ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Supreme Foodservice GmbH	)	ASBCA Nos. 57884, 58666, 58958
	)	58959, 58982, 59038
	)	59164, 59165, 59391
	)	59392, 59393, 59418
	)	59419, 59420, 59481
	)	59615, 59618, 59619
	)	59636, 59653, 59675
	)	59676, 59681, 59682
	)	59683, 59811, 59830
	)	59863, 59867, 59872
	)	59879, 60017, 60024
	)	60250, 60309, 60365
Under Contract No. SPM300-05-D-3130	)	

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OPINION BY ADMINISTRATIVE JUDGE SCOTT ON APPELLANT'S MOTIONS TO STRIKE AND FOR JUDGMENT ON THE PLEADINGS

Supreme Foodservice GmbH (Supreme) has appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, from the contracting officer's (CO's) denial or deemed denial of its claims and from the CO's assertion of government

claims under the subject Subsistence Prime Vendor (SPV) contract for delivery of food and other products to the United States military and Defense Logistics Agency (DLA) customers in Afghanistan. On 17 March 2016, the Board decided DLA's motion for partial summary judgment and Supreme's cross-motions to dismiss and strike and for partial summary judgment in the captioned appeals. *Supreme Foodservice* GmbH, ASBCA No. 57884 *et al.*, 2016 ASBCA LEXIS 201 (March 17, 2016). Familiarity with that decision is presumed.

In the motions at hand, filed before the Board's 17 March 2016 decision, Supreme moved to strike and for the dismissal with prejudice of DLA's affirmative defense of fraud in the inducement, pertaining to Supreme's alleged misrepresentations concerning its "market-basket" pricing, and its affirmative defense of conflict of interest, pertaining to violations allegedly committed by two individuals. Supreme also moved for judgment on the "pleadings" with respect to DLA's affirmative claims asserted by the CO regarding those market-basket pricing and conflict-of-interest allegations. Supreme stated that these motions are distinguishable from its prior dispositive motions because they are based upon its contention that these defenses and claims are insufficient as a matter of law (app. mot. at 2).

Additionally, despite the fact that Supreme raised statute of limitation issues in its prior motions, in its current motion it alleged clearly for the first time that DLA's market-basket pricing fraud in the inducement affirmative defense and claim are barred by the CDA's six-year statute of limitations, 41 U.S.C. § 7103(a)(4)(A). It further alleged, as it did previously, that the affirmative defense and claim are grounded in fraud and not properly before the Board; DLA waived them by its continued treatment of the SPV contract as valid for 10 years; and DLA is estopped from raising them. (App. mot. at 6, 31-32) Supreme also asked that, to the extent the Board might consider matters outside the pleadings in deciding its motions, they be treated as motions for summary judgment (app. mot. at 25 n.22).

DLA has since withdrawn its conflict-of-interest allegations regarding the two individuals with prejudice (*e.g.*, gov't opp'n at 1, 22) and the Board dismisses them with prejudice accordingly (below). Following that withdrawal, appellant asked that the Board direct DLA to amend its pleadings to clarify which specific aspects of its conflict-of-interest affirmative defenses and claims remain in all of the captioned appeals, in effect a motion for a more definite statement (app. reply at 3).

Appellant's motions were not properly presented and briefed as summary judgment motions in accordance with Board Rule 7(c) and the Board will not treat them as such. In any case, although it makes statements of background facts, the Board does not rely upon matters outside the pleadings in reaching its decision on appellant's motions. Further, the Board will not re-visit its conclusions in its 17 March 2016 decision on its jurisdiction concerning DLA's conflict-of-interest and fraud in the

inducement allegations and on the issue of waiver nor its conclusion that the statute of limitations does not apply to affirmative defenses. Thus, the matters remaining for the Board's resolution under appellant's current motions are the legal sufficiency of DLA's market-basket pricing pleadings; Supreme's statute-of-limitations contentions concerning DLA's market-basket pricing fraud in the inducement claim; and Supreme's request for a more definite statement concerning DLA's conflict-of-interest allegations.[1]

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

Background

1. On 3 September 2004 the Defense Supply Center Philadelphia (now DLA Troop Support) issued a solicitation for award of multiple indefinite-quantity contracts to food distributors acting as Prime Vendors (PV) responsible for supply and delivery of semi-perishable and perishable items to areas including Zone 3, Afghanistan. Pricing was to be based upon "Unit Price = Delivered Price + Fixed Distribution Price (or Fee)." *Supreme*, 2016 ASBCA LEXIS 201, at *4-7, ¶¶ 1-2.

