



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR LEAVE TO AMEND COMPLAINT GRANTED: September 9, 2024

CBCA 7999

NOMUDA, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Dilyn Loveless and Timothy J. Turner of Whitcomb Selinsky, P.C., Denver, CO, counsel for Appellant.

Matthew Lane, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **LESTER**, and **CHADWICK**.

CHADWICK, Board Judge.

Respondent, Department of Homeland Security (DHS), through a subagency, the Federal Emergency Management Agency (FEMA), received a certified claim from a party calling itself “NoMuda, LLC.” After a FEMA contracting officer denied the claim, the Board received a filing styled as a “Not[ic]e of Appeal of Contracting Officer’s Final Decision on NoMuda, LLC’s Claim.” The Clerk of the Board accordingly docketed this appeal with NoMuda, LLC as the appellant. Beginning with the complaint it filed in February 2024, however, appellant has referred to itself as “NoMuda, Inc.” As discussed below, neither NoMuda, LLC nor NoMuda, Inc. has a formal, written contract with FEMA.

After inquiries from the Board regarding whether the party that submitted the claim is the same party that is pursuing the appeal, appellant moved for leave to file an amended complaint containing allegations intended to clarify its corporate status and identity. Even though DHS had previously filed a motion to dismiss the original complaint for failure to state a claim (which also included jurisdictional objections), DHS does not oppose the amendment. We grant leave to amend the complaint, subject to the possibility that the Board may revisit the named appellant's standing to pursue the appeal as the case proceeds.

Background

The background of this dispute is unusually complicated. We present a condensed summary, drawing on the allegations of the claim and the amended complaint as well as on pertinent documents now in the record.

The only formally awarded government contract that is alleged in this case does not bear appellant's name (either LLC or Inc.). Rather, appellant alleges that in May or June 2018, FEMA placed an order under a blanket purchase agreement with a company called ATCS, PLC for management training services, and that appellant subsequently became a third-tier subcontractor on the training project. In response to the Board's inquiries about appellant's standing, appellant submitted a subcontract effective September 30, 2018, between CPI Group International, Inc.—which appellant alleges was a second-tier subcontractor—and “NoMuda Consulting.” The signature for the lower-tier entity on this September 2018 subcontract is labeled as that of the president of “NoMuda, Inc.” Appellant alleges in the amended complaint that NoMuda Consulting was “nonexistent” at the relevant time and adds that “[n]either NoMuda, Inc. [sic] nor NoMuda Consulting is the appropriate entity” to pursue the case before us, although it appears from the context that appellant meant to allege that NoMuda, *LLC* is not “appropriate,” whereas NoMuda, Inc. is.

In August 2023, appellant's counsel sent a FEMA contracting officer a letter styled as “NoMuda, LLC's Contract Disputes Act Claim” under the call order. Counsel wrote, “Our firm represents NoMuda, LLC (‘NoMuda’) with respect to its government contracting matters” and went on to demand \$519,969.36 under either of two alternative theories of entitlement. The claim alleged that FEMA owed compensation to NoMuda, LLC (the third-tier subcontractor identified in the claim) because (1) FEMA had “dramatically broadened the scope of the [consulting] work to be performed” in cooperation with the prime contractor but to the detriment of NoMuda, LLC, or (2) an implied contract was formed when “NoMuda personnel . . . communicated an offer to fulfill the [expanded] requirements . . . , in the timeline required by the agency,” and a person identified as a “FEMA Chief of Staff” with the surname Bonilla “accepted that offer” on behalf of FEMA.

The August 2023 claim was certified on a separate page “on behalf of the contractor” by a person who has submitted a declaration to the Board stating that when he signed the certification, he “believed that the contractor was NoMuda, Inc.,” and the name mistake “was missed by me upon review of the final claim draft.” The amended complaint alleges without further explanation that NoMuda, LLC was “the incorrect name” for the claimant.

