

SKANSKA USA BUILDING, INC.	*	IN THE
	*	CIRCUIT COURT
Plaintiff	*	
	*	FOR
v.	*	BALTIMORE CITY
SMITH MANAGEMENT	*	
CONSTRUCTION INC., et al.	*	Case No: 24-C-07-006509
Defendants		

* * * * *

MEMORANDUM OPINION

This case arises from a construction project known as the National Institutes of Health (“NIH”) Biomedical Research Center (the “project”) constructed at the Johns Hopkins Bayview Medical Campus. The project is being developed for NIH pursuant to a lease (the “lease”) that was entered into between FSK Land Corp. (“FSK”) and NIH on June 15, 2001. FSK was the lessor and NIH the lessee. Pursuant to the lease, in December 2001, FSK entered into a Development Management Services Agreement (“DMSA”) with Smith Management Construction, Inc. (“SMCI”) under which SMCI agreed to serve as development manager for construction of the project. Thereafter, FSK assigned its rights under the lease and the DMSA to BRC Lease Co., LLC (“BRC”).

On May 20, 2004, Skanska and SMCI entered into a contract (the “contract”) for construction services in connection with the project. The contract consists of an Agreement for Construction Services (“ACS”) and the Supplement thereto (the “ACS Supplement”). The contract is a subcontract under the DMSA and a sub-subcontract under the lease. The contract provides for a substantial completion date of January 18, 2007 (the “contract time”) and a Guaranteed Maximum

Price (“GMP”) of approximately \$168 million (\$168,276,652.00). The contract expressly provides that it includes and incorporates the DMSA and lease.

Skanska alleges that shortly after it began work, SMCI began to issue substantial changes to the project’s design. The detailed list of changes and events are reflected in Pending Change Orders (“PCOs”). Skanska alleges these changes impacted the cost and time of completion, and that it was never properly compensated for those changes.

In January 2007, at SMCI’s request, Skanska submitted a Fact and Impact Study for the changes and delays it allegedly suffered through October 2006. Skanska alleges that neither SMCI nor BRC took action to ensure Skanska’s claims received attention. Skanska eventually determined that the parties had reached an impasse. As a result, Skanska submitted a request for mediation under the DMSA, as incorporated in the contract. SMCI allegedly refused to participate in mediation unless NIH also participated. NIH refused to participate, allegedly because its participation was not required.

On August 30, 2007, Skanska filed a Complaint in the Circuit Court for Baltimore City against SMCI and BRC seeking \$17 million in damages as a result of changes and delays associated with Skanska’s work on the project. Skanska asserts claims against SMCI for breach of contract, breach of fiduciary duty, promissory estoppel / detrimental reliance, quantum merit, and unjust enrichment. Further, Skanska asserts claims against BRC for quantum merit and unjust enrichment.

Skanska alleges it is entitled to an increase in the GMP and extension of the contract time. Skanska also alleges that it complied with Change Orders (“COs”) and Construction Change Directives (“CCDs”) under a reservation of rights for which it now seeks to recover additional costs associated with the specified changes, as well as delay and impact costs. Moreover, Skanska alleges

that it is entitled to COs for monies previously paid to Skanska from a Construction Contingency Fund, which would have the effect of further increasing the GMP.

On October 24, 2007, SMCI filed its Motion to Dismiss. BRC also filed a Motion to Dismiss, or in the Alternative, for Summary Judgment. The plaintiffs filed oppositions to both motions. On January 11, 2008, this Court entertained an extended hearing on the extant motions.

SMCI's maintains that this contract dispute must be resolved pursuant to the procedures applicable to federal procurement contracts rather than through a civil action in this Court. SMCI cites the disputes clause in the DMSA that has been incorporated into the contract, which requires the parties to undergo a specialized process of dispute resolution when a "government dispute" exists surrounding the contract. SMCI contends that NIH's involvement necessitates resolution of the dispute pursuant to the procedures found in the Contract Disputes Act ("CDA"), 41 U.S.C. §§ 601-613, and its implementing regulations, the Federal Acquisition Regulations ("FAR").

