2023-1909

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
ORIGINATING CASE NO. 1:22-CV-00339-CNL
(JUDGE CAROLYN N. LERNER)

CORRECTED BRIEF FOR *AMICUS CURIAE* THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF APPELLANT AND REVERSAL

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September 13, 2023

CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTEREST OF *AMICUS CURIAE*

Pursuant to Fed. R. App. P. 29(a)(4)(A), undersigned counsel for *Amicus Curiae* The Associated General Contractors of America, Inc. certifies that:

1. The full name of every entity represented in the case is: The Associated General Contractors of America, Inc.

2. The full name of the real party in interest represented by me is: The Associated General Contractors of America, Inc.

3. All parent corporations and every publicly held corporation that own ten percent or more of the stock of the entity or *amicus curiae* represented by me are: None.

4. The names of all law firms, partners, and associates that appeared for the entity now represented in the originating court or the agency or are expected to appear in this Court are: Smith, Currie & Hancock LLP, G. Scott Walters is expected to appear in this Court.

5. Other than the originating case numbers, the title and number of any case known to counsel to be 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 is: None.

6. All information required by Fed. R. App. P. 26.1(b) and (c) that identifies organizational victims in criminal cases and debtors and trustees in bankruptcy cases is: Not applicable.

The information above is accurate and complete to the best of my knowledge.

September 13, 2023

/s/ G. Scott Walters
G. Scott Walters
Counsel for *Amicus Curiae*

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Plaintiff-Appellant and Defendant-Respondent both consent to AGC's participation as *amicus curiae*. Fed. R. App. P. 29(a); Fed. Cir. R. 29.

/s/ G. Scott Walters
G. Scott Walters
Counsel for *Amicus Curiae*

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

/s/ G. Scott Walters
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IDENTITY, INTEREST, AND SOURCE OF AUTHORITY

Identity. Formed in 1918, in direct response to President Woodrow Wilson's request for assistance in communicating the nation's defense and other needs to leading construction contractors, The Associated General Contractors of America, Inc. ("AGC") remains a preeminent national construction industry trade association. AGC is comprised of more than 27,000 members, more than 6,500 of the country's leading general contractors, over 9,000 specialty contracting firms, and more than 10,500 service providers and suppliers.

AGC members construct both public and private buildings, including offices buildings, hospitals, laboratories, schools, shopping centers, factories, and warehouses. They also construct highways, bridges, tunnels, dams, airports, industrial plants, pipelines, power plants, power lines, and both clean water and wastewater facilities. Among these projects are many defense and other federal facilities. Indeed, AGC members regularly construct projects for every branch of the United States government.

AGC's goal is to serve its members by advancing the profession of construction and improving the delivery of the industry's services consistent with the public's interest. AGC and its nationwide network of 89 chapters in every state, Puerto Rico and Washington, D.C. strive to ensure the continued success of

the commercial construction industry by advocating for federal, state, and local measures that support the industry; providing education and training for member firms; and connecting member firms with resources needed to be successful businesses and responsible corporate citizens. To that end, AGC regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's construction industry. AGC has participated in numerous cases involving federal government procurement and contracting. *See, e.g.*, Brief for *Amicus Curiae* The Associated General Contractors of America, Inc. in Support of Petitioner, *Ciminelli v. United States*, 143 S.Ct. 1121 (2023); Brief of *Amicus Curiae* The Associated General Contractors of America, Inc. in Support of Neither Party, *Metcalf Constr. Co., Inc. v. United States*, 742 F.3d 984 (Fed. Cir. 2014).

Interest. AGC has a significant and ongoing interest in the federal procurement system, including the circumstances and conditions under which AGC members are expected to perform their work. In firm, fixed price federal construction procurements, be they delivered via a traditional design-bid-build system or a design-build system, one of the most important remedy granting federal government contract provisions is the Changes clause, 48 C.F.R. § 52.243-4, including the well-established, developed, and recognized doctrine of constructive change. Accordingly, and based on the experience of its members for many decades, AGC is uniquely well-suited to advise the Court on the realities of

the highly-competitive government procurement process and on the real-world impact of the constructive change doctrine.

AGC's interest in these proceedings is limited to the fair, dependable, and correct administration of government procurement law. AGC does not have any interest in the ultimate outcome of this particular case.