In October 2023, the FEMA contracting officer issued a “final decision that NoMuda, LLC’s claim [was] denied in full.” He reasoned in relevant part that if, as alleged, the prime contractor or a higher-tier subcontractor failed to compensate the claimant for changes in the work, “NoMuda must bring that claim against” another private party, “not FEMA,” and that “the [Chief of Staff] referenced in [the] claim did not have actual authority to make any changes to the call order . . . [or] to ratify unauthorized commitments. . . . [T]here was never a contract between NoMuda and FEMA.” (Paragraph break omitted.)

In January 2024, the party using the name “NoMuda, LLC” appealed, through counsel, to the Board. In February 2024, appellant filed a complaint in which it used “NoMuda, Inc.” in the caption without notice, explanation, or motion and introduced itself in the complaint’s first sentence as “Appellant[,] NoMuda, Inc.”

In March 2024, DHS filed, in lieu of an answer, a motion that it styled as one under Board Rule 8(e) (48 CFR 6101.8(e) (2023)) to dismiss the appeal for failure to state a claim, although some of DHS’s arguments were jurisdictional. Only after that motion was fully briefed did the Board notice that appellant had switched from “LLC” to “Inc.” (As appellant now notes, “Respondent has never expressed confusion or disagreement as to Appellant’s identity.”) After responding to requests by the presiding judge for clarification, appellant now seeks leave under Rule 6(c) to amend the complaint, stating that the motion to amend is unopposed. Queried by the Board, DHS confirmed its consent to the amendment but asserts that its “Motion to Dismiss is fully briefed and ripe for decision” as the counts that remain from the original complaint “were not changed in any substantive manner.”

Discussion

We would not ordinarily expect a party that has filed a motion to dismiss to agree to an amendment of the complaint when that party does not concede that the amendment will cure the issues on which it based its motion. In substance, because DHS still thinks we should dismiss the complaint and deny the appeal, DHS’s position is that the amendment is futile, which can be a basis to deny leave to amend. *See Kemin Foods, L.C. v. Pigmentos Vegetales del Centro S.A. de C.V.*, 464 F.3d 1339, 1354–55 (Fed. Cir. 2006), *cited in Williams Building Co. v. Department of Veterans Affairs*, CBCA 6559, et al., 20-1 BCA ¶ 37,492, at 182,160; *Marchena v. United States*, 128 Fed. Cl. 326, 330 (2016) (“A proposed amendment is futile if it would not survive a motion to dismiss.”), *aff’d*, 702 F. App’x 988

(Fed. Cir. 2017). But DHS does not oppose appellant’s motion, and we will not invent arguments in opposition. Pursuant to precedent, we accept the amended complaint in the absence of any “specific reason” offered by DHS “not to.” *Jita Contracting, Inc. v. Department of Transportation*, CBCA 7269, et al., 23-1 BCA ¶ 38,431, at 186,778 (internal quotation marks and ellipsis omitted); see *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Zach Fuentes, LLC v. Department of Health & Human Services*, CBCA 7090, 22-1 BCA ¶ 38,091, at 184,981. The caption of this decision reflects the name that appellant says is correct.

We have independently considered whether the alleged instances of mistaken identity described above pose barriers to our jurisdiction. At present, we see none. Appellant alleges non-frivolously that it is the real party in interest with respect to a claim under a contract with FEMA to provide services to the agency. See 41 U.S.C. §§ 7102(a), 7105(e)(1)(B) (2018); e.g., *Eastco Building Services v. General Services Administration*, CBCA 5272, 17-1 BCA ¶ 36,670, at 178,555–56; *Nassar Group International*, ASBCA 58451, et al., 22-1 BCA ¶ 38,206, at 185,545–46. In a separate decision, we will address the arguments in DHS’s motion to dismiss regarding privity of contract, as well as jurisdictional issues other than appellant’s standing, as if those arguments had been directed toward the allegations of the amended complaint.

Decision

The unopposed motion to amend the complaint is **GRANTED**.

Kyle Chadwick

KYLE CHADWICK
Board Judge

We concur:

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge