause (Count I) or for breach of the Changes clause (Count II). The Amended Complaint also fails to plausibly allege facts demonstrating that the underlying Government acts and omissions that led to the alleged changes were in bad faith.

Accordingly, the Government's Motion to Dismiss the Amended Complaint is **GRANTED**, and the case is **DISMISSED without prejudice**. The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

s/ Carolyn N. Lerner
CAROLYN N. LERNER
Judge

Corrected

In the United States Court of Federal Claims

No. 22-339 C
Filed: February 14, 2023

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.
Plaintiff

v.

JUDGMENT

THE UNITED STATES
Defendant

Pursuant to the court's Opinion and Order, filed February 14, 2023, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's amended complaint is dismissed, without prejudice, for failure to state a claim upon which relief may be granted.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

In the United States Court of Federal Claims

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. 22-339
(Filed: April 24, 2023)

Michael Charles Zisa, Washington, DC, for Plaintiff.

Jimmy S. McBirney, Civil Division, United States Department of Justice, Washington, DC, for Defendant.

OPINION AND ORDER

LERNER, *Judge*.

On February 14, 2023, this Court entered an Order granting the Government's Motion to Dismiss the Amended Complaint and dismissing the above captioned case without prejudice. Order, ECF No. 30. On March 14, 2023, Plaintiff, Hawaiian Dredging and Construction Company ("HDCC"), filed a Motion for Reconsideration of and/or Relief from Order of Dismissal and Motion for Leave to Amend and attached a proposed second amended complaint. Pl.'s Mot. at 1, ECF No. 33; Proposed Second Am. Compl., ("Proposed Am. Compl.") ECF No. 33-1. HDCC—which filed its Complaint one day before the statute of limitations ran—contends that because its claim is now time barred, this Court's dismissal without prejudice is "tantamount to a dismissal with prejudice." *Id.* at 1, 6. HDCC moves under Rules of the United States Court of Federal Claims ("RCFC") 59(a)(1)(C), 60, and 15(a)(2) to vacate its dismissal order, reopen the case, and amend its Amended Complaint in order to "avoid the clear manifest injustice of a dismissal that is equivalent to a dismissal with prejudice." *Id.* at 1.

The Court's dismissal was not the result of clear factual or legal error, nor did it create manifest injustice to warrant reconsideration under Rules 59 or 60. Moreover, because a further amended complaint would be futile, the interests of justice do not require that this Court grant leave to amend. *See* RCFC 15(a)(2). For the following reasons, Plaintiff's Motion for Reconsideration and Motion for Leave to Amend are **DENIED**.

I. Background

The factual background of this case is fully set forth in the Court's dismissal order and only the relevant information is repeated here. Order at 2–5. HDCC filed its Complaint one day before the Contract Disputes Act's one-year statute of limitations expired. *See* Compl. ECF No. 1. HDCC sought review of the contracting officer's final decision to deny it an equitable adjustment for delays and increased costs incurred during performance of the Lahaina Bypass 1B-2 design-build construction contract in Lahaina, Maui, Hawaii ("the Contract"). Order at 1–2; Pl's Mot. at 2. The Government filed a timely Motion to Dismiss. Order at 1. In its opposition to the Motion to Dismiss, HDCC requested that "in the event that the Court finds that HDCC's Complaint does not state sufficient facts to support any portion of its claims against the Government, the Court should grant HDCC leave to amend the Complaint." Pl.'s Resp. to Mot. to Dismiss at 16, ECF No. 18. Plaintiff never objected to any of the Government's several motions for extension of time or otherwise intimated to the Court that time or the statute of limitations posed any concern.

The Court granted the Government's Motion to Dismiss after finding that HDCC failed to state a claim for either an equitable adjustment under Count I or breach of contract under Count II of the Amended Complaint. Order at 1, 14–15. The Court also found that HDCC did not allege facts sufficient to support its claim that the Government's actions were in bad faith. *Id.* The Order did not address HDCC's request, in the alternative, for leave to amend its complaint.