Pursuant to the CDA, a "government dispute" over a federal procurement contract involves the submission of claims from a subcontractor to a general contractor. The contractor then passes that claim through to the government agency's contracting officer for a final decision. If the subcontractor remains unsatisfied, the general contractor can appeal on its behalf to the agency's Board of Contract Appeals or to the U.S. Court of Federal Claims. In that context, SMCI argues that a "pass-through" claims procedure enables a sub-subcontractor (Skanska) to pursue its claims against the agency (NIH) when the agency (NIH) is allegedly responsible for the relief sought under the contract. Thus, SMCI maintains that characterizing the conflict as a "government dispute" effectively precludes the claimant from seeking relief in conventional channels of civil litigation.

Further, SMCI claims that Skanska's Complaint is an attempt to preempt a liquidated damages claim NIH has brought against Skanska due to Skanska's failure to substantially complete the project by the contract time. SMCI alleges that Skanska has artfully pled its causes of action so as to avoid mention of NIH so that this civil action can proceed before any dispute resolution can occur pursuant to the CDA.

A. Lack of subject matter jurisdiction

First, SMCI contends that this case involves a "government dispute" due to SMCI's "mere contention" that NIH may be responsible for the relief sought by Skanska. Therefore, SMCI argues that Skanska failed to exhaust the administrative remedies required under the CDA for the resolution of "government disputes" that involve a federal procurement contract.

Next, SMCI maintains that the contract itself provides that any dispute for which SMCI contends NIH may be responsible shall be resolved pursuant to the CDA. SMCI maintains that it has communicated a willingness to sponsor a claim on Skanska's behalf pursuant to the CDA's "pass-through" scheme. SMCI further argues that Skanska knew that "pass-through" remedies were available for any change for which it claimed relief was warranted, yet Skanska instead complied with COs and CCDs under a reservation of rights.

Additionally, SMCI argues that NIH is inextricably involved, and that NIH allegedly concedes that it may be responsible. In addition, SMCI has taken steps to present Skanska's claims in compliance with the CDA. Furthermore, SMCI argues that the CDA's legislative history mandates that Skanska pursue its claims under the "pass-through" scheme even if the contract had not required Skanska to follow CDA procedures.

Finally, SMCI argues that the CDA as embodied in the contract vests exclusive administrative jurisdiction over Skanska's claims in the agency Board of Contract Appeals or in the U.S. Court of Federal Claims. SMCI states that the CDA's grant of exclusive jurisdiction is consistent with Maryland procurement statutes which grant the Maryland Board of Contract Appeals exclusive jurisdiction over procurement contract claims, including state procurement contracts for construction.

A. Failure to state a claim

SMCI contends that Skanska fails to state a claim for breach of contract because Skanska failed to allege that Skanska complied with the contract's exclusive and mandatory dispute resolution process. See Meyer v. State Farm Fire & Casualty Co., 85 Md. App. 83, 85 (1990). SMCI argues that the parties contracted for dispute resolution procedures and this, in effect, transfers the breach of contract claims into claims for relief under the contract. See Seal & Co., Inc. v. A.S. McLaughan Co., Inc., 907 F.2d 450, 454-55 (4th Cir. 1990).

SMCI further contends that the case should be dismissed for several other reasons, including that the case should be dismissed for (i) plaintiff's failure to join NIH as a necessary party; (ii) improper venue; (iii) a lack of an independent cause of action for breach of fiduciary duty; and (iv) the existence of an express contract bars the plaintiff's quasi-contractual claims.

In response, Skanska maintains that the contract provides for two avenues of civil litigation that apply in this case. First, the contract provides that SMCI consented to exclusive jurisdiction in a Maryland court for any dispute between Skanska and SMCI that cannot be settled by mediation within 60 days after demand for mediation. It is noteworthy that the venue designated for such dispute is Montgomery County. Notwithstanding that provision, Skanska argues that it is

appropriate--and indeed preferable--to permit this action to proceed in Baltimore City. Second, the DMSA, as incorporated in the contract, provides that all non-government disputes surrounding the project may be asserted in a Maryland court. Thus, Skanska argues that SMCI or BRC also had a responsibility to bring a claim under the CDA if either believed the dispute must be resolved pursuant to the CDA.

Next, Skanska contends that the Complaint alleges SMCI is liable for independent breaches, and that Skanska has complied with all conditions precedent to bringing suit. Skanska concedes that NIH may ultimately be liable for Skanska's claims; however, the only way to determine ultimate responsibility is through discovery in this litigation. Skanska argues that it has attempted to follow CDA alternative dispute resolution procedures, but SMCI has wrongfully refused to engage in such proceedings by conditioning its participation on NIH's involvement.

Third, Skanska maintains that the DMSA's Disputes Clause, as incorporated into the contract, extends the CDA beyond its statutory scope rendering other contract provisions meaningless, thereby leading to absurd results. Skanska argues that even if its claims against SMCI proceeded under the CDA, the Board of Contract Appeals or the U.S. Court of Federal Claims would nevertheless be unable to determine whether SMCI had breached its independent obligations under the contract. That is so, according to Skanska, because no subject matter jurisdiction exists over disputes between subcontractors on federal jobs.

Skanska argues that the other provisions of the contract are rendered meaningless, if, when confronted with a lawsuit, SMCI can "merely contend" that NIH "may be responsible," thereby triggering CDA procedures. Skanska maintains that, if SMCI's interpretation were correct, SMCI would have the power to confine Skanska's claims against SMCI to a state of limbo on the pretext

that SMCI could merely contend that NIH may be responsible. As a result, Skanska could not pursue claims against NIH due to sovereign immunity. Moreover, Skanska asserts that, even if SMCI “passed-through” Skanska’s claims, Skanska lacks access to information which sheds light on whether NIH is the ultimate cause of Skanska’s damages.

Fourth, Skanska contends that, in order to initiate a claim under the CDA, SMCI must do more than “merely contend” that NIH “may be responsible.” When read in context, the word “contend” in the DMSA deals with submitting a “certified” claim under the CDA (a contractor submitting a claim must “certify” that claim when the claim is \$100,000 or greater).¹ As such, Skanska argues that SMCI’s mere contention that NIH may be responsible cannot be considered a certified claim that triggers CDA procedures. Furthermore, Skanska claims that SMCI’s mere contention that NIH may be responsible is vague and disingenuous since SMCI’s Motion to Dismiss references the contention that Skanska is liable for liquidated damages and a letter by Skanska to SMCI does not blame NIH.

Skanska argues that the CDA does not preempt this Court’s jurisdiction. In that context, Skanska maintains that the CDA only governs disputes asserted by or against the federal government on a procurement contract and a contract cannot alter that scope. Skanska contends that the parties cannot by contract confer subject matter jurisdiction on a court. See McLean Contracting Co. v. Md. Transp. Auth., 70 Md. App. 514, 526 (1987).

¹Skanska maintains that discovery must take place before any party could determine whether to “certify” a claim against NIH under the CDA. Skanska argues it does not have access to SMCI’s communications with NIH, BRC, and the architect. Skanska believes that discovery will bear out which party is the wrongful actor in many instances.

Fifth, Skanska maintains that it goes against precedent for the CDA to govern this action. Skanska argues that subcontractors regularly assert causes of action against prime contractors in state court for claims arising on federal construction projects. See e.g. Klingensmith v. David H. Snell Landscape Contractor, Inc., 265 Md. 654 (1972). Skanska claims that cases cited by SMCI requiring a subcontractor to bring suit directly against the government in a statutorily-appointed forum are distinguishable since federal agencies were named as defendants in those cases. Skanska contends that it did not fail to exhaust administrative remedies because the CDA does not apply and SMCI fails to cite any relevant decision that provides otherwise. Skanska maintains that the government is not a necessary party to suits by subcontractors against prime contractors on federal projects. Skanska cites an interpretation of Federal Rule of Civil Procedure 19, which provides that the government is normally not a necessary party to lawsuits between private entities in connection with public procurements. See Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1044 (9th Cir. 1983).