Source of Authority. Fed. R. App. P. 29(a) supplies the source of authority for filing this brief.

SUMMARY OF THE ARGUMENT

Federal construction contractors, including AGC members, undertake significant risk in performing sophisticated and complicated construction projects procured by the United States government. Whether a construction contractor takes on greater risk through a design-build project delivery system or through the more traditional design-bid-build procurement, construction performance risks remain. In exchange for undertaking these considerable risks, federal construction contractors expect and are entitled to consistent and reasonable application of the litany of contract provisions incorporated into federal contracts, regardless of the project delivery system. This includes the Changes clause.

From the federal construction contractor's perspective, one of the main purposes of the Changes clause "is to provide the legal means by which the contractor may process claims against the government." John Cibinic, Jr., Ralph

C. Nash, Jr., James F. Nagle, *Administration of Government Contracts* I. Purpose of the Changes Clause (5th ed. 2006). When seeking to establish their right to relief under the Changes clause based on government action or inaction, contractors are necessarily confronted with pleading and proving that their actions were foreseeable and reasonable on the one hand, or that the government's conduct was unforeseeable or unreasonable. Determining whether the contractor is entitled to seek additional time, money, or both, under a constructive change theory based on the foreseeability or reasonableness is, necessarily, a fact intensive inquiry not well suited for dismissal at the early stages of litigation. *See Duke Energy Progress, Inc. v. United States*, 141 Fed. Cl. 230, 234 (2019) (refusing to dismiss plaintiff's complaint where allegations of foreseeability were given "all reasonable inferences" in plaintiff's favor); *RhinoCorps Ltd. Co. v. United States*, 87 Fed. Cl. 481, 493 (2009) (factual allegations of unreasonable conduct of contracting officer sufficient to survive RCFC 12(b)(6) motion). Such allegations are fact intensive and should not be summarily dismissed at the early stages of litigation.

Under RCFC 12(b)(6), the trial court "must not attempt to try plaintiff's case on the basis of allegations in the complaint." *E&E Enters Global, Inc. v. United States*, 120 Fed. Cl. 165, 182 (2015). And justifying a motion to dismiss by relying on case law that states what a plaintiff must prove on the merits of the claim contravenes well-established precedent. If left to stand, the Court of Federal

Claims' dismissal of this case at the early stages of litigation can only have a chilling effect upon, and create unnecessary uncertainty in, the extent of factual allegations that federal construction contractors must allege in order to prosecute constructive change claims under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (the "CDA"). Put more simply, a federal government construction contractor deserves its day in court if it chooses to pursue a CDA appeal of its constructive change doctrine claim denial at the Court of Federal Claims. And, provided it meets the standards for a well-pleaded complaint, that contractor should have that opportunity to do so.

ARGUMENT

I. A Short and Plain Statement of the Claim Showing that the Pleader is Entitled to Relief is All That is Required at the Pleading Stage

Rule 8(a)(2) of the Rules of the Court of Federal Claims (RCFC) states that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." RCFC 8(a)(2). *See Nova Group/Tutor-Saliba v. United States*, 125 Fed. Cl. 469, 472 (2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (construing Fed R. Civ. P. 8, which is identical to RCFC 8)). And, when the complaint contains facts sufficient to "state a claim to relief that is plausible on its face[,] it should not be dismissed under RCFC 12(b)(6). *Nova Group/Tutor-Saliba*, 125 Fed. Cl. at 472 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). At the pleadings stage a plaintiff need not conclusively

prove that it is entitled to a legal remedy." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). Instead, a plaintiff satisfies this plausibility standard when it pleads factual content "that allows the court to draw reasonable inference that the defendant is liable for the alleged misconduct." *Iqbal*, 556 U.S. at 678.

II. Properly Pleading a Constructive Change Claim

A constructive change "entails two base components, the change component and the order or fault component." The 'change' component describes work outside of the scope of the contract, while the 'order/fault' component describes the reason that the contractor performed the work." *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 678 (1994) (citing *Embassy Moving & Storage Co. v. United States*, 191 Ct. Cl. 537, 424 F.2d 602, 607 (1970); *Al Johnson Constr. Co. v. United States*, 20 Cl. Ct. 184, 204 (1990)). If the government expressly or implicitly orders work that is outside the scope of the contract, or if the government was at fault in causing work to be done outside the scope of the contract, a constructive change has occurred. *Miller Elevator*, 30 Fed. Cl. at 678 (citing *Lathan Co. v. United States*, 20 Cl. Ct. 122, 128 (1990)).