2. Each offeror had to submit pricing information in its proposal for specific food item categories, to determine the Distribution Price for each zone. This pricing information became known as "market-basket" pricing, which DLA used in evaluating proposals. The solicitation provided in part regarding market-basket pricing:

> a. A firm receiving an award under this pricing arrangement will be subject to price verification techniques such as market basket analysis and random price and invoice analysis. The distribution prices for the item categories as well as the delivered prices for items in each zone's market basket...will be analyzed extensively to ensure the pricing for all items is fair and reasonable. [T]he pricing strategy for this acquisition has been formulated to ensure that:
>
> (i) A flexible pricing provision should facilitate the establishment of a long-term partnership which allows for price adjustment based on market factors;

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[1] Prior to filing the present motions, Supreme filed a motion for a protective order to prevent production of documents requested by DLA related to issues raised in in the current motions. DLA opposed and cross-moved to compel production. Because the Board's rulings on the instant motions might resolve the pending discovery dispute, we deferred ruling on the discovery cross-motions. (*See* Bd. corr. file, order dtd. 1 October 2015)

(ii) The offerors' procurement/pricing process is being evaluated to ascertain that market pricing provided to the Government is at the most favorable terms;

(iii) An ongoing post award review based on the plan submitted by the successful offeror will be conducted to verify that we continue to receive market pricing during contract performance.

(ASBCA Nos. 57884, 58606, R4, tab 1 at 21-23) It further stated that "[t]he offeror must provide invoices (where available) or written quotes to support each market basket price offering" (*id.* at 99). Delivered prices for market-basket items "should be based on the last delivered price...during the full week (Monday through Friday) two weeks prior to" the solicitation's issue date. If no prices were available for that week, the delivered cost used "shall be based on the last available price" prior thereto. (*Id.* at 106) "To [e]nsure an objective price evaluation, the pricing of all offerors [was] to be based on the exact item in our market basket" (*id.* at 120).

3. Supreme was a subcontractor to Public Warehousing Company (PWC), which provided subsistence services in Afghanistan prior to the subject contract. *Supreme*, 2016 ASBCA LEXIS 201, at *10-11, ¶ 7. Supreme, PWC, and Professional Contract Administrators (PCA) executed an agreement whereby Supreme, with the assistance of PWC/PCA, would submit a proposal in response to the solicitation. PWC/PCA was to provide food prices and supply chains for use in responding. If Supreme secured the SPV contract, it was to pay fees to PWC/PCA. *Id.*, at *12, ¶ 10.

4. Effective 3 June 2005 DLA awarded the SPV contract to Supreme for Afghanistan. *Supreme*, 2016 ASBCA LEXIS 201, at *16, ¶ 16. The contract's scope of work subsequently expanded to include distribution support, with premium fee, for additional customer locations throughout Afghanistan, which became known as "Premium Outbound Transportation" or "POT." *Id.* at *16-17, ¶ 18. Disputes related to POT rates are at issue in several of the captioned appeals.

5. DLA paid Supreme approximately $8.8 billion between December 2005 and December 2013 for contract performance. *Supreme*, 2016 ASBCA LEXIS 201, at *41, ¶ 48.

6. On 14 December 2011 the Board docketed ASBCA No. 57884, Supreme's appeal from a CO's final decision unilaterally definitizing POT rates under the contract and demanding payment from Supreme of alleged POT overpayments. *Supreme*, 2016 ASBCA LEXIS 201, at *39, ¶ 46. Supreme filed additional appeals at the Board between December 2011 and December 2015 arising from claims by Supreme and by DLA. The Board docketed ASBCA No. 60365, the latest appeal, on 14 December 2015.