Skanska further contends that NIH cannot be considered a necessary party under the analysis of Maryland Rule 2-211 (a). The fact that SMCI may at some point claim that others caused it to breach its contract with Skanska does not mean that complete relief cannot be afforded between Skanska and SMCI. In that context, Skanska alleges that NIH's interests will not be impacted by its absence and there is little risk of inconsistent judgments. A finding that SMCI breached the contract with Skanska does not necessarily entail that NIH also breached its obligations to BRC under the lease or that NIH's actions are a cause of Skanska's damages.

Assuming arguendo that NIH is a necessary party, Skanska maintains that the action should proceed for several reasons: (1) judgment against SMCI or BRC does not prejudice their ability to

seek recourse from one another or NIH; (2) judgment against SMCI or BRC does not prejudice NIH's ability to seek recourse from SMCI or BRC; (3) judgment against SMCI in absence of NIH is adequate since Skanska's claims are not directed against NIH; and (4) if the action is dismissed, Skanska will have no other forum in which to pursue its claims since a resolution under the CDA will only determine the extent of NIH's liability under the lease with BRC.

Skanska claims that the parties anticipated that no single forum exists in which claims by all parties can be resolved. Thus, Skanska asserts that its Complaint is the necessary first step in allocating responsibility for the damages incurred. If, after discovery is completed, the parties have sorted out who is ultimately responsible for which portion of Skanska's damages, then Skanska believes the parties will be in a position to certify or not to certify a claim against NIH under the CDA. Skanska argues that once any such certified claim is presented, the parties may agree to stay the portion of Skanska's claims that have been submitted to the government under the CDA.

Skanska further contends that breach of fiduciary duty is permitted as a claim in tort. Although there is no omnibus tort for breach of fiduciary duty, Skanska believes that claims in tort based on breach of duty are permitted. Skanska alleges that SMCI undertook independent duties based on the unique structure of the project, whereby Skanska had to rely on SMCI to obtain payment for its work from third parties.

Finally, Skanska maintains that the quasi-contract claims should not be dismissed since the scope of the contract has not yet been determined. Skanska argues that due to the inconsistency of certain terms in the contract, it is an open question whether and to what extent those terms apply. See Swedish Civil Aviation Admin. v. Proj. Mgt. Enters., Inc., 190 F. Supp.2d 785, 792 (D.Md. 2002); U.S. v. Algernon Blair, Inc., 479 F.2d 638, 641 (4th Cir. 1973). Furthermore, Skanska argues it

is permitted to plead alternative theories of recovery, and its various claims cannot be considered duplicative. See Md. Rule 2-303 (c).

In reply, SMCI argues that the contract requires that “government disputes” be resolved pursuant to the CDA. As a result, SMCI contends that the contract requires that disputes involving NIH or BRC must be resolved pursuant to the DMSA’s Disputes Clause.

Initially, SMCI again reiterates its contention of NIH responsibility renders the dispute a “government dispute” pursuant to the DMSA. SMCI argues that the DMSA specifically defines “government disputes” as disputes for which the lessor or development manager contends that NIH may be responsible. SMCI argues that Skanska recognized this was a “government dispute” when Skanska initially sought mediation that included NIH, and by the fact that Skanska’s Fact and Impact Study was intended to be presented to NIH. SMCI argues that if the parties intended to define “government disputes” as those for which a “certified” claim has been submitted to NIH, the DMSA would have expressly included that requirement. SMCI argues that it is not insulated from liability since Skanska can still plead claims that do not constitute “government disputes” under the DMSA. However, SMCI maintains that Skanska may only sue SMCI in a Maryland court for claims as to which SMCI cannot contend NIH is responsible. Furthermore, if a non-“government dispute” is brought, the forum selection clause of Montgomery County cannot be ignored.

