Appeal No. 2023-1909

In the 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
No. 22-339, Judge Carolyn N. Lerner

CORRECTED BRIEF OF DEFENDANT-APPELLEE THE UNITED STATES

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STATEMENT OF RELATED CASES

No appeal from this civil action was previously before this or any other appellate court. Counsel is not aware of any case that is currently pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal.

JURISDICTIONAL STATEMENT

The trial court correctly held that it possessed "jurisdiction . . . under the Tucker Act[, 28 U.S.C. § 1491(a)(2),] and [Contract Disputes Act (CDA), 41 U.S.C. § 7101,] because the case [arose] from a contract between HDCC and the United States, there was a valid claim and [contracting officer's final decision (COFD)], and [HDCC] filed its Complaint … within 12 months of receiving the COFD." Appx5.

On May 17, 2023, HDCC timely filed its Notice of Appeal in this Court. ECF No. 1. This Court possesses jurisdiction, pursuant to 28 U.S.C. § 1295(a)(3).[1]

STATEMENT OF THE ISSUES

1. Whether the Court of Federal Claims correctly dismissed, without prejudice, plaintiff, Hawaiian Dredging Construction Company, Inc.'s (HDCC), First Amended Complaint (FAC) for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC).

2. Whether the trial court correctly denied HDCC's Motion for Reconsideration of, and/or Relief from, the court's dismissal order pursuant to

[1] HDCC incorrectly states that this Court possesses jurisdiction pursuant to 28 U.S.C. § 1295(a)(1), Pl.-App. Br. at 1, as opposed to pursuant to subsection (a)(3).

RCFC 59(a)(1)(C) and 60, as well as HDCC's Motion for Leave to Amend its FAC pursuant to RCFC 15(a)(2).

STATEMENT OF THE CASE

I. Statement of Facts[2]

A. The Project

On June 3, 2016, the United States Department of Transportation (DOT), through the Federal Highway Administration (FHWA), Central Federal Lands Highway Division (CFLHD), awarded HDCC Contract No. DTFH6816C00024 (the Contract), a fixed-unit-price, design-build contract in the amount of $38,671,000. Appx28, Appx1437. The Contract was for the construction of the Lahaina Bypass 1B-2, an approximately 2.7 mile, four-lane highway designed to stop shoreline erosion, coastal hazards, and traffic congestion on the Honoapiilani Highway, in Lahaina, Maui, Hawaii. Appx28-29. The Contract involved extending the existing road on both sides, constructing an overpass and box culverts, grading for drainage, and installing road and bridge safety features.

[2] This section relies upon the facts as alleged in HDCC's FAC, which must be taken as true, with all reasonable inferences construed in HDCC's favor, just as COFC did in its dismissal order. Appx2 (citing *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007)); *see also United States v. Ford Motor Co.*, 497 F.3d 1331, 1336 (Fed. Cir. 2007) ("In reviewing a motion to dismiss based on the pleadings, this court must accept all well-pleaded facts as true and view them in the light most favorable to the non-moving party.").

Appx29.

To perform the Contract, final Rights of Way (ROWs) were to be acquired from multiple landowners near the highway. Appx29. Relocation of overhead utilities was also required. *Id.* And local, state, and federal permits were to be obtained. *Id.* On May 25, 2018, the Lahaina Bypass opened to the public, and by July 24, 2018, HDCC's Contract work was substantially complete. *Id.*

B. The RFQ, RFP, And HDCC's Proposal

HDCC alleges that, during the procurement process, the agency made verbal and written representations that it would acquire the necessary ROWs prior to issuance of the notice to proceed (NTP). Appx2, Appx35, Appx42-43. In support, HDCC quotes from the October 1, 2015, Request for Qualifications (RFQ), which 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 completed prior to the issuance of the [Request for Proposals (RFP)].

Appx2, Appx39 (HDCC's emphasis removed); Pl.-App. Br. at 3.

On December 18, 2015, when the agency issued the RFP, the "Government Furnished Information" section of the RFP noted that the following information would be provided via CD: ROW Dedication of Deed documentation, Final Environmental Assessment/Finding of No Significant Impact, Survey Data, and

Alternative No. 3 Profile. Appx2-3, Appx298. HDCC alleges that the "Alternative No. 3 Profile," provided with the RFP, 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." Appx3, Appx39; Pl.-App. Br. at 4.

The RFP required each proposal to 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." Appx3, Appx39, Appx301. The RFP also required the contractor to locate and identify all utilities within the project area, "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." Appx3, Appx49, Appx385.

On April 26, 2016, HDCC submitted its Price Proposal and a Technical Proposal. Pl.-App. Br. at 4. As the court noted, HDCC alleged in its certified claim – attached to its FAC – 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." Appx3, Appx40; Pl.-App. Br. at 5. HDCC also alleged in its certified claim that, when it

submitted its bid, HDCC believed that the agency had already secured the required ROW documents and permits—or would at least do so prior to issuing the NTP—and that neither the Government nor HDCC were required to obtain grading permits from the County of Maui. Appx43-44. These requirements were not completed until after contract performance commenced. Appx3.

C. The Contract

The Contract, awarded to HDCC on June 3, 2016, made clear that HDCC was "responsible for all work as described in these RFP documents," noting that:

> The scope of work includes design, construction, maintenance during construction, project management, project scheduling, quality control/quality assurance for design and construction, materials sampling and testing, obtaining permits . . . and coordination with other governmental agencies and entities including federal, state, local governments, and communication with the public regarding ongoing and upcoming construction activities.

Appx1448. The Contract incorporated by reference 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.

Appx3-4, Appx1473 (emphasis added).

While the Contract contemplated that the Government would execute final

ROWs, it 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." Appx4, Appx1531.

The Contract also required HDCC 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." Appx4, Appx1515.

The Contract also incorporated by reference FAR 52.243-4, Changes, under which HDCC could 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. Appx6; FAR 52.243-4(d).

The agency issued the NTP on June 29, 2016.[3] Appx3; Pl.-App. Br. at 5.

[3] Although the NTP was issued twelve days later than originally anticipated, the contracting officer, in her final decision, granted HDCC's request for a twelve-day extension and accounted for related liquidated damages. *See infra* n. 4.

The NTP directed HDCC to "begin design-build operations." Appx54; *but see* Pl.-App. Br. at 5 (suggesting incorrectly that the NTP directed HDCC specifically "to proceed with the Alternative No. 3 alignment"); *compare* Appx1725 (NTP).

D. The Certified Claim, COFD, and The Sage Group Analysis

On July 17, 2020, HDCC submitted a certified claim to the contracting officer requesting an equitable adjustment for various delays and increased costs during contract performance. Appx4, Appx30, Appx38-52; Pl.-App. Br. at 5-6. HDCC sought $7,049,991, inclusive of $1,212,640 in withheld liquidated damages that HDCC sought to negate through excusable delay claims. Appx38-52.

HDCC alleged in its claim that the agency's failure to secure the ROWs in a timely manner caused delays in obtaining Clean Water Act permits and relocating utilities. Appx42-44, Appx46-49; *see also* Appx29-32. HDCC also alleged in its claim that it suffered: delays and increased costs due to differences between the final ROWs and the preliminary ROW documents provided in the RFP, Appx44-46; *see also* Appx29-32; and excusable delays between Substantial Completion and Final Completion because the agency allegedly ordered changes and additions to 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, Appx49-50; *see also* Appx29-32. HDCC further alleged in its claim that these various

delays led to critical path delay in performing the Contract. Appx31-32.

On March 30, 2021, following additional correspondence between the parties to resolve gaps and discrepancies in HDCC's claim, Appx60, the contracting officer issued her Contracting Officer's Final Decision (COFD). Appx30, Appx53-146. In an exhaustive decision, the contracting officer carefully analyzed and rejected all but one of HDCC's claims.[4] *Id.* The contracting officer observed that the majority of HDCC's claims arose from HDCC's allegations that its work was inhibited by delays in obtaining the requisite permits and ROWs, and proceeded to analyze each of HDCC's claims individually. *Id.* The contracting officer determined that nearly all of the delays for which HDCC sought compensation involved causes for which HDCC had assumed the responsibility and risk under the Contract. *Id.* Finally, the contracting officer determined that the financial impact of her decision, primarily based upon overpayment relating to utility relocation costs, was that HDCC owed the Government $829,753.05. Appx145.