7. On 7 January 2015 DLA sought leave to amend its answers in a number of the pending appeals to assert the affirmative defenses of unclean hands, fraud in the inducement, and first material breach. On the same date, DLA moved for partial summary judgment on those defenses in the pending appeals. On 25 February 2015 the Board granted DLA's motion for leave to amend its pleadings. *Supreme*, 2016 ASBCA LEXIS 201, at *53, ¶ 56 n.13. DLA's answers in appeals filed after 25 February 2015 contain materially similar language, or allege additional facts with regard to those affirmative defenses.

8. DLA's 20 January 2015 answer to Supreme's second amended complaint in the POT appeals pending at the time (ASBCA Nos. 57884, 58666, 59636) contains the following language, in part, concerning the affirmative defenses of unclean hands and fraud in the inducement:

> 2. **Unclean hands:** Supreme's unclean hands makes the Contract void *ab initio*, and Supreme must reimburse the Government for all money paid under the Contract. *Former DLA employees "switched sides" on the Contract and systematically violated federal conflict-of-interest statutes on behalf of Supreme.* These violations occurred during the formation of the original Contract and the development of Premium Outbound Transportation. Furthermore, *one of these former DLA employees worked for both DLA and Supreme at the same time.* [Italics added]
>
> 3. **Fraud in the inducement:** Supreme's fraud in the inducement makes the Contract void *ab initio*, and Supreme must reimburse the Government for all money paid under the Contract. Supreme committed fraud in the inducement in at least three respects. First, Supreme made material misrepresentations regarding its market-basket pricing. Supreme's market-basket pricing was used to determine the overall fairness and reasonableness of Supreme's proposed prices prior to award of the Contract. Supreme misrepresented this information to DLA because Supreme proposed artificially low prices that the company knew would rise, once the contract was awarded.

(Answer at 84-85)

9. On 22 January 2015 the CO issued a final decision asserting a government claim against Supreme for all sums the government paid under the contract, plus its costs to review the allegedly unsupported parts of Supreme's claims, less the amounts Supreme paid pursuant to an earlier CO's final decision and payments made by Supreme as a result of a guilty plea agreement in separate criminal proceedings. *Supreme*, 2016 ASBCA LEXIS 201, at *49-52, ¶¶ 53-54. The CO claimed that, through a partnership with PWC and PCA, Supreme made material representations regarding its market-basket pricing, which fraudulently induced DLA to enter into the contract, and it failed to report its inflated pricing after it became aware of PWC's major fraud (ASBCA No. 59811, R4, vol. 1 (Contract), tab 7 at 6-7). DLA also alleged that, through MAJ Joseph Alvarez (ret.), a former DLA employee, and other unidentified employees, Supreme repeatedly violated conflict-of-interest restrictions and failed to notify the CO. *Supreme*, at *51-52, ¶ 54. The Board docketed Supreme's appeal from the final decision as ASBCA No. 59811. *Id.*, at *53, ¶ 55.

10. In its complaint in ASBCA No. 59811, Supreme asserted five affirmative defenses: (1) Claims Grounded in Fraud; (2) Statute of Limitations; (3) Release; (4) Waiver; and (5) Accord and Satisfaction. The complaint's factual statements and DLA's corresponding responses in its answer concerning its fraud in the inducement allegations regarding market-basket pricing follow in relevant part:

> **V.**
> **AFFIRMATIVE DEFENSE I**
> **(Claims Grounded in Fraud)**
>
> ....
>
> 15. Contracting agencies are not authorized "to settle, compromise, pay, or otherwise adjust any claim involving fraud." 41 U.S.C. § 7103(c)(1).
>
> **Response: The allegations in this paragraph are conclusions of law to which no response is required.**
>
> ....
>
> 17. Here, each of the bases set forth in DLA's claim is founded on allegations of fraud.
>
> **Response: The allegations in this paragraph are conclusions of law to which no response is required. By way of further answer, denied and aver that the**

January 22, 2015 Contracting Officer's final decision is the best evidence of its contents.