Secondly, SMCI maintains that by making CDA procedures contractually binding for any “government dispute,” the parties contractually selected the exclusive forum for this action. SMCI argues that where parties commit themselves by contract to following CDA procedures, the CDA governs any such dispute and provides the only available forum in which to resolve that dispute. SMCI argues that regardless of whether the CDA applies as a matter of statutory construction, the

contractual invocation of the CDA operates as a binding forum selection clause. See Four Star Aviation, Inc. v. U.S. Postal Serv., 120 F. Supp.2d 523, 526-27 (D.V.I. 2000); Victory Outreach Ministries v. Fed. Aviation Admin., 68 F. Supp.2d 133, 135-36 (D.Conn. 1996); Spodek v. U.S., 26 F. Supp.2d 750, 756 (E.D.Pa. 1998); Deshields v. Chuong, 1996 WL 397473, at *1 (E.D.Pa., July 5, 1996). SMCI argues that Skanska's status as a subcontractor does not enable Skanska to avoid a valid and enforceable forum selection clause, as both Congress and the contract intended the CDA to apply to subcontractor claims brought against the government through the "pass-through" mechanism.

Third, SMCI maintains that for this "government dispute," the contract requires Skanska to proceed under the CDA. SMCI contends the CDA preempts subject matter jurisdiction in this Court. SMCI argues that it passed Skanska's claims through to NIH in BRC's name, and that any failure to "certify" that claim originates with Skanska alone since Skanska did not provide SMCI with a certified claim or anything qualifying as a true claim for relief. SMCI argues that NIH has countered Skanska's claims by asserting a liquidated damages claim against Skanska under the CDA. Thus, NIH has itself initiated a "government dispute" with Skanska under the CDA concerning the same subject matter as Skanska's Complaint.

Fourth, SMCI contends that Skanska failed to exhaust exclusive and mandatory remedies. SMCI argues that this failure by itself precludes this Court from exercising subject matter jurisdiction. SMCI argues that Skanska never updated its Fact and Impact Study, and instead, filed the Complaint.

Lastly, SMCI maintains that Skanska concedes that NIH may be responsible and that Skanska is using this lawsuit as merely an investigatory "first step" in allocating that responsibility.

SMCI contends that it is inappropriate for Skanska to assert bad faith claims against SMCI in this Court, attempting to use the discovery process to sort out which party is ultimately responsible. SMCI argues there is no merit to Skanska's contention that formal discovery is necessary for Skanska to present a certified CDA claim because the contract provides that SMCI will cooperate with and assist Skanska in presenting its claim to NIH. SMCI argues that Skanska belies the facade of purported SMCI liability by conceding the likelihood of NIH's ultimate responsibility for Skanska's claims. SMCI argues that Skanska is essentially squeezing SMCI to pressure NIH because NIH is a federal government entity covered and protected by the CDA.

Defendant BRC has also filed a Motion to Dismiss, or in the Alternative, for Summary Judgment. For the reasons that follow, this Court declines to address the substantive arguments contained in BRC's filing.

STANDARD OF REVIEW

It is well settled that “[s]ubject matter jurisdiction is ‘the power to hear and determine a case.’” Grindstaff v. State, 57 Md. App. 412, 416 (1984). The test for determining whether this Court has the requisite subject matter jurisdiction over plaintiff's claims is whether, “by law which defines the authority of the court, a judicial body is given the power to render a judgment over that class of cases within which a particular one falls...” Engineering Mgmt. Servs. V. Md. State Highway Admin., 375 Md. 211, 242 (2003).

DECISION

As outlined herein, this case involves the construction of the NIH Biomedical Research Center at the Johns Hopkins Bayview Campus. Consonant with that lease, BRC entered into a

DMSA with SMCI for development advisory services. SMCI engaged Plaintiff Skanska to construct the project.

Skanska's claims arise out of delays with regard to the construction of the project. Skanska maintains that, as a result of changes, delays, and impacts to its work on the project--which were the responsibilities of others--Skanska should receive both an increase in the GMP and an extension of the contract time.

The contract between the parties dictates the way by which the parties are bound to resolve disputes arising from the contract. Article 7.3.1 of the ACS Supplement (the subcontract under the DMSA and a subcontract under the lease) explicitly provides that:

The Contractor shall have no right to relief for a Contractor Change if it has not complied with the provisions of this Subparagraph 7.3.1.

The Contract further provides that any remaining disagreement concerning the proposed Contractor Change:

[S]hall be resolved in accordance with Paragraphs 7.4 and 7.11 below with pricing and schedule issues resolved on the basis of Subparagraphs 7.5.1 through 7.5.5 below [and that] [u]nder no circumstances shall Contractor file suit or otherwise initiate legal proceedings against Owner relating to the Agreement if the Contractor has not adhered to the requirements contained in Article 7.

Subparagraph 7.5.1 of the ACS Supplement provides that:

Any disagreement on or failure to agree upon the appropriate adjustment in the GMP or the Contract Time associated with an Owner Change or Contractor Change shall be settled in accordance with Paragraphs 7.5 through 7.11.

Subparagraph 7.6.1 provides the mandatory dispute resolution procedure, namely, that “[f]or disputes involving NIH or Lessor, Contractor shall adhere to the dispute resolution provisions contained in

the DMSA.” (Emphasis added). Therefore, the dispute resolution provisions of the DMSA clearly governs a dispute “involving NIH or Lessor.” Inasmuch as BRC (the Lessor) is a defendant in this case (although it is arguable whether NIH is a participant in the dispute), there is no doubt that BRC is clearly a participant in the dispute by virtue of it being sued as a defendant.

In that context, the DMSA specifically provides that:

Disputes for which Lessor or Development Manager contend that the NIH may be responsible shall be resolved pursuant to the Dispute Clause, FAR § 52-233.1.

The Disputes Clause reiterates that “[t]his contract is subject to the Contract Disputes Act of 1978 and provides additional requirements for certifying and presenting claims to the Contracting Officer.”

FAR § 52-233.1.

Upon reviewing the Complaint, the contention that permeates Skanska’s claims is that Skanska is owed an increase in the GMP and an extension to the time for performing due to additional work performed and delays sustained on the project. In that context, Section 7.5.4 of the ACS Supplement provides that:

Contractor’s receipt of a Change Order, CCD, payment on a Change Order or other increase in the GMP is expressly made conditional on Owner’s [SMCI’s] receipt of same from NIH.

[Emphasis Added].

Accordingly, the ultimate approval of COs and CCDs was the responsibility of NIH.

The contract between Skanska and SMCI expressly incorporates the DMSA which provides that any dispute for which SMCI contends NIH may be responsible shall be resolved pursuant to the Federal Acquisition Regulation, which requires the resolution of disputes under the CDA and with

exclusive jurisdiction in the United States Court of Federal Claims or the relevant Federal Agency Board of Contract Appeals. Therefore, under the plain language of the parties governing agreement, SMCI need only contend that NIH may be responsible to place this dispute within the purview of the CDA. See DMSA § 10.2(a). Although the Court finds that language overly broad, this Court finds that § 10.2(a) of the DMSA nevertheless controls the issue associated with the extant motions.

This Court does not find merit in Skanska's argument that a "certified" claim must be submitted in order for the claim to be characterized as a "government dispute." If the parties intended to define a "government dispute" as those for which a "certified" claim has been submitted to NIH, the DMSA or other document would have expressly included that requirement.

Accordingly, this Court finds that the CDA preempts subject matter jurisdiction in this Court. In that context, the plain language of the DMSA compels a finding that SMCI's contention that NIH may be responsible is sufficient to find that subject matter jurisdiction does not properly vest in this Court. As a result, SMCI's Motion to dismiss is hereby granted without prejudice, and the parties are directed to proceed under the Contract Disputes Act, 41 U.S.C. §§ 601-613, and its implementing regulations, Federal Acquisition Regulation § 52-233.1.

February 6, 2008
Date

Judge Stuart R. Berger
The Judge's Signature Appears
On The Original Document Only
Stuart R. Berger
Judge, Circuit Court for Baltimore City