Following the contracting officer's final decision, instead of filing its

[4] As noted, HDCC's certified claim also requested a twelve-day extension of time and remission of liquidated damages for the agency's alleged delay in issuing the NTP. Appx41-42. The contracting officer granted this request in the COFD. Appx74-76, Appx179. The claim remained in the FAC, but HDCC clarified in briefing to the trial court that this claim was no longer at issue. Appx5.

complaint, HDCC retained an expert construction consulting firm, The Sage Group, to evaluate HDCC's certified claim and the COFD. Appx32, Appx147-282. On November 10, 2021, the Sage Group issued a "Preliminary Schedule and Damage Analysis" that in fact reduced HDCC's claim amount, but otherwise largely reasserted the arguments HDCC raised in its certified claim. *Id.* On November 17, 2021, nearly eight months after issuance of the COFD, HDCC provided a copy of the Sage Group's analysis to the agency and invited the agency to advise whether it wished to amend the COFD. Appx32. The agency declined HDCC's invitation.

II. Course Of Proceedings Below

A. The Complaint And First Amended Complaint

On March 29, 2022, more than four months after HDCC provided the Sage Group's analysis to the agency and only one day before the expiration of the CDA's one-year statute of limitations for appealing a COFD to the trial court, Appx17, Appx146, HDCC filed its original complaint. Appx5, Appx24; Pl.-App. Br. at 7. Thereafter, counsel for the United States contacted counsel for HDCC and advised that the Government believed HDCC's original complaint was deficient and encouraged HDCC to consider filing an amended complaint that more fully fleshed out HDCC's claims. Appx1688.

On July 22, 2022, before the Government responded to the original

complaint, HDCC filed its FAC, adding a small number of additional allegations, and attaching for the first time three exhibits: (1) HDCC's certified claim; (2) the COFD; and (3) the Sage Group's analysis. Appx24, Appx27-282.

In its FAC, HDCC asserted two counts – (1) Equitable Adjustment (Count I), and (2) Breach of Contract (Count II) – but relied only upon the Changes clause of the Contract to support both Counts I and II. Appx5, Appx33-36. By referencing HDCC's certified claim, attached to the FAC, the trial court later interpreted the FAC as also asserting a claim of breach of the implied duty of good faith and fair dealing. Appx5, Appx50-51. The FAC did not specify any other contract provision (beyond the Changes clause), any express or implied warranty, or any law that the agency allegedly breached or violated. Appx5, Appx31.

For these claims, HDCC sought a judgment of $6,576,968, a time extension of 190 compensable and excusable delay days, an additional 482 excusable delay days, interest, attorney fees, and costs. Appx37. HDCC broke down the elements of its demand identically under both Counts I and II as including:

- $3,588,549 in general conditions for 190 days of alleged compensable delay;
- 482 days of excusable delay;
- remission of $1,139,840 in withheld liquidated damages;
- $1,262,640 of unpaid "approved contract value";
- $1,273,530 of unpaid change proposals;

- $452,250 of accelerated construction overtime premiums; and
- release of claimed repayment due of $829,753.

Appx33-36; Pl.-App. Br. at 7-8.[5]

B. The Government's Motion To Dismiss And Subsequent Briefing

On August 5, 2022, the Government filed a timely motion to dismiss HDCC's FAC for failure to state a claim upon which relief may be granted pursuant to RCFC 12(b)(6). Appx1, Appx24; Pl.-App. Br. at 8-10. We argued that HDCC bore the risk for increased contract costs as a matter of law under its fixed-price Contract, that HDCC had not plausibly alleged any directed or constructive changes to the Contract, and that no other Contract provision justified relief. Appx1, Appx6.

In its August 31, 2022 opposition, HDCC argued that it had sufficiently plead causes of action for equitable adjustment and breach of contract. Appx25, Appx1632. In the alternative, however, HDCC requested that, "in the event that the Court finds that HDCC's [First Amended] 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 [First Amended] Complaint." Appx18, Appx25, Appx1651-1652. To be clear, HDCC did not provide any justification for the trial

[5] It is unclear how HDCC adds and off-sets the constituent parts of its demand to reach the total claimed amount of $6,576,968.

court to grant its unsupported request in the alternative for leave to amend, nor did it file a separate motion seeking such leave. Appx1651-1652.[6] Nor, for that matter, did HDCC raise the fact that a decision granting the Government's motion to dismiss after the relevant statute of limitations had run could leave HDCC without recourse even if the dismissal was without prejudice. *Id.* Also, nowhere in HDCC's opposition to our motion to dismiss (or any subsequent trial court briefing for that matter) did HDCC address its complaint allegation that the agency is not entitled to repayment of an alleged overpayment of $829,753.05 primarily related to utility relocation costs. Appx34, Appx36. HDCC does raise this issue in its briefing before this Court.

Following additional briefing, and a court order allowing HDCC a surreply to our reply, on November 22, 2022, the trial court requested additional documentation and supplemental briefing. Appx25, Appx1673, Appx1675, Appx1684. Again, HDCC concluded its supplemental brief by reiterating its unsupported request in the alternative that the trial court grant it leave to amend its

[6] In August 2022, when as part of its opposition to the Government's motion to dismiss HDCC first requested in the alternative that it be granted leave to amend its FAC, HDCC did not submit to the trial court a proposed second amended complaint. The Proposed Second Amended Complaint (PSAC) in this case, Appx1621, was not provided to the trial court until March 14, 2023, as an attachment to HDCC's Motion for Leave to Amend its FAC, after the Government's motion to dismiss had already been granted. Appx26.

FAC. Appx25, Appx1682. And, again, HDCC did not raise the statute of limitations issue. *Id.* As such, at no time prior to the court's ruling on the Government's motion to dismiss did HDCC file a motion seeking leave to amend its FAC or raise the statute of limitations issue.

C. Trial Court Grants The Motion To Dismiss

On February 14, 2023, the trial court granted the Government's motion to dismiss, finding that HDCC failed to state a claim for either an equitable adjustment for alleged changes (Count I) or for breach of contract (Count II). The trial court noted that HDCC's FAC relied only upon the Contract's Changes clause as grounds for their claims, Appx5, Appx30-31, Appx33, while also including a claim for breach of the implied duty of good faith and fair dealing. Appx5, Appx50-51. Otherwise, the court continued, HDCC's claims were "broadly assert[ed]" breaches of contract, breaches of express and implied warranties, and violations of the FAR and other applicable law, relying largely upon attachments to the FAC for the substantive details. Appx5, Appx30-31, Appx33, Appx38.

The trial court found that HDCC had failed to state a claim that the agency required HDCC to perform work outside of its contractual requirements. Appx8-9, Appx14. Further, the court found that the issues HDCC allegedly encountered--involving the final ROWs, permits, utilities relocation, and retaining wall work – were both HDCC's sole responsibility under the firm fixed-price Contract and

reasonably foreseeable. Appx8-14. The court found that HDCC did not allege that the agency directed it to obtain permits or gather ROWs that were not contemplated in the Contract or incur overtime premiums caused by accelerated construction. *Id.* Nor did HDCC allege or imply that the agency acted unfairly or in bad faith. *Id.*

The trial court ultimately dismissed HDCC's FAC without prejudice. Appx15-16; Pl.-App. Br. at 11.

D. HDCC's Motion For Reconsideration Of, And/Or Relief From, Dismissal Order And Motion For Leave To Amend

On March 14, 2023, HDCC filed a combined Motion for Reconsideration of, and/or Relief from, the court's February 14, 2023 Order of Dismissal, pursuant to RCFC 59(a)(1)(C) and 60, as well as – for the first time – a Motion for Leave to Amend its FAC, pursuant to RCFC 15(a)(2), Appx17, Appx26, attaching to its motion a proposed second amended complaint (PSAC). Appx1621. Therein, HDCC argued that the dismissal without prejudice was "tantamount to a dismissal with prejudice" because the statute of limitations had run by the time the court granted the Government's motion to dismiss. Appx17. HDCC asked the court to vacate its dismissal order, reopen the case, and permit HDCC to amend its FAC. Appx17.

The court found that its dismissal of HDCC's FAC was not the result of clear factual or legal error, nor did it create manifest injustice to warrant

reconsideration under RCFC 59 or 60 merely because the statute of limitations had run, barring HDCC from refilling. Appx17. The court observed that HDCC's assertion of manifest injustice would apply to every plaintiff whose case is dismissed after the statute of limitations has run and would lead to "infinite amendments." Appx20-21. The court also noted HDCC's failure to raise the statute of limitations issue in any prior briefing despite clearly knowing that it had run the day after HDCC filed its original complaint. Appx 21. Finally, the court also noted the lack of material differences between HDCC's FAC and its PSAC, where the proposed filing merely added conclusory assertions about the agency's actions, and found that, because a further amended complaint would be futile, the interests of justice did not require the court grant leave to amend under RCFC 15(a)(2). Appx17.

This appeal followed.

SUMMARY OF THE ARGUMENT

HDCC characterizes the trial court's dismissal of its FAC, without first granting it leave to amend, as a "rush to judgment." Pl.-App. Br. at 12. In actual fact, HDCC filed a threadbare complaint one day before its CDA limitations period expired. When we suggested to HDCC that amendment might be required for HDCC's suit to survive a motion to dismiss, HDCC filed a near-identical FAC, the primary difference being HDCC attaching its certified claim, the contracting

officer's final decision, and a third-party's analysis of both.

When we filed our motion to dismiss, HDCC opposed, only suggesting to the court that instead of granting the motion, it could allow HDCC to amend. After obtaining new counsel, who sought and obtained leave for a surreply, HDCC again chose not to seek leave to amend. The court requested additional briefing before ruling, with HDCC yet again failing to seek leave to amend. After the court dismissed, HDCC moved for reconsideration and, finally, sought leave to amend.

HDCC would have this Court allow it to amend its complaint *ad infinitum*, or at least until HDCC gets it right. As it has been from the start – HDCC failed to state a claim, for either an equitable adjustment for alleged changes or for a so-called breach of the Changes clause of the Contract, because the agency did not directly or constructively order HDCC to perform work outside of its contractual requirements. And, also, because the myriad issues HDCC allegedly encountered – involving the ROWs, permits, utilities, and retaining wall work – were both HDCC's sole responsibility under the firm fixed-price Contract and reasonably foreseeable.

For these reasons, this Court should affirm both the trial court's dismissal order and its denial of HDCC's subsequent motions.

STANDARD OF REVIEW

I. The Standard Of Review For Motions To Dismiss For Failure To State A Claim

Whether a trial court properly dismissed a complaint for failure to state a claim upon which relief could be granted is an issue of law which this Court reviews *de novo*. *See Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015) (citing *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009)).

To withstand a motion to dismiss under RCFC 12(b)(6), a complaint must contain enough facts to state a claim to relief that is plausible on its face. *See Frankel v. United States*, 842 F.3d 1246, 1249 (Fed. Cir. 2016) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads 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, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009). As such, mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555.

Of course, in deciding a motion to dismiss, the court is required to accept as true all factual allegations pleaded, but is not required to accept a complaint's legal conclusions. *Frankel*, 842 F.3d at 1249 (citing *Iqbal*, 556 U.S. at 678). "Legal

conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." *Figueroa v. United States*, 57 Fed. Cl. 488, 497 (2003), aff'd, 466 F.3d 1023 (Fed. Cir. 2006).

Moreover, the court is not limited to the four corners of the complaint; it may also look to matters incorporated by reference or integral to the claim, items subject to judicial notice, and matters of public record. *See Dimare Fresh*, 808 F.3d at 1306 (citing 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. 2004)). Ultimately, this Court can "affirm the Court of Federal Claims' dismissal on any ground supported by the record." *Wyandot Nation v. United States*, 858 F.3d 1392, 1397 (Fed. Cir. 2017).

"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 v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2014) (citing *Hercules, Inc. v. United States*, 24 F.3d 188, 198 (Fed. Cir. 1994); *San Carlos Irrigation & Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989)). When considering a motion to dismiss for failure to state a breach of contract claim, "the court must interpret the contract's provisions to ascertain whether the facts plaintiff alleges would, if true, establish a breach of contract." *Id.* Where a complaint seeks relief based on the Changes clause relating to permitting requirements in a fixed-

price contract that allocates responsibility for those requirements to the contractor, the complaint fails to state a claim as a matter of law where it fails to allege a specific "change in the form of a 'written or oral order . . . from the Contracting Officer that causes a change.'" *Bell/Heery*, 739 F.3d at 1334 (citing 48 C.F.R. § 52.243-4(b)).

II. The Standard Of Review For Motions Under RCFC 59(a)(1)(C), 60, and 15(a)(2)

This Court reviews the court's denial of a motion for reconsideration for abuse of discretion. *See Indiana Municipal Power Agency v. United States*, 59 F.4th 1382, 1384 (Fed. Cir. 2023) (citing *Entergy Nuclear FitzPatrick, LLC v. United States*, 711 F.3d 1382, 1386 (Fed. Cir. 2013)); *see also Mass. Bay Transp. Auth. v. United States*, 254 F.3d 1367, 1378 (Fed. Cir. 2001). This Court also reviews the court's denial of a motion under Rule 60 for an abuse of discretion. *See Progressive Indus., Inc. v. United States*, 888 F.3d 1248, 1255 (Fed. Cir. 2018). Finally, this Court reviews the court's denial of a motion to amend a complaint for abuse of discretion. *Steffen*, 995 F.3d at 1379 (citing *Intrepid v. Pollock*, 907 F.2d 1125, 1129 (Fed. Cir. 1990)); *see also E.W. Bliss Co. v. United States*, 77 F.3d 445, 450 (Fed. Cir. 1996). When leave to amend has been denied on futility grounds, however, this Court "review[s] the legal basis for the court's futility conclusion *de novo*." *Simio, LLC v. FlexSim Software Products, Inc.*, 983 F.3d 1353, 1364 (Fed. Cir. 2020). To be clear, even when futility is the basis of

the denial of leave to amend, only the futility analysis is reviewed *de novo*; the overarching denial of leave to amend is still reviewed for abuse of discretion. *Compare* Pl.-App. Br. at 17 (listing cases from other circuit courts of appeal possibly suggesting otherwise).

An abuse of discretion exists when the court's decision was based on an erroneous conclusion of law or on a clearly erroneous finding of fact. *See Progressive Indus.*, 888 F.3d at 1255 (internal citation and quotation omitted); *see also Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1379 (Fed. Cir. 2007) ("An abuse of discretion occurs when a court misunderstands or misapplies the relevant law or makes clearly erroneous findings of fact."); *Lazare Kaplan Int'l, Inc. v. Photoscribe Techs., Inc.*, 714 F.3d 1289, 1293 (Fed. Cir. 2013) ("An abuse of discretion exists when the trial court's decision is clearly unreasonable, arbitrary or fanciful, or is based on clearly erroneous findings of fact or erroneous conclusions of law.") (internal quotation marks and citations omitted).

ARGUMENT

I. The Court Did Not Err In Granting The Government's Motion To Dismiss

The trial court's judgment, dismissing HDCC's FAC for failure to state a claim upon which relief may be granted pursuant to RCFC 12(b)(6), should be affirmed. The court did not err in finding that the FAC failed to state a claim for an equitable adjustment under the Changes clause (Count I) or for breach of the

Changes clause (Count II)[7] because HDCC failed to "plausibly allege that there were Government directed changes to the Contract," that "[w]hat 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," or that HDCC "was solely responsible for the costs associated with addressing these obstacles." Appx14. Nor did the court err in finding that HDCC failed to "plausibly allege facts demonstrating that the underlying Government acts and omissions that led to the alleged changes were in bad faith." *Id.*

A. HDCC Bore The Risk For Increased Contract Costs Absent A Change

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. v. United States*, 115 Fed. Cl. 247, 249 (2014); *see also Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed. Cir. 1996); Appx6. Indeed, a firm fixed-price contract is one that, by its very design, "provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience." 48 C.F.R. § 16.202-1 (2000). In other words, "[b]ecause fixed price contracts do not contain a method for varying the price of the contract in even unforeseen

[7] As a matter of precision, because this is a CDA contract, one does not breach the Changes clause, rather one seeks an equitable adjustment under the Changes clause in lieu of asserting breach. For purposes of this briefing, we follow the characterization of Count II made by the plaintiff and discussed by the court.

circumstances, they assign the risk to the contractor that the actual cost of performance will be higher than the price of the contract." *Dalton*, 98 F.3d at 1305; *see also ITT Arctic Services, Inc. v. United States*, 524 F.2d 680, 691 (Ct. Cl. 1975) ("Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered.") (quoting *United States v. Spearin*, 248 U.S. 132, 136 (1918)).

As HDCC acknowledged in its FAC, the Contract was a firm fixed-price contract. Appx28; *see also* Appx1445, Appx1470 (incorporating FAR 52.232-5, Payments under Fixed-Price Construction Contracts). HDCC, therefore, assumed the risk of any delays or increased costs, including the risk of contractually specified liquidated damages, in the event that HDCC failed to fulfill its obligations in the time required. *See, e.g.*, 48 C.F.R. § 16.202-1; *Dalton*, 98 F.3d at 1305; *Agility Def. & Gov't Servs.*, 115 Fed. Cl. at 249; Appx6. Accordingly, the court did not err in concluding that HDCC could not be entitled to an equitable adjustment as a matter of law, absent a directed or constructive change to the Contract terms, or upon some other compensable contractual basis. Appx6 (citing *Zafer Taahhut Insaat ve Ticaret A.S. v. United States*, 833 F.3d 1356, 1361 (Fed. Cir. 2016)).

B. The Claims (Counts I and II) In HDCC's FAC

Despite its contractual responsibility for unforeseen delays and increased costs, HDCC alleged in its FAC entitlement to an equitable adjustment for "numerous impacts and delays during construction" pursuant to the Changes clause, FAR 52.243-4 (Count I). Appx29-30, Appx33.

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); Appx6. But first that contractor must demonstrate 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); Appx6-7.

Typically, the contractor must allege the "change in the form of a 'written or oral order . . . from the Contracting Officer that causes a change.'" *Bell/Heery*, 739 F.3d at 1334 (quoting 48 C.F.R. § 52.243-4(b)); Appx7. HDCC does not

plausibly allege in the FAC – nor could it – any such change.[8] Appx27-37; *see also* Appx9. And the trial court did not err in concluding as much. Appx7 (finding that the FAC "does not plausibly allege that the Government made any written or oral order for changes to the work").

Instead, HDCC alleged that its delays were the result of the unforeseen agency delay to timely secure the final ROWs from local landowners which, in turn, delayed the final road design and grading; the unforeseen requirements for an additional jurisdictional agency permit that resulted from the late finalization of the ROWs; and the unforeseen delay of having to wait for the local utility service providers to approve and perform utility relocations. Appx31, Appx46. The court correctly "constru[ed] these claims as constructive change arguments." Appx9. A constructive change occurs when a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault

[8] HDCC alleges in its certified claim that the agency made "verbal and written representations" in the RFQ relating to the ROWs. Appx42-43. Besides the factual problem that the RFQ merely states that "[ROW] acquisition is expected to be completed prior to the issuance of the [RFP]," Appx39, it is well established that any alleged representations during the bidding process cannot serve to defeat the unambiguous contract language. *See, e.g., MW Builders, Inc. v. United States*, 134 Fed. Cl. 469, 512 (2017) (citing *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1375-76 (Fed. Cir. 2004) (where contract language "was unambiguous and susceptible only to one reasonable meaning, the court's review is limited to the plain meaning without considering extrinsic evidence.")); *see also* Appx1448 ("[C]ontract constitutes and defines the entire agreement between the Contractor and the Government.").

of the Government. *Int'l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007); Appx7.

The trial court also correctly noted that HDCC was alleging constructive *acceleration*, 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."[9] *Fraser Const. Co. v. United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004); Appx7.

HDCC also alleged in its FAC that the agency breached the Changes clause of the Contract (Count II) when the contracting officer denied HDCC's certified claim. Appx30-32, Appx7. The court interpreted this allegation as a breach of contract, and for a breach of contract claim to survive a motion to dismiss, the factual allegations must establish (1) an obligation or duty arising out of the contract, and (2) a breach of that obligation or duty. *Bell/Heery*, 739 F.3d at 1330; Appx8. Moreover, contract interpretation requires the trial court give clear and unambiguous contract terms their plain and ordinary meaning and construe the contract "in a manner that gives meaning to all of its provisions and makes sense."

[9] An excusable delay arises from unforeseeable causes beyond the control and without the fault or negligence of the contractor. FAR 52.249-10(b)(1); Appx7. Even then, the contractor must show it took reasonable action to perform. *Int'l Elecs. Corp. v. United States*, 646 F.2d 496, 510 (Ct. Cl. 1981); Appx7.

McAbee Constr., Inc. v. United States, 97 F.3d 1431, 1435 (Fed. Cir. 1996).

HDCC supported both its Changes clause claims (Count I) and its breach claims (Count II) with allegations regarding the implied duty of good faith and fair dealing by allegedly causing unreasonable delay. Appx50-51; *see also* Appx8. "The 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). But this implied covenant cannot "create duties inconsistent with the contract's provisions." *Id.* at 831; *see also Dobyns v. United States*, 915 F.3d 733, 739 (Fed. Cir. 2019) (holding that an implied duty claim cannot expand a party's "contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions"). Although this implied covenant attaches to every contract, "what that duty entails depends in part on what that contract promises (or disclaims)." *Precision Pine*, 596 F.3d at 830.

C. The Trial Court Did Not Err In Its Risk Analysis

HDCC states in its brief that the first error made in dismissing HDCC's FAC

was "effectively finding that HDCC assumed all risks under [the] firm fixed-price contract . . . ignor[ing] 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." Pl.-App. Br. at 12-13; *see also id.* at 18-20. In doing so, HDCC argues, the court ignored the alleged sufficiency of HDCC's allegations of 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." *Id.* at 13. But this suggestion of error ignores the content of the trial court's decision.

The trial court plainly recognized that, although HDCC assumed various risks, the only way it could obtain an equitable adjustment and recover its losses was to present "plausible factual allegations indicating the Government changed the Contract requirements—or that [HDCC] is entitled to compensation under another specified contract provision." Appx6. The court then analyzed HDCC's claims of constructive change and breach. Appx8-14. As the court found, nowhere in those allegations does HDCC identify formal or informal Government direction sufficient to support those claims. Rather, the FAC identifies challenges HDCC confronted when performing, but fails to provide contractual support to lay the blame for these challenges on the Government.

D. HDCC Failed To Allege Facts To Plausibly Support Its Claims

To survive the Government's motion to dismiss then, HDCC was required to allege facts in its FAC plausibly suggesting the existence of these "unforeseen delays" and "additional requirements," Appx31, Appx46, such that the trial court could find HDCC's constructive change and associated breach claims to be "facially plausible" despite HDCC having assumed the risks associated with a firm fixed-price contract. *Dimare Fresh*, 808 F.3d at 1306; *Iqbal*, 556 U.S. at 678.

HDCC was unable to do so, however, because the Contract incorporated by reference 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.

Appx3-4, Appx1473. The Contract 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." Appx4, Appx1531. The Contract also required HDCC 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." Appx4, Appx1515.

As such, the various "unforeseen delays" and "additional requirements" HDCC alleged in its FAC, Appx31, Appx46, were neither "unforeseen" nor "additional." And the trial court did not err in finding as much. Appx14.

E. The Trial Court Did Not Err With Respect To Accepting HDCC's Allegations As True

HDCC's second suggested error is that the trial court failed to "accept HDCC's well plead allegations as true or construe the allegations in the light most favorable to HDCC." Pl.-App. Br. at 13-14. Moreover, HDCC argues that, when rejecting HDCC's allegedly "well plead allegations," the trial court also allegedly made factual findings regarding foreseeability, materiality, and other potential defenses to HDCC's claims, which HDCC claims is improper when ruling on a motion to dismiss. *Id.* at 14.

The applicable standard when ruling on a motion to dismiss is, however, not as black and white as HDCC would have this Court believe. A court is not required to accept as true *all* the allegations in a complaint. "Legal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." *Figueroa*, 57 Fed. Cl. at 497; *see also Frankel*, 842 F.3d at 1249. "Threadbare recitals of the elements of a cause of action, supported by mere

conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). In making these determinations, a court may look beyond the complaint to matters incorporated by reference or integral to the claim, items subject to judicial notice, and matters of public record. *See Dimare Fresh*, 808 F.3d at 1306. It was not error, then, for the trial court to reject certain of HDCC's allegations as merely "conclusory assertions that the Government caused various delays." Appx10.

HDCC summarizes its allegedly "well-plead allegations" as:

> 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.

Pl.-App. Br. at 13; *see also id.* 28-29 (summary); *id.* at 20-34 (addressing specific allegations). A consideration of HDCC's specific allegations is warranted.

1. Alleged Failure To Timely Secure And Provide The ROWs And Related Alleged Changes To Design Parameters

In its brief, HDCC walks through a series of allegations from its FAC

relating to the agency and the final ROWs.[10] Pl.-App. Br. at 21-26. From those allegations, HDCC asserts that it "stated a constructive change claim that is plausible on its face." *Id.* at 23; *see also id.* at 25-26 ("HDCC alleged that the Government's action . . . constituted an actual and/or a constructive change . . . ."). As HDCC notes, the court did not agree. *Id.* at 23 (citing Appx9); *see also id.* at 25 (citing Appx11). HDCC takes issue with these results, characterizing the court's approach as (1) disbelief in HDCC's allegations when it should have accepted them as true, and (2) improperly making factual determinations regarding foreseeability and reasonableness. *Id.* at 23-26. HDCC is wrong on both counts.

The gravamen of HDCC's allegations is that the agency allegedly failed to timely secure the final ROWs over the Makila Land Company and County of Maui Lands – or, somewhat paradoxically, made changes to ROWs upon which HDCC based its bid – and that the delay in securing ROWs and/or changes to the ROWs caused increased delay and costs. Appx31-32, Appx41-46, Appx189-193. But HDCC failed to point to any provision of the Contract requiring the agency to timely secure the final ROWs by any particular date certain, and also failed to

[10] To be clear, the allegations are in fact only minimally from the FAC itself, while the details virtually all come from its certified claim or the Sage Group analysis, which is itself improper. That HDCC seeks to use it certified claim and hundreds of pages of a third-party evaluation of both its certified claim and the COFD as a proxy for fully articulating allegations in the FAC itself plainly runs counter to RCFC 8(a)(2), which requires "a short and plain statement of the claim."

identify any changes to ROWs.

Indeed, the Contract contains no provision establishing a final ROW acquisition deadline and instead makes clear that final ROW acquisition will depend upon various factors, including HDCC's progress as the designer-builder in successfully "prepar[ing] right of way plans and any legal descriptions documents to facilitate the final acquisition of the design and permanent right of way." Appx1531; *see also* Appx9.

To the extent that HDCC baselessly asserted otherwise in its FAC, those conclusory assertions are incompatible with the Contract, and so are not entitled to the presumption of truthfulness. *Figueroa*, 57 Fed. Cl. at 497; *Frankel*, 842 F.3d at 1249; *Iqbal*, 556 U.S. at 679; *Bell/Heery*, 739 F.3d at 1324 ("[T]he court must interpret the contract's provisions to ascertain whether the facts plaintiff alleges would, if true, establish a breach of contract."). Basically, HDCC takes the trial court to task for actually examining the Contract when determining whether a claim was stated.

HDCC's alternative argument that the agency "made changes to ROWs" is rooted in HDCC's assertion that the materials provided with the RFP establishing the outer bounds within which the winning bidder would be permitted to construct

the bypass constituted the final ROW itself.[11] Appx45 ("The 'designated right of way (ROW) and future dedication of deed' referred to in the above Section 111.05 and the 'Right of Way Dedication of Deed documentation' referred to on page A-11 of the RFP were (and are) both assumed to be one in the same . . ."). That assertion is inconsistent with both the RFP and the Contract and is also not entitled to the presumption of truthfulness. *Figueroa*, 57 Fed. Cl. at 497. Indeed, HDCC's certified claim acknowledged that the RFP documentation was not a final ROW and did "not contain the legal description (i.e., metes and bounds)" that are an essential part of a ROW, despite HDCC's immediately preceding paradoxical assertion that it "assumed" otherwise. *Id.*

Notwithstanding HDCC's contradictory assertions, the Contract is unambiguous that: (1) final ROWs would be obtained at an unspecified time after contract award, following the awardee's preparation of "right of way plans and any legal descriptions documents to facilitate the final acquisition of the design and permanent right of way," Appx1531; (2) the Contract allowed "construction to

[11] Related to the ROW changes argument, HDCC notes that it alleged that it "relied upon Alternative No. 3 that was included in the RFP" to prepare its design only to receive a "materially different" final ROW after 80% of its design was complete. Pl.-App. Br. at 25-26. But Alternative No. 3 was never represented to be a final ROW. Indeed, the Contract and RFP were unambiguous that Alternative No. 3 was not the ROW, Appx1528, Appx1531, and HDCC's alleged error in treating it as such during its early design phase cannot state a claim for relief.

commence concurrently" with ROW planning and acquisition, meaning final ROWs would necessarily be obtained at some point after NTP issuance, Appx43 (Answer to Q&A Question #7); and (3) the only ROWs ever secured for this project were the ROWs provided on "November 7, 2016," Appx45, to which the agency never made any subsequent changes. *See also* Appx80. To the extent HDCC misread the Contract as establishing an earlier ROW acquisition deadline or misconstrued the RFP documents as representing final ROWs, HDCC's errors cannot form the basis for a claim against the Government as a matter of law. HDCC's insistence that it "specifically stated '[t]he delayed ROW final acquisition . . . [was] unforeseen," Pl.-App. Br. at 24, is exactly the sort of legal conclusion that the trial court was not required to presume true. As such, the court did not commit reversible error in concluding that HDCC "[had] not identified any legal or factual basis that entitles it to recover on its ROW claims." Appx11.

2. ROW Impact On Permit Process And *Bell/Heery*

In its brief, HDCC also asserts that the trial court improperly analyzed the Contract's Permits and Responsibilities clause, FAR 52.236-7, in considering HDCC's permitting allegations. Pl.-App. Br. at 26-29. In doing so, HDCC addresses *Bell/Heery*, 739 F.3d 1324, this Court's decision that provides a particularly instructive framework for the analysis in this case.

Like the Contract in this case, the contract at issue in *Bell/Heery* was a

design-build firm fixed-price contract that incorporated FAR 52.236-7, the Permits and Responsibilities Clause. *Bell/Heery*, 739 F.3d at 1327; Appx1473. And, like HDCC, the plaintiff in *Bell/Heery* sought compensation from the Government under the Changes clause, alleging that denial of permits that the plaintiff believed would be approved prevented it from utilizing the construction plan it had submitted in its bid, and instead required the plaintiff to perform the work using a more expensive and time-consuming method. *Bell/Heery*, 739 F.3d at 1328.

In *Bell/Heery*, this Court affirmed the trial court's dismissal of the plaintiff-contractor's complaint for failure to state a claim and rejected the contractor's assertion that the delay and added costs attributable to the denial of permits for which the contractor was responsible constituted a compensable change under the Changes clause. This Court held that, although FAR 52.236-7 "can be constrained by other contractual provisions that specifically limit the scope of the contractor's obligations for permitting requirements," the plaintiff-contractor had not identified any contract provision that might "limit the plain allocation of responsibility to [plaintiff] for complying with permits under the Permits and Responsibilities clause." *Bell/Heery*, 739 F.3d at 1331. This Court thus found that "[t]he plain language of the Permits and Responsibilities clause [] unequivocally assigns all of the risk for complying with the permitting requirements to [plaintiff] 'without additional expense to the Government,'" and that, "[i]n the absence of any change

accepted by the Contracting Officer, there can be no claim for a breach of the Changes clause and, accordingly, it does not limit the obligations assumed by [plaintiff] under the Privileges and Responsibilities clause." *Id.* at 1334 (quoting FAR 52.236-7).

This Court's decision in *Bell/Heery* dictates an identical result here, where HDCC similarly attributed "unforeseen delays," "additional requirements," and associated costs to permitting issues that were solely HDCC's obligation under FAR 52.236-7. HDCC tries in vain to distinguish *Bell/Heery* in its brief. Pl.-App. Br. at 27-28. HDCC claims that "[t]he important distinction . . . is that the contractor in *Bell/Heery* did not allege that the Government's action caused the state's rejection of the . . . construction plan." Pl.-App. Br. at 28. Presumably HDCC believes it did make such an allegation. HDCC continues, noting that this Court found that "the [*Bell/Heery*] 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 28 (quoting *Bell/Heery*, 739 F.3d at 1334). In contrast to *Bell/Heery*, HDCC claims that it alleged in its FAC:

> [T]he 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. . . . HDCC could not apply for permits until the design was complete. 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. The change in the permitting conditions increased the amount of time and HDCC's costs necessary to obtain the 404 permits. In short, HDCC alleged that the Government's actions caused a change to the Contract requirements.

Pl.-App. Br. at 28-29 (citing Appx31-32, Appx46-47, Appx193-196). But, for the reasons already discussed above, these allegations are not entitled to the presumption of truthfulness. *Figueroa*, 57 Fed. Cl. at 497. *See also Sarro & Associates, Inc. v. United States*, 152 Fed. Cl. 44 (2021) (although not binding, this case applies the teachings of *Bell/Heery* to a similarly worded contract). Accordingly, the trial court did not err in analyzing the Contract's Permits and Responsibilities clause, FAR 52.236-7, or in its reliance on *Bell/Heery*.

3. Alleged Delays Regarding Utility Companies

In its brief, HDCC also alleges that the trial court erred by ignoring the allegations in the FAC relating to agreements with third-party utility companies. Pl.-App. Br. at 29-30. Again, HDCC reviews the allegations in the FAC and asserts that "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." *Id.* at 29 (citing Appx48-49, Appx196-206). But, again, such "legal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." *Figueroa*, 57 Fed.

Cl. at 497.

