UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS GRANTED IN PART: September 13, 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.

Appellant, NoMuda, Inc. (NoMuda), alleges that the Federal Emergency Management Agency (FEMA), a subagency of respondent, Department of Homeland Security (DHS), breached an oral or implied-in-fact contract. DHS seeks dismissal of the amended complaint on grounds including lack of jurisdiction and failure to state claims on which the Board could grant relief. We lack jurisdiction to entertain one of the amended complaint's five counts. Another count fails to state a claim. Accordingly, we grant the motion in part and dismiss those two counts on those respective grounds. The other three counts remain in the case.

Background

NoMuda alleges that it was incorporated in September 2018 for the specific purpose of becoming a third-tier subcontractor with respect to an ongoing federal contract. According to the amended complaint, the factual allegations of which we accept as true at this stage, FEMA placed a call order in May 2018 for management training services under a blanket purchase agreement with a company called ATCS, PLC. (The details of the services are immaterial at this time but allegedly involved training in "Lean Sigma Six" management concepts.) Multiple subcontractors at various levels performed most of the work. The amended complaint describes one such alleged subcontractor, CPI Group International, Inc. (CPI Group), as both a first-tier and a second-tier subcontractor, but usually as the latter. NoMuda says the prime contractor and CPI Group "both . . . operated in a manner similar to staffing agencies, wherein they tasked well over 50% of the work to third-tier [sub]contractors."

NoMuda alleges that in August 2018, "the [training] program's scope was substantially and materially augmented by [FEMA's] Chief of Staff Ana Bonilla."[1] According to the amended complaint, that month, a group of subcontractor personnel briefed Ms. Bonilla on three "options" for meeting FEMA's training needs, and Ms. Bonilla "unequivocally selected option three." Allegedly,

> [u]nder option three, while the [training] contractors and subcontractors would conduct some independent projects, their duties and obligations would largely entail mentoring, training, and monitoring projects initiated by FEMA personnel in what would be a "training pipeline." [Ms.] Bonilla was informed that this option would require substantial adaptations and modifications to the [existing statement of work of the prime call order] pertaining to scope, staffing, mission, and [intellectual property (IP)], therein requiring more than double the level of work . . . . Ms. Bonilla was also informed that the IP necessary to effectuate this option was outside the scope of the [prime] contract award and would be difficult, and expensive, to obtain.

NoMuda alleges that Ms. Bonilla "had actual or apparent authority to commit agency funds and enter into agreements, binding FEMA. This is supported by the fact that [her] signature

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[1] Although we accept the amended complaint's factual allegations, we note for clarity and fairness to the named individual that FEMA denies that Ms. Bonilla was "FEMA's Chief of Staff" and states, without providing evidence, that her "title during the dates in question was 'Chief of Staff (Trainee)' for the Puerto Rico Joint Field Office."

was required for certain expenditures as she was often an authorized signatory for expense approvals at the highest level of the agency."

NoMuda alleges that some of the people who participated in briefing Ms. Bonilla in August 2018 then participated in incorporating NoMuda in September 2018, and that by virtue of Ms. Bonilla's selection of "option three[] and advising NoMuda to perform the tasks required thereunder, a valid and enforceable oral contract was created between FEMA and NoMuda. Such a finding is supported by extensive documentation and correspondence, in addition to the facts alleged [in the amended complaint] and the totality of circumstances."

NoMuda alleges that a FEMA program manager (not Ms. Bonilla) "caused NoMuda to begin [subcontract] negotiations with CPI Group in September of 2018," which resulted in a subcontract executed on October 9, 2018, effective as of September 30, 2018. Confusingly, NoMuda alleges in this portion of the amended complaint that NoMuda "bec[ame] a second-tier subcontractor" to CPI Group, while elsewhere it alleges it was a third-tier subcontractor and CPI Group was at the second tier. NoMuda alleges without specificity that it was involved in "provision of the complex IP demanded by FEMA."

NoMuda goes on to allege in considerable detail (not always easy to follow) that its subcontract was "terminated" in May 2019, and it was not paid for some of its work and "IP." Those allegations are not pertinent to DHS's motion.

In August 2023, a party that is now alleged to have been NoMuda, Inc. using an incorrect corporate name ("NoMuda, LLC") submitted to FEMA, through counsel, a twenty-four-page certified claim ("under" the prime contractor's call order) for $519,969.36, consisting of $460.548 for the value of "training . . . with customization" plus $59,120.84 in "interest." The legal theories of the August 2023 claim were stated as "constructive change" (apparently of the prime contract), "implied contract," ratification of the change and/or of the implied contract, and breach of the implied duty of good faith and fair dealing.

The claim was denied, and NoMuda, LLC (which we are currently treating as interchangeable with appellant, NoMuda, Inc.[2]) timely appealed. The amended complaint, filed by leave of the Board in September 2024, without opposition by DHS, has five counts: "Breach of Oral Contract," "Breach of Implied Duty of Good Faith and Fair Dealing,"

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[2] *See NoMuda, Inc. v. Department of Homeland Security*, CBCA 7999, slip op. at 4 (Sept. 9, 2024) (granting unopposed motion for leave to amend the complaint to, inter alia, substitute NoMuda, Inc. for NoMuda, LLC). We treat the claimant and appellant as the same party in this decision, but we have not found or been asked to find that the named appellant is the real party in interest or otherwise has standing to pursue the appeal.

"Breach of Implied Duty to Disclose Superior Knowledge," "Implied-in-Fact Contract in the Alternative," and "Unjust Enrichment and Quantum Meruit in the Alternative."[3]

Before the amendment of the complaint, DHS had filed, in lieu of an answer, a motion to dismiss the original complaint for failure to state a claim, which also included jurisdictional objections. DHS asks us to apply that motion to the amended complaint.[4] DHS's motion was fully briefed in May 2024. We address the parties' arguments below.

Discussion

The Board Lacks Jurisdiction to Adjudicate the Unjust Enrichment Count

Although DHS bases its motion on Board Rule 8(e) (48 CFR 6101.8(e) (2023)), which governs motions to dismiss for failure to state a claim, the motion includes a mixture of jurisdictional and merits arguments. NoMuda responded to DHS's jurisdictional objections. We address them first.

DHS correctly notes that "the Board does not have jurisdiction over unjust enrichment claims" seeking recovery in quantum meruit, such as the fifth count of the amended complaint. *See Burke v. Department of Health & Human Services*, CBCA 7492, 23-1 BCA ¶ 38,304, at 185,976, *motion for reconsideration denied*, 23-1 BCA ¶ 38,360, *appeal docketed*, No. 24-1019 (Fed. Cir. Oct. 5, 2023); *Flux Resources, LLC v. Department of Energy*, CBCA 6208, 19-1 BCA ¶ 37,338, at 181,589. The fifth count "must be dismissed for lack of jurisdiction." *Flux Resources*, 19-1 BCA at 181,589.

DHS asserts that we also lack jurisdiction to adjudicate NoMuda's claims of breach of an oral contract and of superior knowledge, on the grounds that neither of those theories was presented in the certified claim. *See, e.g.*, *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017) (per 41 U.S.C. § 7103(a)(1) (2012) (now 2018), "the Board may not consider 'new' claims a contractor failed to present to the contracting officer"); *MLU Services, Inc. v. Department of Homeland Security*, CBCA 8002, slip op. at 18–19 (Sept. 9, 2024). We disagree and will address both theories on the merits.

As noted, the certified claim alleged an implied-in-fact contract rather than an oral contract. It is true, as DHS notes, that an oral contract is a type of express contract, not an implied contract, and the two are often alleged in the alternative. *See, e.g.*, *New America Shipbuilders, Inc. v. United States*, 871 F.2d 1077, 1079–80 (Fed. Cir. 1989) (discussing

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[3] NoMuda has confirmed its abandonment of the constructive change claim.

[4] *See NoMuda, Inc.*, slip op. at 3.

whether oral assurances formed implied contract); *Baer v. Chase*, 392 F.3d 609, 616–17 (3d Cir. 2004). But DHS's assertion that oral and implied contract theories are, by definition, "materially different" is incorrect. Rather, "[t]he elements of an implied-in-fact contract are the same as those of an oral express contract." *Night Vision Corp. v. United States*, 469 F.3d 1369, 1375 (Fed. Cir. 2006) (citing *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997)). Here, moreover, the claim and the amended complaint recite virtually identical factual allegations as to contract formation, involving the same alleged conduct by the same alleged FEMA official. Both documents rely on the same core of "operative facts" in this regard. *See Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990) (claims are the same when based on the same operative facts); *Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539, at 178,005.