....

21. Fourth, DLA asserts that "Supreme made material misrepresentations regarding the company's market-basket pricing, which fraudulently induced DLA to enter into the SPV contract."

Response: Admit that the January 22, 2015 Contracting Officer's final decision includes the above-quoted language.

....

23. Because the linchpin of each of the alleged factual grounds underlying DLA's claim for $8.2 billion is that Supreme "corrupted" and "tainted" the SPV Contract through alleged fraudulent conduct or violations of criminal conflict of interest laws, and would require the Board to determine whether [Supreme] committed the alleged fraudulent and illegal acts, the COFD is invalid and the Board lacks jurisdiction to entertain it.

Response: The allegations in this paragraph are Supreme's characterization of its case and conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

....

VIII
AFFIRMATIVE DEFENSE V[2]
(Waiver)

....

46. DLA was aware of the facts underlying its claim that, because of its relationship with PWC, Supreme

[2] "Waiver" was actually Supreme's fourth affirmative defense but it misnumbered it in its recitations and DLA followed suit for ease of reference (answer at 12 n.1).

> fraudulently induced the Contract by making material misrepresentations regarding its market-basket pricing, no later than November 9, 2009.
>
> **Response: The allegations in this paragraph as to what "DLA was aware of" are vague and constitute Supreme's characterization of its case and conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.**
>
> ....
>
> 48. Notwithstanding its knowledge of these facts, DLA never opted to cancel the Contract.
>
> **Response: The allegations in this paragraph as to DLA's "knowledge" are Supreme's characterization of its case and conclusions of law to which no response is required. To the extent a response is required, the allegations are denied. Aver that on January 22, 2015, the Contracting Officer determined that the Contract was void *ab initio* from inception.**

(Answer at 6-8, 14-16)

11. In its answers in a number of the later-filed of the captioned appeals, DLA alleged violations of 18 U.S.C. §§ 207 and 208, by MAJ Alvarez, with Supreme's aiding and abetting; 18 U.S.C. § 207, by another individual, with Supreme's aiding and abetting; and 18 U.S.C. § 208 by a third individual, with Supreme's aiding and abetting (*see* answer in ASBCA No. 60024 at 28-36). DLA did not repeat its general conflict-of-interest allegations in its 20 January 2015 answer in ASBCA Nos. 57784, 58666, and 59636 about "former DLA employees" (*see* SOF ¶ 8).

12. On 16 February 2016 DLA filed its answer in the latest appeal, ASBCA No. 60365. It included an unclean hands affirmative defense in connection with alleged conflict-of-interest violations by MAJ Alvarez, but it did not assert the defense regarding the other two individuals. Concerning its fraud in the inducement affirmative defense based upon market-basket pricing, DLA alleged, in relevant part:

> 87. As part of its original proposal for the SPV contract, Supreme submitted prices for a market basket of items.

88. These market basket prices were used to determine the overall fairness and reasonableness of Supreme's proposal, in accordance with DLA issuances.

89. At the time Supreme submitted its proposed market-basket pricing, the company knew that these prices were artificially low and that they would rise following award of the SPV contract.

90. In fact, in January 2006, shortly after commencement of performance, DLA personnel demanded an explanation from Supreme as to why market-basket items were rising in price, as compared to the prices originally proposed.

91. According to SPV contracting personnel, by January 2006, 50 out of 52 items had higher prices, with an average price increase of 64.4%.

92. Bakery prices from Supreme's own bakery in Afghanistan had a "markup of about 400% from the prices offered on the solicitation," and eggs, lettuce, olives, and French fries increased approximately 200%.

93. DLA never received an adequate explanation for this rise in prices, and DLA subsequently learned that that [sic] Supreme changed the source of some of its market-basket items post-award to JAFCO.

94. Supreme later admitted that JAFCO was an illegal vehicle from which to inflate product prices.

95. Supreme's market-basket pricing was the subject of Supreme's previous litigation with PWC. In that litigation, Michael Gans, Supreme's minority owner, testified that more than half of Supreme's market-basket prices came from PWC, and that Supreme apparently believed that this pricing "may be a problem."