Even if HDCC had asserted that the agency – not HDCC – was responsible for executing and enforcing contracts with the utility owners to perform the necessary utility relocation, and that the agency – not HDCC – could compel third-party utility contractors to perform the necessary utility work, "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." Appx12. At the same time, the Contract plainly required HDCC to "prepare utility agreements for CFLHD, to be executed by HDOT," while making no assurances that CFLHD or HDOT would ensure the utility companies' adherence to HDCC's schedule. Appx1515 (Contract clause 107.02, Protection and Restoration of Property and Landscape); *see also* Appx12. Moreover, the Contract makes clear 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." Appx1515; *see also* Appx12. HDCC's allegations, contradicted by the Contract itself, are not entitled to the "presumption of truthfulness." *Figueroa*, 57 Fed. Cl. at 497.

Notably, HDCC presents the alleged agency delay with respect to utility companies solely as a breach of the duty of good faith and fair dealing. Pl.-App.

Br. at 30. But because the Contract contains no provision that could make the agency responsible for the expediency of third-party utilities, the implied duty of good faith and fair dealing cannot be used to create one. *See Dobyns*, 915 F.3d at 739 (the implied duty cannot expand a party's "contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions"); *Precision Pine*, 596 F.3d at 831 (same).

4. Alleged Delays Associated With Wall Work

In its brief, HDCC also alleges that the trail court erred by ignoring the allegations in the FAC relating to retaining wall work on the Maui Electrical Company (MECO) and Kai Hele Ku (Castleton) retaining walls. Pl.-App. Br. at 31-33. Here, HDCC reviews the allegations in the FAC and suggests it sufficiently plead that alleged agency delay in approving changes delayed HDCC's performance of the work, allegations that, when taken as true, support HDCC's claim for equitable adjustment. *Id.* at 31-32. As an initial matter, HDCC admits that the agency "instructed HDCC not to perform the Castleton wall work (and the Government awarded the work to another contractor)." *Id.* at 31. What HDCC does not admit in its briefing, but was found by the trial court is that the Castleton wall work was not required by the contract. Rather, the trial court interpreted the FAC to assert that HDCC intentionally delayed contractually required wall work (MECO wall work) in anticipation of a contract modification adding Castleton wall

work. Appx14. But the agency decided to go in a different direction regarding the Castleton wall work. As the court found, the FAC did not allege sufficient facts to establish any right to delay damages as a result of these events.

As to the MECO wall work, HDCC's references to its FAC are in fact cites to its own Sage Group analysis, which it attached to the FAC. *Id.* at 31 (citing Appx206-215). Therein, as the trial court observed, HDCC "admit[ed]" in its own document that it "chose to delay" the MECO wall work, "an economic decision that was beneficial to both HDCC and CFL[HD]." Appx13 (citing Appx208-209).

HDCC now argues that "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." Pl.-App. Br. at 33. But these allegations are not disputed facts, they are admissions found in HDCC's own document, the Sage Group analysis, attached to the FAC. As such, the trial court properly concluded that 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." Appx14 (citing Appx198-200; FAR 52.233-1, Disputes ("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.")).

Concurrent delay cannot serve as the basis for an equitable adjustment claim. *See, e.g., Beauchamp Const. Co., Inc. v. United States*, 14 Cl. Ct. 430, 437 (Cl. Ct. 1988) (explaining the rule that, in proving Government delay, the contractor must also show that it was not delayed by any concurrent cause). As such, the trial court did not err in dismissing these claims.

5. Alleged Constructive Acceleration

In its brief, HDCC also alleges that the trial court erred in failing to address HDCC's alleged constructive acceleration claim, other than "generally stating the standard." Pl.-App. Br. at 33-34 (citing Appx7). HDCC claims it alleged sufficient facts to support such a claim. *Id.* To be clear, "acceleration costs" are only briefly mentioned in HDCC's FAC, Appx30 ("HDCC is also entitled to compensation under the Contract and the FAR for acceleration costs required due to CFL[HD]'s failure to grant time extensions to which HDCC was entitled."), and once again in HDCC's claim. Appx51.

Regardless, as the court noted, "constructive acceleration is a type of constructive change," but one that requires a showing of excusable delay. Appx7 (citing *Fraser Const. Co. v. United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004)). As such, the sufficiency of HDCC's constructive acceleration claim is dependent upon the sufficiency of HDCC's delay claims. But because the court properly found HDCC assumed certain risks under the plain terms of the Contract and

rejected HDCC's delay claims as based only upon "conclusory assertions," Appx10, HDCC's constructive delay claim is fatally flawed.

II. The Court Did Not Err With Respect To HDCC's 12-Day Extension Claim Or The Government's Overpayment Determination

In its brief, HDCC argues that the court erred by dismissing claims asserted in the FAC that were allegedly not subject to the Government's motion to dismiss. Pl.-App. Br. at 35. HDCC raises two such claims: (1) a Government claim for repayment asserted in the COFD (Appx34, Appx36, Appx136-145); and (2) a claim seeking a 12-day extension of time relating to the NTP (Appx8, Appx33, Appx35, Appx41-42). Pl.-App. Br. at 35-36.

The second of those claims, from HDCC's certified claim, Appx41-42, was granted in the COFD, Appx62-76, and accounted for via a reduction in liquidated damages, Appx145 ($62,400 offset). In its opinion, the court noted that HDCC "clarified in its supplemental brief that this [12-day] claim is not at issue." Appx5.

The first of those claims, for repayment by HDCC, sought $892,153.05. Appx136-145. When offset by the liquidated damages reduction, the repayment claim noted in the FAC is for $829,753.05. Appx34, Appx36, Appx145. While HDCC is correct in noting that the court did not address this claim, the court did not err in granting the Government's motion to dismiss. This is because the repayment claim is dependent upon HDCC succeeding in its claim for utility relocation costs, *see* Appx136-145, and the court found that the contract imposed

the duty to coordinate with the utilities on the contractor. Appx9. *See supra* at 29-30, 38-40.

Moreover, we moved to dismiss HDCC's FAC, not in part, but completely. Appx1622, Appx1631. When HDCC filed its opposition to our motion to dismiss, HDCC did not raise the issue of the Government's claim for repayment of $892,153.05, Appx1632, nor did it address this claim when it filed, with leave of court, its surreply. 1667. When HDCC filed its response to the court's order seeking supplemental briefing, HDCC did not raise the issue of the Government's claim for repayment. Appx1675.

HDCC is, therefore, making this argument regarding the agency's repayment claim now, for the first time, in its appeal to this Court. As such, this argument and the related claim is waived. *See Taser International, Inc. v. Phazzer Electronics, Inc.*, 754 Fed. Appx. 955 (Fed. Cir. 2018) ("[Appellant] did not raise these arguments in response to the motion for sanctions before the district court, and cannot do so for the first time on appeal.") (citing *Stauffer v. Brooks Bros. Group, Inc.*, 758 F.3d 1314, 1322 (Fed. Cir. 2014) ("Issues not properly raised before the district court are waived on appeal.") and *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129, 1140 (11th Cir. 2007) ("As a general rule, we do not consider issues not presented in the first instance to the trial court.")).

Regardless, as noted, HDCC's repayment claim is directly related to its

claim regarding utility relocation costs. Appx136-145. As such, HDCC's failure to state a claim regarding utility relocation costs negates this repayment claim.

* * * * *

For the reasons stated above, the trial court did not err in finding that the FAC failed to state a claim for an equitable adjustment under the Changes clause (Count I) or for breach of the Changes clause (Count II). The court's judgment, dismissing HDCC's FAC for failure to state a claim upon which relief may be granted, pursuant to RCFC 12(b)(6), should be affirmed.

III. The Court Did Not Abuse Its Discretion When It Denied HDCC's Motion for Reconsideration Of, And/Or Relief From The Court's Dismissal Order

The court did not abuse its discretion when it found that its dismissal was not the result of clear factual or legal error, and did not create manifest injustice to warrant reconsideration. *See Indiana Municipal Power Agency*, 59 F.4th at 1384; *Progressive Indus., Inc.*, 888 F.3d at 1255. In its brief, HDCC asserts that the 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" because the statute of limitations had run. Pl.-App. Br. at 36-37. To be clear, HDCC's one-year CDA statute of limitations for appealing the COFD was March 30, 2022, one day after HDCC filed its original complaint. Appx5, Appx17, Appx24, Appx146; Pl.-App. Br. at 7, 40. On February 14, 2023, after extensive briefing, the court granted the Government's

motion, dismissing HDCC's FAC without prejudice. Appx1, Appx15, Appx25. Therefore, HDCC is correct when it states that it is "barred from refiling its claims." Pl.-App. Br. at 41.