Given this degree of factual and legal overlap—and the fact that NoMuda still alleges an implied-in-fact contract in the alternative—it is unclear what difference DHS thinks eliminating the theory of oral contract from the case would make. In any event, NoMuda's allegation of an oral contract was fairly presented to the contracting officer in the presentation of the implied contract theory and is not a new claim over which we would lack jurisdiction. *See Lee's Ford Dock*, 865 F.3d at 1369; *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987) (claim must give the contracting officer "adequate notice of the basis and amount of the claim").

We also do not agree with DHS that the superior knowledge count of the amended complaint constitutes a new claim—but this is mainly because we do not read that count, as pleaded, as stating a claim for relief on the merits. "A superior knowledge claim . . . focuses . . . upon the Government's knowledge of vital information *prior* to contract award and its failure to share it with an unknowing contractor." *VSE Corp. v. Department of Justice*, CBCA 5116, 18-1 BCA ¶ 36,928, at 179,916 (2017) (citing *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, et al., 17-1 BCA ¶ 36,870, at 179,687, *motion for reconsideration denied*, 18-1 BCA ¶ 36,959 (2017), *motion for full Board consideration and to vacate denied*, 18-1 BCA ¶ 36,968); *see Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000) (enumerating four elements of such a claim). DHS states simply that NoMuda "did not present" a superior knowledge claim "to the Contracting Officer for decision."

The problem with DHS's position is that substantially all of the facts on which NoMuda bases the superior knowledge count of the amended complaint were alleged in the claim, just without being linked to that legal theory.[5] The flaw in NoMuda's superior knowledge count is not that it is "new" but that—as we hold on the merits, below—the facts alleged in the claim *and* the amended complaint do not plausibly support recovery for a breach of the duty to disclose superior knowledge. We have jurisdiction to adjudicate both the oral contract theory and the superior knowledge count.

The Amended Complaint States a Claim of Breach

Turning to the merits, "[w]e apply essentially the same standard as would a federal trial court when ruling on a motion to dismiss for failure to state a claim." *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272, at 181,366 (citing Board Rule 8(e)). Under that standard, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and that a recovery is very remote and unlikely." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (internal quotation marks omitted); *accord Chapman Law Firm Co. v. Greenleaf Construction Co.*, 490 F.3d 934, 938 (Fed. Cir. 2007) (the issue on a motion to dismiss is "not whether the claimant will ultimately prevail"). Notice pleading does not require a detailed recitation of facts. *Williams Building Co. v. Department of Veterans Affairs*, CBCA 6559, 20-1 BCA ¶ 37,492, at 182,160 (citing *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). A complaint must, however, allege "factual content" that could support a "reasonable inference that the [other party] is liable," making "a claim to relief . . . plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

DHS argues that Ms. Bonilla could not have formed any contract with NoMuda because she "did not have authority to enter into contracts on behalf of the Government." NoMuda accuses DHS of ranging beyond the pleadings and improperly seeking summary

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[5] The certified claim is not always easy to follow, but it alleges in substance that NoMuda believed at the time it allegedly formed the unwritten contract with FEMA in 2018 that it would be important to amend the prime contractor's statement of work and that FEMA officials misled NoMuda about whether they expected or intended to make those changes. NoMuda argues that its claim also generally notified the contracting officer that NoMuda alleged it "was not put on notice" before entering into the unwritten contract "that its contractual relationship with Respondent was unauthorized or that [NoMuda] would not be adequately compensated, . . . which it had no way of knowing." The superior knowledge count of the amended complaint rests on allegations of this same sort, which, as we explain below, do not implicate the superior knowledge doctrine.

judgment through a motion to dismiss. We agree with NoMuda. DHS relies on factual assertions as well as on decisions in which the issue of contracting authority was resolved on summary judgment (or summary relief). *E.g.*, *CACI, Inc. v. Stone*, 990 F.2d 1233, 1234, 1236 (Fed. Cir. 1993); *Crowley Logistics, Inc. v. Department of Homeland Security*, CBCA 6188, et al., 20-1 BCA ¶ 37,579, at 182,464, 182,467–68; *Llamera v. United States*, 15 Cl. Ct. 593, 595, 599 (1988); *cf. Leonardo v. United States*, 63 Fed. Cl. 552, 560, 579 (2005) (finding contracting authority after trial but denying relief), *aff'd*, 163 Fed. App'x 880 (Fed. Cir. 2006). The amended complaint alleges that Ms. Bonilla had "actual" contracting authority.[6] We cannot find, in ruling on a motion to dismiss, that the allegation is incorrect—no matter what we may think is likely. *E.g.*, *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1380 (Fed. Cir. 2001) ("It was sufficient for the complaint to allege that the government's promise was authorized by a person having legal authority to do so."), *cited in Portland Mint v. United States*, 102 F.4th 1371, 1383 (Fed. Cir. 2024).