So, to successfully plead a claim for relief based on the constructive change doctrine, the plaintiff must set out two elements. First, the plaintiff must plead that "it performed work beyond the contract requirements." *Bell/Heery v. United States*, 739 F.3d 1324, 1335 (Fed. Cir. 2014) (citing *The Redland Co. v. United*

States, 97 Fed. Cl. 736, 755-56 (2011)). Second, the plaintiff must plead that "the additional work was ordered, expressly or impliedly, by the government." *Id.*; *see Int'l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007) (holding that a "constructive change occurs where a contractor performs work beyond the contract requirements, without a formal order under the changes clause, either by an informal order of the Government ***or by fault*** of the Government.") (emphasis supplied).

III. What Are Well and Truly Pleaded Factual Allegations in a Constructive Change Claim That Will Survive a 12(b)(6) Motion to Dismiss?

A plaintiff plausibly pleads a constructive change claim where it sets out factual content sufficient to show that there was a change to the contract requiring the contractor to perform outside the contract's scope, and the "order or fault component." *M.A. DeAtley Const., Inc. v. United States*, 71 Fed. Cl. 370, 376 (2006) (citing *Flink/Vulcan v. United States*, 63 Fed. Cl. 292, 303 (2004); *CTA Inc. v. United States*, 44 Fed. Cl. 684, 696 (1999)). In a government contracts case, when ruling on an RCFC 12(b)(6) motion to dismiss, the trial court need only determine whether the plaintiff has provided "sufficient factual allegations in the complaint to support success on the type of contract claim alleged in the complaint." *Extreme Coatings, Inc. v. United States*, 109 Fed. Cl. 450, 455 (2013).

And, when reviewing the complaint on a 12(b)(6) motion, the court must accept as true all the factual allegations in the complaint and [] indulge all

reasonable inferences in favor of the non-movant." *Fisherman's Finest, Inc. v. United States,* 59 F.4th 169, 174 (Fed. Cir. 2023) (citation omitted). This pleading standard applies equally to claims seeking relief based on the constructive change doctrine.

Thus, this appeal begs the question for federal construction contractors – *What are well and truly pleaded factual allegations in a constructive change claim that will survive a 12(b)(6) motion to dismiss at the Court of Federal Claims?*

Amicus curiae urge the Court to consider that determining whether the contractor is entitled to seek additional time, money, or both, under a constructive change theory based on foreseeability or reasonableness (or unreasonableness), as is the case here, is necessarily a fact intensive inquiry. *See, e.g., Duke Energy Progress, Inc. v. United States,* 141 Fed. Cl. 230, 234 (2019) (refusing to dismiss plaintiff's complaint where allegations of foreseeability were given "all reasonable inferences" in plaintiff's favor); *RhinoCorps Ltd. Co. v. United States,* 87 Fed. Cl. 481, 493 (2009) (factual allegations of unreasonable conduct of contracting officer sufficient to survive RCFC 12(b)(6) motion). Such allegations are fact intensive and should not be the basis for dismissal at the early stages of litigation.

CONCLUSION

Amicus curiae The Associated General Contractors of America respectfully suggest that straying from established rules and precedent concerning the CDA

claim pleading standard at the Court of Federal Claims, in general, and adopting a heightened standard of review for constructive change claims, in particular, is antithetical to the lower court's stated purpose. Such an approach will frustrate numerous claimants presenting claims for consideration that deserve full and fair adjudication on the merits. For the foregoing reasons, in addition to those set forth in Appellant's Opening Brief, this Court should reverse the Court of Federal Claims' dismissal of Appellant's complaint.

Dated: September 13, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the undersigned certifies the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. Cir. R. 32(b)(1) because this brief contains 1922 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, with 14 point font for text and footnotes.

Dated: September 13, 2023

/s/ G. Scott Walters
G. Scott Walters
Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic transmission, and served on all parties through the Court's CM/ECF system, this 13th day of September, 2023.

/s/ G. Scott Walters
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