A. Standard for Reconsideration and Relief from Judgment

"[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); Appx19. "Clear factual or legal error" and "manifest injustice" means error that is "apparent to the point of being almost indisputable." *Fillmore Equip. of Holland, Inc. v. United States*, 105 Fed. Cl. 1, 8 (2012), aff'd, 2013 WL 5450651 (Fed. Cir. June 18, 2013); Appx19. "This showing, under RCFC 59, must be based upon manifest error of law, or mistake of fact, and is not intended to give an unhappy litigant an additional chance to sway the court." *Id.*

"A showing of extraordinary circumstances is necessary before a party may prevail on its motion for reconsideration." *CW Gov't Travel, Inc. v. United States*, 63 Fed. Cl. 459, 462 (2005) (quoting *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999), aff'd, 250 F.3d 762 (Fed. Cir. 2000)). "[I]t 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) (quoting *Robinson v. District of Columbia*, 296 F. Supp. 3d 189, 192 (D.D.C. 2018)); Appx19. A party seeking reconsideration of a final judgment under Rule 59(e), as HDCC was here, carries an even higher burden than a party challenging an interlocutory order. *See, e.g., Martin v. United States*, 101 Fed. Cl. 664, 670 (2011) ("[T]he standard for reconsideration of an interlocutory order under RCFC 54(b) and 59(a)(1) has been described as less rigorous" than the standard "applicable to final judgments under RCFC 59(e)").

The trial court may grant relief from a judgment or order for a variety of reasons, including pursuant to a catchall provision, "any other reason that justifies relief." RCFC 60(b)(6). But such relief is limited to "extraordinary circumstances . . . when the basis for relief does not fall within any other subsections of Rule 60(b)." Appx19 (citing *Fiskars, Inc. v. Hunt Mfg. Co.*, 279 F.3d 1378, 1382 (Fed. Cir. 2002)). Moreover, such "extraordinary circumstances" require the movant to "demonstrate that [it] was not at fault for [its] predicament." Appx19 (citing *Mendez v. United States*, 600 Fed. App'x 731, 733 (Fed. Cir. 2015)).

B. HDCC Waived Its Argument Related To The Statute of Limitations

As an initial matter, "it is well-established that motions for reconsideration cannot be used . . . as a vehicle for presenting theories or arguments that could

have been advanced earlier." *Lodge Constr.*, 159 Fed. Cl. at 422. After the Government filed its motion to dismiss, HDCC had ample opportunity to raise its argument that dismissal without prejudice would be tantamount to a dismissal with prejudice because the statute of limitations had run. But HDCC did not raise this argument in its opposition to the motion to dismiss, Appx1632, in its surreply in response to the Government's reply in support of its motion to dismiss, Appx1667, or in its supplemental briefing regarding the Government's motion to dismiss. Appx1675. Instead, HDCC waited until after judgment had issued, Appx16, to raise this argument for the first time in its motion for reconsideration. Appx1695. For this reason alone, the denial of HDCC's motion for reconsideration was not an abuse of discretion.

C. The Operation of the CDA's Statute of Limitations Is Far From Extraordinary

Otherwise, HDCC argues "manifest injustice" befalls it through the entirely un-"extraordinary" operation of the CDA's statue of limitations. Pl.-App. Br. at 36-37. As this Court has noted generally:

> A statute of limitations, simply put, is a law that bars claims after a specified period. Statutes of limitations are designed to encourage plaintiffs to pursue diligent prosecution of known claims by prescribing a period within which certain rights may be enforced. By barring stale claims, statutes of limitations assure fairness to defendants and promote justice by preventing surprises through the revival of claims that have been allowed to slumber.

Arellano v. McDonough, 1 F.4th 1059, 1068 (Fed. Cir. 2021) (Chen, J. concurring) (internal quotations and citations omitted).

Here, the court recognized the natural conclusion of HDCC's "logic," noting that "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." Appx20-21. The court continued, noting that "[i]t 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 [CDA's] one-year limit here." Appx21.

The fact that HDCC filed its original complaint just one day before the statute of limitations expired, while admittedly not an uncommon practice, still demonstrates that HDCC was fully aware that this suit was its one opportunity to appeal the COFD. Appx21. As such, HDCC was litigating beyond the expiration of the statute of limitations from the very start, including when it chose to file its deficient FAC after having been apprised of the Government's concerns regarding the initial complaint, Appx1688, and when it opposed our motion to dismiss without raising its statute of limitations concerns. Appx21. The court's analysis here is entirely reasonable and not based upon erroneous findings of fact, therefore, it is far from an abuse of discretion. *See Progressive Indus.*, 888 F.3d at 1255; *Renda Marine*, 509 F.3d at 1379; *Lazare Kaplan Int'l*, 714 F.3d at 1293.

D. Persuasive Authority Supports Affirmance

As HDCC points out, the trial court recognized that neither it nor this Court has "addressed whether a dismissal without prejudice where the statute of limitations has expired is akin to a dismissal with prejudice." Pl.-App. Br. at 27 (citing Appx20).[12] HDCC would have this Court instead look to the Fifth Circuit Court of Appeals' non-binding, forty-three-year-old decision in *Burden v. Yates*, 644 F.2d 503, 505 (5th Cir. 1981). Pl.-App. Br. at 39-40. In that case, the court held, "with extreme reluctance," that a district court abused its discretion by dismissing a complaint without leave to amend *as a sanction* when the statute of limitations had run, reaffirming an earlier line of Fifth Circuit cases holding that dismissal with prejudice is "a drastic remedy to be used only in those situations where a lesser sanction would not better serve the interests of justice." *Id.* at 505 (quoting *Brown v. Thompson*, 430 F.2d 1214, 1216 (5th Cir. 1970) (emphasis added)). Those cases thus have no bearing on the dismissal of an amended complaint on the merits for failure to state a claim.

The Court of Appeals for the D.C. Circuit's decision in *Morrissey v. Mayorkas*, 17 F.4th 1150 (D.C. Cir. 2021) offers a different, persuasive take. In

[12] HDCC appears to argue that the trial court cannot rule upon an issue of first impression without abusing its discretion. Pl.-App. Br. at 37. The argument is nonsensical.

that case, two different plaintiffs sued their respective agencies, but had their actions dismissed for failure to comply with the requirements for serving the United States, the effect of which was a dismissal with prejudice because the statute of limitations had run. *Id.* at 1153. The district court denied their motions brought pursuant to Rules 59 and 60 and the plaintiffs appealed. The court of appeals affirmed, noting that the plaintiffs had not raised the statute of limitations issue until after dismissal. The D.C. Circuit found that "[n]o manifest injustice exists . . . where a party could have easily avoided the outcome, but instead elected not to act until after a final order had been entered." *Id.* at 1160-61 (internal quotation omitted) (citing *Ciralsky v. CIA*, 355 F.3d 661, 673 (D.C. Cir. 2004)). As to one of the plaintiffs, the D.C. Circuit found that "[t]he possibility that the statute of limitations would run does not transform the district court's dismissal of [plaintiff's] case into an abuse of discretion," adding that plaintiff "may not be heard to complain that the district court has abused its discretion by failing to compensate for counsel's inadequate effort." *Morrissey*, 17 F.4th at 1162 (citing *Twist v. Meese*, 854 F.2d 1421, 1425 (D.C. Cir. 1988)).

This Court should no less countenance HDCC's failure to raise the statute of limitations issue until after the trial court had granted the Government's motion to dismiss. Denying HDCC's motion for reconsideration was, therefore, not an abuse of discretion.

IV. The Court Did Not Abuse Its Discretion When It Denied HDCC's Motion for Leave to Amend

The trial court's judgment, denying HDCC's Motion for Leave to Amend its FAC pursuant to RCFC 15(a)(2), should be affirmed. The court did not abuse its discretion when it found that the interests of justice did not require it to grant HDCC leave to amend. Nor did the court err in finding that further amendment would be futile.

A. Standard For A Motion For Leave To Amend

A party seeking leave to amend must provide "a particularized statement of the grounds justifying amendment," the absence of which "[fails] to comply with RCFC 7(b)(1)(B)" and results in the request not being "properly before the court," so that "the court's failure to rule on it works no injustice." *United Cmtys., LLC v. United States*, 157 Fed. Cl. 19, 22 (2021) (citing *Rafaei v. United States*, 725 F. App'x 945 (Fed. Cir. 2018)); *see also Meehan v. United Consumers Club Franchising Corp.*, 312 F.3d 909, 913 (8th Cir. 2002) ("A district court does not abuse its discretion in failing to invite an amended complaint when plaintiff has not moved to amend and submitted a proposed amended pleading.").

Once a party properly moves the court to amend, "[i]t is well established that the 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." *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)). The appropriate test for "futility" is "whether the allegations in the proposed amended complaint state a plausible claim for relief." *Campbell v. United States*, 137 Fed. Cl. 54, 57 (2018). In other words, could the allegations survive a RCFC 12(b)(6) motion to dismiss. *Iqbal*, 556 U.S. at 678. "A court may deny a party's motion to amend a pleading if that pleading 'could have been cured by [an] earlier amendment.'" *Rockwell Automation, Inc. v. United States*, 70 Fed. Cl. 114, 122 (2006) (quoting *Te-Moak Bands of Western Shoshone Indians v. United States*, 948 F.2d 1258, 1261 (Fed. Cir. 1991)).

B. Relevant Background

A review of the course of proceedings below is necessary here. Again, on March 30, 2021, the contracting officer issued her COFD, and on March 29, 2022, HDCC filed its original complaint at the Court of Federal Claims. Appx5, Appx17, Appx24, Appx146; Pl.-App. Br. at 7. Counsel for the United States contacted counsel for HDCC and advised that the Government believed HDCC's original complaint was deficient. Appx1688. Counsel for the United States encouraged HDCC to consider filing an amended complaint that more fully fleshed

out HDCC's claims. *Id.* On July 22, 2022, HDCC filed its FAC. On August 5, 2022, the Government moved to dismiss HDCC's FAC for failure to state a claim. Appx1, Appx24, Appx27-282; Pl.-App. Br. at 8-10.

On August 31, 2022, HDCC filed its opposition to the Government's motion to dismiss. Appx25, Appx1632. With regard to leave to amend, HDCC requested that, "in the event that the Court finds that HDCC's [FAC] does not state sufficient facts to support any portion of its claims against the Government, the Court should grant HDCC leave to amend the [FAC]." Appx18, Appx25, Appx1651-1652. HDCC's request, made in response to a motion to dismiss, did not provide any particularized statement of the grounds supposedly justifying another amendment and did not include a proposed second amended complaint.

On October 4, 2022, we filed our reply in support of its pending motion. Appx25, Appx1654. On November 4, 2022, HDCC filed a motion seeking leave to file a surreply, justifying its request by claiming that we had raised arguments for the first time in our reply brief. Appx25, Appx1664, Appx1667. The court granted HDCC's motion for leave to file a surreply and accepted the proposed surreply that HDCC had appended to its motion for leave. Appx25, Appx1667. But, again, HDCC's surreply concluded by merely reiterating its unsupported request in the alternative that COFC grant it leave to amend its FAC. Appx1671.

On November 22, 2022, the court issued an order requesting additional

documentation and supplemental briefing on several topics, including "whether [HDCC] should be granted leave to amend its Amended Complaint." Appx25, Appx1674. On December 9, 2022, both the Government and HDCC filed their respective supplemental briefs in response to the order. Appx25, Appx1675, Appx1684. But when presented with yet another opportunity to justify leave to amend, HDCC responded as follows:

> HDCC believes that it has sufficiently stated its claims against the Government in the [FAC] and exhibits attached thereto. However, to the extent that the Court disagrees or would like further clarification included within the body of the complaint, HDCC should be granted leave to file an amended complaint. RCFC 15(a)(2) ("[t]he court should freely give leave when justice so requires.") "The decision whether 'to grant leave [to amend] rests within the sound discretion of the [court],' and the federal rules 'strongly favor granting leave to amend.'" *The Centech Grp., Inc. v. United States*, 78 Fed. Cl. 658, 659 (2007).

Appx25, Appx1682. On February 14, 2023, having considered all of the parties' briefing including on the issue of further amendment of the FAC, the court granted the Government's motion to dismiss. Appx1.

C. HDCC Failed To Properly Seek Leave To Amend Until After Its Case Was Dismissed

The court did not abuse its discretion in denying HDCC's motion for leave to further amend its FAC because HDCC failed to place its request properly before the court. HDCC's repeated, but unsupported request for leave to amend if the

court thought it necessary was plainly insufficient. Under no circumstances would it be viewed as "a particularized statement of the grounds justifying amendment" and, therefore, did not satisfy RCFC 7(b)(1)(B). *United Cmtys.*, 157 Fed. Cl. at 22; *see also Meehan*, 312 F.3d at 913.

HDCC's position mirrors that of the plaintiff in *United Cmtys., LLC v. United States*, 157 Fed. Cl. 19 (2021), which, although not binding, is well reasoned. There, the plaintiff argued that "reconsideration . . . is necessary to prevent manifest injustice because the court did not grant plaintiff permission to file an amended complaint before dismissing the case." 157 Fed. Cl. at 21. Much like here, the plaintiff in *United Cmtys.* had sought leave to amend in a single perfunctory sentence in its response to a motion to dismiss. *Id.* The court held that the plaintiff's "cursory request for leave to amend its complaint" had "failed to comply with RCFC 7(b)(1)(B), and as such, was not properly before the court," and thus the plaintiff had also "failed to demonstrate that it is entitled to reconsideration." *Id.* at 22. Here, HDCC was seeking leave to amend for the second time and ignored the court's inquiry as to whether amending the FAC was warranted, instead responding with its cursory request for leave to amend, if "the Court would like further clarification." Appx1682.

HDCC attempts to side-step its failure to properly move for leave with the retort that "there are two methods by which a party can seek to amend a complaint

– file a motion or seek leave." Pl.-App. Br. at 45. This appears to be a distinction without a difference, as a party seeks leave via a motion. While that could perhaps be written or oral, it is a motion nonetheless. Moreover, the important point is that the motion (or seeking of leave) provides "a particularized statement of the grounds justifying amendment." It is the justification that was lacking here, despite an initial informal notice from the Government that the complaint was lacking, a formal notice in the form of our motion to dismiss, and, most significantly, a suggestion by the trial court to provide some justification before the court ruled on the motion to dismiss.

D. HDCC's PSAC Was Futile

The court did not abuse its discretion in denying HDCC's motion for leave to further amend its FAC because doing so based upon HDCC's PSAC would be futile, Appx22, "futility" being an appropriate ground for denying leave to amend. *Alfa Laval Separation, Inc.*, 47 Fed. Cl. at 312. Moreover, the court did not commit reversible legal error in its futility analysis when it considered whether the allegations in HDCC's PSAC stated a plausible claim for relief that could survive a motion to dismiss. *Simio*, 983 F.3d at 1364; Appx4.

To be clear, the court would have been well within its discretion to deny HDCC's motion for leave to amend without consideration of any legal conclusion regarding futility. That is so because HDCC had already amended its original

complaint once, without success, making no real effort to bolster its allegations, instead merely attaching documents. The court would be justified in denying HDCC a third bite at the proverbial apple.[13]

Nevertheless, to conduct its futility analysis, the court properly considered and summarized the allegations in HDCC's PSAC. Appx18. Having done so, it found them wanting. The PSAC, the court concluded, "simply makes conclusory assertions that the Government's acts or omissions were 'unreasonable,'" Appx22, much like HDCC's FAC did. *Compare* Appx10. Comparing HDCC's FAC and PSAC, the court found "no material differences between" them. Appx21. It considered, as examples, HDCC's allegations regarding the ROWs or utility relocation issues, but had the same issues with the allegations that it had with HDCC's FAC. Appx22. As such, the court properly rejected HDCC's assertion that the PSAC "fully address[es] any alleged pleading failures . . . ." *Id.*

In its brief, HDCC argues that the PSAC "states a claim for relief that is plausible on its face" for breach of the Changes clause and breach of the implied duty of good faith and fair dealing. But the "factual" allegations in HDCC's PSAC

[13] For that matter, it would have been entirely appropriate for the court to grant the Government's motion to dismiss *with prejudice* in the first place. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) ("A dismissal with prejudice is appropriate where a complaint fails to state a claim for relief under Rule 12(b)(6) and granting leave to amend would be futile.").

suffer from the same problems as the "factual" allegations in HDCC's FAC. Namely, the risk HDCC accepted under various clauses of the Contract contradict many of HDCC's conclusory assertions, meaning they are no longer entitled to a presumption of truthfulness." *Figueroa*, 57 Fed. Cl. at 497. As such, even in its PSAC, HDCC again fails to plausibly allege that there were Government directed changes to the Contract, that 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, and that HDCC was solely responsible for the costs associated with addressing these obstacles. Appx14.

CONCLUSION

The judgment of the Court of Federal Claims should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
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This brief complies with the type-volume limitation of Federal Circuit Rule 32(b)(1). The brief contains 13,758 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

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