DHS also urges us to hold that NoMuda fails to state a breach claim because the alleged timeline does not seem to make sense. DHS notes that the allegedly crucial selection of "option three" occurred before NoMuda existed and asserts that FEMA "would have had no reason" to contract with a lower-tier subcontractor for work for which the prime contractor was responsible. We have no grounds, however, to scrutinize the allegations so closely at this stage. *See, e.g.*, *Williams Building Co.*, 20-1 BCA at 182,160 (noting that elements of well-pleaded claim could be explored in discovery); *cf. Vanguard Business Solutions v. Department of State*, CBCA 6951, 21-1 BCA ¶ 37,838, at 182,734 (declining to inquire "too deep[ly] into the merits" on motion to dismiss for lack of jurisdiction).

NoMuda sufficiently alleges under the liberal notice pleading standard that an authorized FEMA official promised that NoMuda would be paid for extra work in connection with the call order. Consequently, the counts of the amended complaint alleging breach of an oral contract, breach of an implied-in-fact contract, and breach of the implied duty of good faith and fair dealing all survive DHS's motion to dismiss.[7]

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[6] As DHS notes, apparent authority would not suffice. *Winter v. Cath–dr/Balti Joint Venture*, 497 F.3d 1339, 1344 (Fed. Cir. 2007).

[7] DHS's arguments for dismissal of the good faith and fair dealing count for failure to state a claim rely in part on the mistaken premise that NoMuda must allege "bad faith," *contra CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377, at 177,349, and in larger part on DHS's assertion that Ms. Bonilla lacked contracting authority.

The Amended Complaint Fails to State a Claim of Withholding Superior Knowledge

DHS argues, among other things, that the superior knowledge count of the amended complaint fails to state a claim for relief because it represents "a nonsensical application of the doctrine of superior knowledge." We agree that the count does not state a claim.[8] The pertinent allegations of the count are as follows:

> 105. At the time of the solicitation and award of the contract [sic],[9] FEMA had notice, knowledge, and awareness of the scope of the [call order statement of work (SOW)] and the work to be performed thereunder.
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> 106. Subsequently, FEMA, through . . . personnel, undertook to demand services and IP from NoMuda outside of the scope of the SOW.
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> 107. On numerous occasions, over a period of more than one year, . . . FEMA representatives . . . represented and assured [NoMuda] that the SOW modifications and amendments were underway and that NoMuda would be fully compensated.
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> 108. At all relevant times, FEMA was aware that the SOW was not in the process of being amended or modified, and that FEMA did not intend to initiate the required processes to do so.
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> 109. NoMuda undertook to perform out of scope work without vital knowledge of facts affecting performance and costs, as described herein.
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> 110. FEMA was aware that NoMuda had no knowledge, nor could it obtain such knowledge, that FEMA was not in the process of amending or modifying the SOW, nor that FEMA did not intend to. Knowledge of these facts was vital and [a]ffected NoMuda's performance and costs.

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[8] DHS's other arguments are misdirected. DHS presumes, for example, that NoMuda should have pleaded facts to support each element of the claim, which is not necessary for notice pleading. *Cf. Bell/Heery v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2014) (pleading breach does not require pleading elements of contract formation).

[9] Here as elsewhere in the amended complaint, "the contract" seems to mean the call order allegedly placed with the prime contractor, not the alleged, unwritten contract between FEMA and NoMuda.

> 111. Despite numerous opportunities, pursuant to weekly meetings and/or daily correspondences . . . , FEMA failed to provide relevant information within its possession.
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> 112. As a result of FEMA's breach of its duty to disclose superior knowledge, NoMuda has been damaged in the amount of $519,969.36.

Even under the liberal standard we apply, we cannot discern a plausible superior knowledge claim here. "The superior knowledge doctrine imposes upon a contracting agency an implied duty to disclose to a contractor otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance." *Giesler*, 232 F.3d at 876. A cardinal difference between superior knowledge claims and other breach claims is their timing. The duty to disclose superior knowledge operates before contract formation, whereas other breaches can occur only afterward. *See, e.g.*, *Scott Timber Co. v. United States*, 692 F.3d 1365, 1372 (Fed. Cir. 2012) (pre-award conduct could not breach duty of good faith and fair dealing, which "did not [yet] exist"); *GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991) (discussing superior knowledge doctrine); *TranBen, Ltd. v. Department of Transportation*, CBCA 5448, 17-1 BCA ¶ 36,635, at 178,429 (contractor alleging breach of implied duty of good faith and fair dealing "did not set forth a superior knowledge claim in its certified claim or complaint"); *CAE USA*, 16-1 BCA at 177,353–54 n.3 (duty to disclose superior knowledge is "separate and distinct from the implied duty of good faith and fair dealing, even if they involve similar principles"). NoMuda does not allege (apart from the purely conclusory recitation in paragraph 110) that its performance became more difficult or expensive because FEMA wrongly failed to share "*vital information prior to*" the alleged formation of the direct contract between FEMA and NoMuda. *See VSE Corp.*, 18-1 BCA at 179,916 (emphasis added).

Liberally construed, the paragraphs of the amended complaint, quoted above, allege that "for a period of more than one year"—i.e., mostly or entirely *after* the alleged adoption of "option three" a few months after FEMA placed the prime call order—FEMA did not amend the call order as NoMuda had been led to believe FEMA would. These allegations do not implicate the superior knowledge doctrine for at least three reasons.

First, NoMuda does not claim it was misinformed about *facts* in existence when it allegedly formed the contract directly with FEMA in about September 2018. An agency's mere thoughts or expectations about the future are not "information" or facts that may form a basis of a superior knowledge claim. *See ACC Construction Co.*, ASBCA 62265, et al., 22-1 BCA ¶ 38,194, at 185,470 ("government's judgment about [a] possibility" was not "a fact existing prior to award" about which it could have superior knowledge "but . . . a prediction"), *aff'd*, No. 2023-1372, 2024 WL 2064620 (Fed. Cir. May 9, 2024); *Northrop Grumman Corp. v. United States*, 47 Fed. Cl. 20, 90 (2000) (judgments and predictions are

not superior knowledge); *see also GAF Corp.*, 932 F.2d at 949 (doctrine applies "in limited circumstances" such as when the Government should have known a prospective contractor "needed to learn more" about the requirements). Second, the time frame is mostly inapt. NoMuda's allegation that FEMA officials misled NoMuda *after* its alleged oral or implied contract was formed is irrelevant to a superior knowledge claim.

Third, and no less importantly, there is no plausible connection between not amending the statement of work and NoMuda's costs. NoMuda does not allege that the unwritten contract it allegedly formed with FEMA became more costly to perform because the call order stayed the same. *See Hercules Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994) (superior knowledge claim "is tenable where the government fails to provide a contractor with vital knowledge . . . which bears upon the costs of the contractor's performance"), *aff'd*, 516 U.S. 417 (1996). NoMuda's only discernable claim of injury is that it was not "fully compensated" because the call order was not amended. The amount that NoMuda might ultimately be compensated by FEMA or anyone else was not, however, a consideration plausibly, or even conceivably, "vital to" NoMuda's "*performance*" of the management training, i.e., to its ability to meet contract requirements. *Giesler*, 232 F.3d at 876 (emphasis added). In sum, a failure by FEMA to disclose a pre-contract prediction or expectation that the agency would not amend the prime contractor's call order, so that NoMuda could be paid commensurate with its expectations, simply could not amount to withholding "superior knowledge" within the specialized meaning of that term.

We are not, to be clear, purporting to say exactly what a superior knowledge claim must include to survive a motion to dismiss. Presumably, as with other theories, a claimant need not allege everything it would ultimately need to prove. We hold that the amended complaint fails to state a claim for relief under the superior knowledge doctrine because the facts alleged do not support a reasonable inference of a plausible superior knowledge claim.

Decision

DHS's motion to dismiss is **GRANTED IN PART**. The fifth count of the amended complaint (unjust enrichment) is dismissed for lack of jurisdiction, and the third count (superior knowledge) is dismissed for failure to state a claim. DHS's motion to dismiss is otherwise denied.

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