96. Therefore, Supreme fraudulently induced DLA into entering into the SPV contract.

(Answer at 36-37)

DISCUSSION

Supreme's Motions to Strike DLA's Market-Basket Pricing Fraud in the Inducement Affirmative Defense and for Judgment on the Pleadings Regarding DLA's Market-Basket Pricing Fraud in the Inducement Claim

Timeliness

Preliminarily, DLA contends that the Board should deny Supreme's motions to strike and for judgment on the pleadings as untimely under the Federal Rules of Civil Procedure (gov't opp'n at 33-37). Regarding Supreme's motion to strike, DLA cites to FED. R. CIV. P. 12(f), which provides:

> (f) **Motion to Strike**. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
>
> (1) on its own; or
>
> (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

DLA asserts that Supreme's motion to strike was filed months after DLA's 20 January 2015 answer (*see* SOF ¶ 8), which contained its market-basket pricing allegations; the issues raised in the motion could have been raised in Supreme's earlier cross-motions to dismiss and strike and for partial summary judgment; and the motion further delays Supreme's response to DLA's document production requests (gov't opp'n at 34-36). Supreme counters that the Board's Rules do not address motions to strike and the Board routinely considers such motions, regardless of FED. R. CIV. P. 12(f)'s time limits (app. opp'n at 22).

Although we can look to the Federal Rules of Civil Procedure for guidance, particularly in areas our Rules do not address, the Federal Rules do not apply to the Board as an administrative tribunal and we are not bound by them. *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920, *aff'd, Thai Hai v. Brownlee*, 82 F. App'x 226 (Fed. Cir. 2003) (table); *Ordnance Devices, Inc.*, ASBCA No. 42709, 99-1 BCA ¶ 30,304 at 149,836. While DLA is correct that Supreme filed its current motions and its earlier dispositive motions in an unfortunate piecemeal fashion, Supreme is correct that the Board has considered motions to strike regardless of FED. R. CIV. P. 12(f)'s time limit. For example, in *Fru-Con Construction Corp.*, ASBCA Nos. 53544, 53794, 03-2 BCA ¶ 32,275, the Board found appellant's motion to strike to be untimely under FED. R. CIV. P. 12(f), but it nonetheless addressed it on the merits. In *Danac, Inc.*, ASBCA Nos. 30227, 33394, 88-3 BCA ¶ 20,993, the Board considered what it

determined to be a motion to strike by appellant even though it was filed "long after the time period specified in Rule 12(f)." *Id.* at 106,071.

Accordingly, we deny DLA's timeliness defense concerning Supreme's motion to strike DLA's market-basket pricing fraud in the inducement affirmative defense.

Regarding the timeliness of Supreme's motion for judgment on the pleadings, DLA cites to FED. R. CIV. P. 12(c), which states that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." The Board does not have such a rule. DLA apparently wants us to apply FED. R. CIV. P. 12(f)'s 21-day time limit to Supreme's pleadings motion (*see* gov't opp'n at 33). However, FED. R. CIV. P. 12(c) does not contain any specific time limit. No hearing date is currently set in these appeals and the parties continue with discovery. Thus, Supreme's motion for judgment on the pleadings will not delay the hearing.

Accordingly, we deny DLA's timeliness defense concerning Supreme's motion for judgment on the pleadings with respect to DLA's market-basket pricing fraud in the inducement claim.

Supreme's Motion to Strike

Supreme contends that DLA's pleadings asserting its market-basket pricing fraud in the inducement affirmative defense in these appeals are insufficient as a matter of law, under either the pleadings standards of FED. R. CIV. P. 8 or the heightened standards of FED. R. CIV. P. 9(b) when alleged fraud is involved, and the Board should grant Supreme's motion to strike DLA's affirmative defense with prejudice pursuant to FED. R. CIV. P. 12(f). FED. R. CIV. P. 8(b)(1)(A) provides in part that, in responding to a pleading, a party must "state in short and plain terms its defenses to each claim asserted against it." FED. R. CIV. P. 8(d)(1) states that each allegation in a pleading "must be simple, concise, and direct." FED. R. CIV. P. 9(b) states in part that, in alleging fraud, "a party must state with particularity the circumstances constituting fraud." The Board's own Rule 6(b) regarding defenses, including affirmative defenses, asserted by the government in its answer to a complaint requires only simple, concise, and direct statements, and even allows for the Board's entry of a general denial on behalf of the government.