The Proposed Second Amended Complaint attached to HDCC's Motion for Reconsideration alleges:

- There was in fact a valid contract between the parties (Ex. 1, at ¶¶ 65 and 71).
- Pursuant to the Contract, if the Government directs and/or causes constructive changes to the work, then the Government is obligated, and HDCC is entitled to, additional time and/or compensation (Ex. 1, at ¶ 66).
- Implied in every contract is the duty of good faith and fair dealing (Ex. 1, at ¶ 72 and 73).
- The Government breached is duties and obligations by, *inter alia*:
    - Failing to make the necessary land acquisitions and provide the ROWs in a reasonable time;
    - Failing to execute and enforce utility agreements in a reasonable time;
    - Failing to execute change orders for additional work associated with the Castleton Wall and MECO Wall in a reasonable time;
    - Failing to grant HDCC's proper claims for time extensions; and
    - Improperly attempting to reverse a previously approved Contract modification (Ex. 1, at ¶¶ 21–54, 62–75).
- HDCC has been damaged as a result of the Government's alleged breaches (Ex. 1, at ¶¶ 69 and 76.).

Pl.'s Mot. at 10 (citing Proposed Am. Compl) (cleaned up).

II. Legal Standards

A. Motion for Reconsideration

Plaintiff seeks reconsideration of the Court's decision under Rules 59(a) and 60.

"Under Rule 59(a)(1), a court, in its discretion, 'may grant a motion for reconsideration when there has been an intervening change in the controlling law, newly discovered evidence, or a need to correct clear factual or legal error or prevent manifest injustice.'" *Biery v. United States*, 818 F.3d 704, 711 (Fed. Cir. 2016) (quoting *Young v. United States*, 94 Fed. Cl. 671, 674 (2010)). A motion for reconsideration also requires that the movant make a "showing of extraordinary circumstances which justify relief." *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) (internal quotation marks and citations omitted). "Where a party seeks reconsideration on the ground of manifest injustice, it cannot prevail unless it demonstrates that any injustice is 'apparent to the point of being almost indisputable.'" *Griffin v. United States*, 96 Fed. Cl. 1, 7 (2010) (quoting *Pac. Gas & Elec. Co. v. United States*, 74 Fed. Cl. 779, 785 (2006), *rev'd on other grounds*, 536 F.3d 1282 (Fed. Cir. 2008)). Additionally, "it is well-established that motions for reconsideration cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier." *Lodge Constr., Inc. v. United States*, 159 Fed. Cl. 414, 422 (2022) (quotation marks omitted) (quoting *Robinson v. Dist. of Columbia*, 296 F. Supp. 3d 189, 192 (D.D.C. 2018)).

Under Rule 60(a), a "court may correct a clerical mistake or a mistake arising from oversight or omission wherever one is found in a judgment, order, or other part of the record." RCFC 60(a). Additionally, Rule 60(b) permits relief for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under RCFC 60(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

RCFC 60(b). The catchall provision in Rule 60(b)(6) is limited to "extraordinary circumstances . . . when the basis for relief does not fall within any other subsections of Rule 60(b)." *E.g.*, *Fiskars, Inc. v. Hunt Mfg. Co.*, 279 F.3d 1378, 1382 (Fed. Cir. 2002). And of particular relevance in this case, to prove that extraordinary circumstances are present, the movant must "demonstrate that [it] was not at fault for [its] predicament." *Mendez v. United States*, 600 Fed. App'x 731, 733 (Fed. Cir. 2015) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993)).

B. Motion for Leave to Amend Pleadings

Pursuant to Rule 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave. The Court should freely give leave when justice so requires." RCFC 15(a)(2). "[T]he grant or denial of an opportunity to amend pleadings is within the discretion of the trial court." *Mitsui Foods, Inc. v. United States*, 867 F.2d 1401, 1403 (Fed. Cir. 1989). Denial of leave to amend is warranted for "reasons such as undue delay, bad faith or dilatory motives, prejudice to the opposing party, or futility," and "any one of these criteria is sufficient to deny a motion to amend." *E.g.*, *Alfa Laval Separation, Inc. v. United States*, 47 Fed. Cl. 305, 312 (2000) (quoting *Spalding & Son, Inc. v. United States*, 22 Cl. Ct. 678, 680 (1991)). Under the present circumstances, the appropriate test for futility is whether the allegations in the proposed amended complaint state a plausible claim for relief. *See Campbell v. United States*, 137 Fed. Cl. 54, 57 (2018). Thus, the standards for a motion to dismiss under Rule 12(b)(6) apply. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'")

A party seeking leave to amend its complaint must move in writing during a hearing or trial, state its argument with particularity, and state the relief sought. RCFC 7(b)(1); *see also United Cmtys., LLC v. United States*, 157 Fed. Cl. 19, 22 (2021) (finding plaintiff's one-sentence request for leave to amend in its opposition to a motion to dismiss was not properly before the court) (citing *Refaei v. United States*, 725 F. App'x 945, 947 (Fed. Cir. 2018)). When a motion for leave to amend is not properly before the court, "the court's failure to rule on it works no injustice." *Id.*

III. Analysis

Plaintiff's Motion for Reconsideration and Motion for Leave to Amend fail to establish any of the elements under Rules 59(a), 60, 15(a), or 7(b).

First, HDCC has not established under Rule 59(a) that this Court's dismissal order resulted in manifest injustice "apparent to the point of being almost indisputable" because the statute of limitations bars HDCC from refiling. Neither this Court nor the United States Court of Appeals for the Federal Circuit have addressed whether a dismissal without prejudice where the statute of limitations has expired is akin to a dismissal with prejudice. And as the Government points out, "HDCC fails to provide any support for the position that dismissal without leave to amend constitutes 'manifest injustice' whenever the statute of limitations has expired, or even that the statute of limitations is a relevant consideration to the proper disposition of a complaint at all." Def.'s Resp. at 8, ECF No. 34 (quoting *Marasovic v. Contra Costa Cty. Adult Protective Servs.*, 2004 U.S. Dist. LEXIS 29328, *10 (N.D. Cal. Aug. 21, 2004) ("[E]ven if a case is dismissed without prejudice, future related suits may be blocked if the limitations period has run.")). This Court's dismissal order was also not the result of a mistake or oversight to justify relief under Rule 60(a) or (b)(1). Moreover, HDCC's statute of limitations problem is of its own making and does not present extraordinary circumstances as Rule 60(b)(6) contemplates.

Following HDCC's logic, manifest injustice would befall every plaintiff whose case is dismissed after the statute of limitations expired while litigation was pending, and the only way

to prevent said injustice is to allow infinite amendments. While creative, HDCC's suggestion is without merit. It is hardly uncommon—much less "extraordinary"—for the statute of limitations to run while a case is pending, especially when the filing period is as short as the one-year limit here. HDCC waited until *one day before* the statute of limitations expired to file its Complaint in this Court. *See, e.g.*, Pl.'s Mot. at 2 (recognizing that "HDCC had twelve months, or until March 30, 2022," to file an action in this Court, and that it filed its Complaint on March 29, 2022). It also never objected to any of the Government's several motions for extension of time.

HDCC's decision to file its case one day before the statute of limitations ran is telling for several reasons. First, it demonstrates that there was no error when HDCC's request for leave to amend its complaint as an alternative to dismissal was not granted. *See* Pl.'s Mot. at 8. HDCC was aware when it filed its opposition to the Motion to Dismiss that the statute of limitations had expired and it would not be able to refile its claims if the case were dismissed. Nevertheless, HDCC did not argue, either then or during supplemental briefing, that justice required the Court to grant leave to amend in order to avoid a dismissal that is "tantamount to a dismissal with prejudice." *See* RCFC 15(a)(2). Motions for reconsideration are not to be used as "a vehicle for presenting theories or arguments that could have been advanced earlier." *Lodge Constr.*, 159 Fed. Cl. at 422.

In its Reply in support of its Motion, HDCC explains that its Motion "is not based upon the Court's refusal to grant HDCC's request for leave to amend in its response to the Government's Motion to Dismiss" and "whether HDCC requested leave to amend in response to the Government's Motion to Dismiss is irrelevant to HDCC's Motion for Reconsideration." Pl.'s Reply at 2, ECF No. 35 (emphasis removed). However, Plaintiff is incorrect that its first request to amend is irrelevant. It demonstrates that HDCC had ample opportunity prior to dismissal to present its argument that the Court should grant leave to amend due to statute of limitations concerns. The failure to do so cannot form the basis for Plaintiff's current request.

Furthermore, the expiration of the statute of limitations and this dismissal order could not have coalesced into "manifest injustice" when the statute of limitations expired the day after Plaintiff filed its Complaint. HDCC also cannot establish that its predicament constitutes an "extraordinary circumstance" because it was largely of HDCC's own making. *See Mendez*, 600 Fed. App'x at 733.

Finally, the dismissal did not result in manifest injustice because HDCC's initial request for leave to amend was not properly before the Court. Either way, amendment would be futile because the Proposed Amended Complaint also fails to state a claim. HDCC's threadbare request for leave to amend as an alternative to dismissal did not "state with particularity the grounds for seeking the order" as Rule 7(b)(1)(B) requires. Its present motion also fails because there are no material differences between the First Amended Complaint and the Proposed Amended Complaint. While this Court must treat all factual allegations in the complaint as true, it does not afford legal conclusions in the complaint the same treatment. *See, e.g.*, *Ashcroft*, 556

U.S. at 678. The Proposed Amended Complaint simply makes conclusory assertions that the Government's acts or omissions were "unreasonable."

For example, the Proposed Amended Complaint baldly asserts that the delay in obtaining the ROWs or utility relocation was unreasonable and unforeseeable. Taking the facts in the Proposed Amended Complaint as true, it is apparent that the Contract contemplated that the Government would negotiate with third parties in order to finalize the ROWs and utility relocations. *See* Proposed Am. Compl. at ¶¶ 9, 21, 41. The Proposed Amended Complaint does not explain why it was unforeseeable that project components which relied on third parties might culminate in delays. It also does not present any facts suggesting that the Government, in bad faith, failed to prudently pursue these agreements with third parties. Thus, HDCC's conclusion that the Proposed Amended Complaint "fully address[es] any alleged pleading failures as stated in the Court's Order" is incorrect. Pl.'s Mot. at 10.

IV. Conclusion

Plaintiff had multiple opportunities to raise its concerns about the statute of limitations prior to dismissal. It did not. And it is clear that any amendment would be futile given the insufficient Proposed Amended Complaint. Accordingly, Plaintiff's Motion for Reconsideration and Motion for Leave to Amend are **DENIED**.

IT IS SO ORDERED.

s/ Carolyn N. Lerner
CAROLYN N. LERNER
Judge

Federal Rule of Appellate Procedure Rule 32(g) Certificate of Compliance with Type-Volume Limit

I hereby certify that on this 18th day of July 2023, that the Opening Brief of Appellant-Plaintiff Hawaiian Dredging Construction Company, Inc. complies with the type-volume limit of Fed. Cir. Rule 28.1 (b)(1), because, excluding the parts of the document exempted by Fed. R. App. 32(f), the Opening Brief of Appellant-Plaintiff Hawaiian Dredging Construction Company, Inc. contains 12,909 words. I further certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Times New Roman.

/s/ *Michael C. Zisa*
Michael C. Zisa

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of July 2023, a copy of the foregoing was served on the following through the Court's CM/ECF electronic filing service:

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