Supreme acknowledges that, in deciding a motion to strike, the Board accepts all well-pleaded factual allegations as true (app. mot. at 24), but it contends that the Board will grant a motion to strike if the defense is insufficient as a matter of law, citing *Space Age Engineering, Inc.*, ASBCA No. 25761 *et al.*, 83-2 BCA ¶ 16,789. The Board in that case stated that "[t]he standard that must be met is undisputed; only if a defense is insufficient as a matter of law will it be stricken," *id.* at 83,439, and it

ultimately denied what appellant had styled a motion to strike (which the Board characterized otherwise). In *Danac*, 88-3 BCA ¶ 20,993 at 106,071, the Board set forth the standards governing a motion to strike a defense under Fed. R. Civ. P. 12(f):

> [T]he motion will be denied "if the defense is sufficient as a matter of law or if it fairly presents a question of law or fact which the court ought to hear." It has been held that "a defense is good unless it appears to a certainty that plaintiffs would succeed despite any state of facts which could be proved in support of the defense." As stated by the court in *Carter-Wallace, Inc. v. Riverton Laboratories, Inc.*, 47 F.R.D. 366, 368 (S.D.N.Y. 1969),
>
> > [f]or the plaintiff to succeed on this motion, the Court must be convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed. In examining the defenses, the Court must accept the matters well pleaded as true.... These narrow standards are designed to provide a party the opportunity to *prove* his allegations if there is the possibility that his defense or defenses may succeed after a full hearing on the merits. [Citations omitted]

Supreme further alleges that "[t]he standard by which the legal sufficiency of DLA's claims and defenses are [sic] to be judged is well-settled. In order to survive a motion to dismiss, a claim or defense must be 'plausible on its face'" (app. mot. at 25 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Supreme contends that DLA has not alleged sufficient facts or offered evidence on the face of its pleadings that plausibly suggest that its relationship with PWC and rising market-basket prices establish that Supreme materially misrepresented its market-basket pricing, such as to support a fraud in the inducement defense.

DLA opposes Supreme's motion to strike its affirmative defense, asserting that the plausibility standards governing a claim for relief in a complaint are not applicable to its affirmative defense in its answer. DLA alleges that the proper standard in considering a motion to strike is whether a pleading asserts an "insufficient defense" or contains "any redundant, immaterial, impertinent, or scandalous matter" (the FED. R. CIV. P. 12(f) criteria), or is "patently frivolous" or "clearly invalid" on its face (gov't opp'n at 23) (quoting *Space Age Engineering,* 83-2 BCA ¶ 16,789 at 83,439).

DLA contends that its pleadings are sufficient and it has alleged facts that provide sufficient notice to Supreme of its allegations.

DLA's contention that plausibility standards do not apply to affirmative defenses has support:

> There is a difference in pleading standards between pleading affirmative defenses in an answer and asserting a claim for relief. In summary, affirmative defense pleading should not be subject to the same "plausibility" standard applicable in pleading a claim for relief.

2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 8.081[1] at 8-68 (3d ed. 2016) (discussing why plausibility standard not applicable to affirmative defense but noting federal courts differ over issue). Regardless, although FED. R. CIV. P. 12(f) provides a tribunal discretion to strike a facially insufficient defense in a pleading, "Motions to Strike a defense are not favored and will be denied if the defense fairly presents a question of law or fact." *Taylor & Sons Equipment Co.*, ASBCA No. 34675, 88-2 BCA ¶ 20,694 at 104,585; *see also Lunsford v. United States*, 570 F.2d 221, 229 (8th Cir. 1977).

The Board's rules only require notice pleading. *The Boeing Co.*, ASBCA No. 54853, 12-1 BCA ¶ 35,054 at 172,197; *UniTech Services Group, Inc.*, ASBCA No. 56482, 10-1 BCA ¶ 34,362 at 169,695. DLA's affirmative defense concerning Supreme's market-basket pricing does not suffer from any of the impediments quoted above and it contains factual allegations that inform and adequately provide notice to Supreme of the underlying issues. *See ABB Turbo Systems AG v. TurboUSA, Inc.*, 774 F.3d 979, 984-85 (Fed. Cir. 2014) (FED. R. CIV. P. 8 pleading "'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence' of the alleged violation") (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

Accordingly, we deny Supreme's motion to strike DLA's affirmative defense of fraud in the inducement with respect to Supreme's market-basket pricing.

Supreme's Motion for Judgment on the Pleadings

Supreme asserts that DLA's market-basket pricing fraud in the inducement claim asserted by the CO in her 22 January 2015 final decision is legally insufficient and that, therefore, Supreme is entitled to judgment on the "pleadings" in this regard. In a motion for judgment on the pleadings pursuant to FED. R. CIV. P. 12(c), we apply the same standard as for a motion to dismiss for failure to state a claim under FED. R. CIV. P. 12(b)(6):

> We must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff. [Citation omitted] To state a claim, the complaint must allege facts "plausibly suggesting (not merely consistent with)" a showing of entitlement to relief. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1966, 167 L.Ed.2d 929 (2007). The factual allegations must be enough to raise a right to relief above the speculative level. *Id.* at 1965. This does not require the plaintiff to set out in detail the facts upon which the claim is based, but enough facts to state a claim to relief that is plausible on its face. *Id.* at 1974.

UniTech Services, 10-1 BCA ¶ 34,362 at 169,695 (quoting *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009)).

The process quoted by the Board in *UniTech* differs from that in Board proceedings where, as here, an appellant is challenging the legal sufficiency of a government claim, which is not itself a "pleading." Under Board Rule 6(a) an appellant normally files the complaint, including on an appeal from a government claim. In the latter case the appellant typically does so "with enough information about the government claim to form a sufficient predicate for the government's answer and allow for adequate framing of the issues." *Highland Al Hujaz Co.*, ASBCA Nos. 59746, 59818, 15-1 BCA ¶ 36,041 at 176,031-032. Under certain circumstances we have granted an appellant's motion to direct the government to file the complaint, recognizing that the government might be in a better position to do so. *See id.* (excess reprocurement costs); *BAE Systems Land & Armaments Inc.*, ASBCA No. 59374, 15-1 BCA ¶ 35,817 (alleged defective pricing); *Kellogg Brown & Root Services, Inc.*, ASBCA No. 59557, 15-1 BCA ¶ 35,865 (final decision did not explain rationale for determining costs unallowable).

Here, Supreme did not move for an order from the Board to direct DLA to file the complaint but instead filed its own complaint asserting its affirmative defenses against DLA's market-basket pricing fraud in the inducement claim. Therefore, we infer that Supreme was adequately informed of the basis underlying DLA's claim to

provide a responsive pleading. Further, as noted, we are to presume DLA's alleged facts are true and are to draw all reasonable inferences in favor of DLA regarding Supreme's alleged deliberate underpricing of its market-basket items in its proposal before contract award (*see* SOF ¶ 12). For these reasons, we conclude that DLA's allegations are sufficient to survive Supreme's motion for judgment on the pleadings.

Accordingly, we deny Supreme's motion for judgment on the pleadings regarding DLA's market-basket pricing fraud in the inducement claim.

Statute of Limitations

Supreme further contends that DLA's claim concerning market-basket pricing is time-barred by the CDA's statute of limitations, under which a government contract claim against a contractor is to be submitted within six years after the accrual of the claim. 41 U.S.C. § 7103(a)(4)(A). Claim accrual is defined as the "date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known." FAR 33.201. The test for determining when the events were known or should have been known includes an intrinsic reasonableness component. *Kellogg Brown & Root Services, Inc.*, ASBCA No. 58175, 15-1 BCA ¶ 35,988 at 175,825. Supreme bears the burden to prove its statute of limitations affirmative defense. *Id.*

Supreme alleges that DLA has conceded that it was aware of the market-basket pricing issue as early as January 2006 (app. mot. at 31). In its answer to Supreme's complaint in ASBCA No. 60365, DLA alleged that "in January 2006, shortly after commencement of performance, DLA personnel demanded an explanation from Supreme as to why market-basket items were rising in price, as compared to the prices originally proposed" (SOF ¶ 12). However, this does not establish that DLA had knowledge at the time of what eventually became its fraud in the inducement allegations regarding market-basket pricing. Moreover, DLA points out that, in its earlier cross-motion for partial summary judgment, Supreme stated that "[t]he Government was therefore aware of the facts underlying its [market-basket pricing] claim in November 2009, ***at the latest***" (app. summ. j. mot. at 42). If a date in November 2009 were the claim accrual measuring date, DLA's 22 January 2015 market-basket pricing claim (SOF ¶ 9) would fall within the CDA's six-year limitation period, and hence, be timely. The question of when that claim accrued remains a fact issue for the hearing.

Accordingly, we deny Supreme's motion that DLA's market-basket pricing fraud in the inducement allegations are barred by the CDA's statute of limitations.

Motion for a More Definite Statement Concerning DLA's Remaining Conflict-of-Interest Allegations

In its 17 March 2016 decision the Board dismissed DLA's conflict-of-interest claims concerning MAJ Alvarez as time-barred, but its affirmative conflict-of-interest defense concerning him remains. DLA has withdrawn its conflict of interest allegations against the two other individuals with prejudice. However, in view of DLA's general conflict-of-interest allegations concerning former DLA employees in its 20 January 2015 answer to Supreme's second amended complaint in the POT appeals (SOF ¶ 8), and the CO's general conflict-of-interest allegations concerning other unidentified employees in her 22 January 2015 final decision (SOF ¶ 9), it is not clear whether DLA is raising, or intends to raise, any conflict-of-interest allegations before the Board other than in connection with its affirmative defense concerning MAJ Alvarez.

Accordingly, we grant Supreme's motion for a more definite statement and direct DLA to clarify, in a supplemental pleading or amended pleadings, the nature and extent of its remaining conflict-of-interest allegations against Supreme and whether any DLA employees or former employees, not previously named, are allegedly involved.

DECISION

We dismiss DLA's withdrawn conflict-of-interest allegations against the aforementioned two individuals with prejudice in all of the captioned appeals.

We deny DLA's timeliness defense concerning Supreme's motion to strike DLA's market-basket pricing fraud in the inducement affirmative defense.

We deny DLA's timeliness defense concerning Supreme's motion for judgment on the pleadings with respect to DLA's market-basket pricing fraud in the inducement claim.

We deny Supreme's motion to strike DLA's affirmative defense of fraud in the inducement with respect to Supreme's market-basket pricing.

We deny Supreme's motion for judgment on the pleadings regarding DLA's market-basket pricing fraud in the inducement claim.

We deny Supreme's motion to dismiss DLA's market-basket pricing fraud in the inducement allegations as barred by the CDA's statute of limitations.

We grant Supreme's motion for a more definite statement and direct DLA to clarify, in a supplemental pleading or amended pleadings, the nature and extent of its remaining conflict-of-interest allegations against Supreme and whether any DLA employees, not previously named, are allegedly involved.

Dated: 21 June 2016

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 57884, 58666, 58958, 58959, 58982, 59038, 59164, 59165, 59391, 59392, 59393, 59418, 59419, 59420, 59481, 59615, 59618, 59619, 59636, 59653, 59675, 59676, 59681, 59682, 59683, 59811, 59830, 59863, 59867, 59872, 59879, 60017, 60024, 60250, 60309, 60365, Appeals of Supreme Foodservice GmbH, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals