IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

CITY OF CHICAGO, an Illinois municipal corporation,	)	
Plaintiff,	)	
v.	)	**Case No. 19-cv-1817**
	)	**Judge Ronald A. Guzman**
MOTIV POWER SYSTEMS, INC., a Delaware corporation,	)	**Mag. Judge Sunil R. Harjani**
Defendant.	)	
MOTIV POWER SYSTEMS, INC., a Delaware corporation,	)	
Counter-Plaintiff,	)	
v.	)	
CITY OF CHICAGO, an Illinois Municipal corporation,	)	
Counter-Defendant.	)	

CITY OF CHICAGO'S MOTION TO DISMISS COUNTERCLAIM

Plaintiff/Counter-Defendant, the City of Chicago ("City"), by its attorney, Mark A. Flessner, Acting Corporation Counsel for the City, pursuant to Federal Rule of Civil Procedure 12(b)(6), hereby moves this Honorable Court to dismiss Defendant/Counter-Plaintiff, Motiv Power Systems, Inc.'s ("Defendant") Counterclaim for Breach of Contract/Breach of the Duty of Good Faith ("Counterclaim") for failure to state a claim.

INTRODUCTION

Defendant's Counterclaim, Dkt. No. 23 at 33-42, Countercl., seeking damages for the City's purported breach of Contract No. 26567, Specification No. 98782 ("Specification"), titled "Electric Trucks – Refuse Trucks" ("Contract") does not, and cannot, state a claim for breach of

contract; therefore, it should be dismissed with prejudice pursuant to Rule 12(b)(6). The Counterclaim should be dismissed for three reasons: 1) Defendant failed to state a claim for breach of contract because it did not allege that it performed all contractual conditions required of it; 2) Defendant waived its right to bring a breach of contract action against the City; and 3) the Contract did not obligate the City to buy a set number of garbage trucks or give the Defendant the right to enforce the terms of the Research, Design & Development Grant that the United States Department of Energy ("DOE") awarded to the City ("Grant"), Dkt. No. 1-1 at 242-275, Grant.

FACTUAL ALLEGATIONS

1. The City was awarded a Grant from the DOE.

In 2008, the City launched the Chicago Climate Action Plan ("CCAP"), a comprehensive and detailed strategy to help lower green-house gas emissions and address climate change. *See* Dkt. No. 23 at 34-35, Countercl. ¶¶ 4-6. One part of the CCAP was an initiative to introduce all-electric and hybrid garbage trucks into the City's fleet. *Id.* In furtherance of the CCAP, DOE awarded the City the Grant for, *inter alia*, the purchase of an electric refuse truck. *See* Dkt. No. 1-1 at 242-75, Grant.

2. The City and Defendant entered into the Contract, which required Defendant to bring any dispute thereunder to the City's Chief Procurement Officer for resolution.

Six months after the Grant was officially awarded, the City advertised the Specification for bid, requesting proposals for the sale of electric trucks to the City's Department of Fleet and Facility Management and "all necessary labor, materials, parts, accessories, assemblies, and/or components" necessary to repair the electric trucks. Dkt. No. 1-1 at 131, Contract, § 6.1. The City selected Defendant's bid, pursuant to 65 ILCS 5/8-10-3,[1] and the parties entered into the Contract

[1] Although initially advertised with a reverse auction, per Addendum No. 1 to the Contract, the City cancelled the reverse auction, instead requiring the submission of sealed bids. *See* Dkt. No. 1-1 at 28, Contract, Addendum No. 1, Change # 2.

for a term beginning on October 15, 2012 and ending on October 14, 2017. *Id*. at 27.

In addition to containing Defendant's performance obligations, the Contract required Defendant to bring any dispute it had under the Contract to the City's Chief Procurement Officer ("CPO"):

> **3.64. DISPUTES**
>
> Except as otherwise provided in this Contract, ***Contractor must*** and the City may ***bring any dispute arising under this Contract which is not resolved by the parties to the Chief Procurement Officer for decision based upon the written submissions of the parties***. (A copy of the "Regulations of the Department of Procurement Services for Resolution of Disputes between Contractors and the City of Chicago" is available in City Hall, 121 N. LaSalle Street, Room 301, Bid and Bond Room.) The Chief Procurement Officer will issue a written decision and send it to the Contractor by mail. The decision of the Chief Procurement Officer is final and binding. ***The sole and exclusive remedy to challenge the decision of the Chief Procurement Officer is judicial review by means of a common law writ of certiorari***.

Id. at 72, Contract, § 3.64 ("Disputes Clause").

Chapter 2-92 of the Municipal Code of Chicago ("MCC") establishes the City's Department of Procurement Services ("DPS"), headed by the CPO, who is charged by state law and municipal ordinance with entering into, and administering, contracts on behalf of the City. 65 ILCS 5/8-10-1, *et seq*. ("Act"); MCC § 2-92-010. DPS's Regulations for Resolution of Disputes Between Contractors and the City of Chicago ("Regulations"), are expressly referenced in the Disputes Clause, and were issued pursuant to the MCC and in accordance with the Act. *See* Regulations, attached as **Exhibit 1**.[2] The Regulations empower the CPO to:

> (a) adopt, promulgate and from time to time revise rules and regulations for the proper conduct of his office . . . (e) enforce written specifications describing standards established by [the Act].

Ex. 1 at § 1.1.

[2] The Regulations are also publicly available at: https://www.chicago.gov/content/dam/city/depts/dol/rulesandregs/Dispute%20Rules.pdf.

The Regulations define "Contract Dispute" or "Dispute" as "***any disagreement*** between a Contractor and the City as to ***a question of fact*** or the ***meaning or applicability of any term or provision*** of a Contract, or ***the extent of compensation due*** under a Contract." *Id.* at § 2 (emphasis added). Under the Regulations, the CPO "may consider issues of fact or interpretation of Contract language in order to render a final decision regarding the disputed matter." *Id.* at § 3.1. The Regulations also state that the CPO's "final decision regarding the Dispute shall be conclusive, final and binding on all Parties." *Id.* at § 4.

The Regulations provide the procedures that Defendant was required to follow to bring its Dispute, which include, *inter alia*, procedures for initiating the request, *id.* at § 3.1, notice and effect, *id.* at § 3.2, response by other parties, *id.* at § 3.3, means of resolution, *id.* at § 3.6, request for and notice of hearing, *id.* at § 3.7, conduct at hearings, *id.* at § 3.8, the CPO's final decision, *id.* at § 3.9, and appeal rights, *id*. at § 4. The Regulations required Defendant to bring a dispute "no later than 120 days after the expiration of the Contract[,]" *id*. at § 3.2, which was February 12, 2018.[3]

3. The Contract does not obligate the City to purchase any set quantity of electric trucks from Defendant or to collect or monitor data.

Under the Contract, the City had no obligation to purchase any set number of electric trucks from Defendant:

> Any quantities of specified vehicles or equipment shown on the Proposal Page(s) are estimates for the initial contract term and are for bid canvassing purposes only. The City reserves the right to increase or decrease quantities ordered under this contract. Nothing herein will be construed as an intent on the part of the City to purchase any vehicles or equipment other than those determined by the Department of Fleet and Facility Management to be necessary to meet their current needs.
>
> The City will be obligated to order and pay for only such quantities as are from time to time ordered on purchase order releases issued directly by the Department of Fleet and Facility Management, delivered and accepted.

[3] Defendant does not allege that it has brought a Dispute to the CPO.

Dkt. No. 1-1 at 73, Contract, § 4.5. The Contract did not contain any provision that obligated the City to subject garbage trucks to data collection, monitoring, or reporting. *Id.*at 30-242, Contract.

4. The Contract does not give Defendant the right to enforce the terms of the Grant against the City.

The Contract required Defendant to adhere to the terms of the Grant, and incorporated those terms only to the extent that they benefited the City:

> **3.58 COMPLIANCE WITH TERMS OF GRANT**
>
> Notwithstanding anything in this [Contract] to the contrary, Contractor is subject to and must conform with all of the terms and conditions of the Grant Agreement as required by the Grant Agreement, which is attached as Exhibit Two to this [Contract] and incorporated by reference as if fully set forth here. In the event of any conflict or inconsistency between the terms set forth in this [Contract] and the terms set forth in the Grant Agreement, the terms and provisions in the Grant Agreement take precedence over the terms and provisions in this [Contract], ***except to the extent that this [Contract] contains provisions more favorable to the City***, State of Illinois or Federal government ***or onerous to Contractor.*** Contractor must not by action or omission cause the City to be in breach of the Grant Agreement.

Dkt. No. 1-1 at 69, Contract, § 3.58 (emphasis added).

5. The City sued Defendant and Defendant filed its Counterclaim for breach of contract.

On February 14, 2019, the City filed its Complaint against Defendant for (I) breach of contract, (II) indemnity, and (III) breach of express warranty. Dkt. No. 1-1 at 2-24, Compl. On May 22, 2019, Defendant filed its Counterclaim for breach of contract. Dkt. No. 23 at 33-42, Countercl. Defendant's Counterclaim contains only one allegation of breach by the City, as follows:

> The City breached the Contract by failing to comply with the terms of the development project, including not purchasing five complete experimental garbage trucks for use in real-world conditions and not subjecting the trucks to the contemplated data collection, monitoring and reporting phases.

Id. at ¶ 44. Defendant does not define the term "development project" in its Counterclaim;

presumably, Defendant is referring to the Grant, which it alleges was incorporated into the Contract by the Contract's terms. *See id*. at ¶¶ 17-19.

LEGAL STANDARD

A Rule 12(b)(6) motion challenges the sufficiency of the complaint to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6); *Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). When considering a Rule 12(b)(6) motion to dismiss, the court accepts as true all well-pled allegations, construing all such allegations in the light most favorable to the plaintiff, and drawing all reasonable inferences in favor of the plaintiff. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008).

To survive a motion to dismiss for failure to state a claim, the complaint "must describe the claim in sufficient detail to give the defendant fair notice of what the claim is and the grounds on which it rests" and "its allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level[.]'" *Id.* at 1084. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Rather, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Ashcroft,* 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). For a claim to be plausible, the plaintiff must put forth enough "facts to raise a reasonable expectation that discovery will reveal evidence" that support its allegations. *Brooks v. Ross,* 578 F.3d 574, 581 (7th Cir. 2009). The Counterclaim should be read as a whole to determine its plausibility. *See Atkins v. City of Chicago,* 631 F. 3d 823, 832 (7th Cir. 2011).

ARGUMENT

I. Defendant's Counterclaim fails to state a claim for breach of contract.

To state a claim for breach of contract under Illinois law, Defendant's Counterclaim is required to allege that: 1) a valid and enforceable contract existed between Defendant and the City; 2) the City breached that contract; 3) Defendant performed its obligations under the contract; and 4) Defendant was injured as a result of the City's breach. *Hess v. Kanoski & Assoc.*, 668 F.3d 446, 452 (7th Cir. 2012) (quoting *Henderson-Smith & Assoc., Inc. v. Nahamani Family Serv. Ctr., Inc.*, 752 N.E.2d 33, 43 (2003)). It is axiomatic that "[a]n essential allegation of a complaint based upon a breach of contract is that the plaintiff performed all contractual conditions required of him." *Redfield v. Cont'l Cas. Corp.*, 818 F.2d 596, 610 (7th Cir. 1987). Defendant, however, wholly fails to allege that it performed any (let alone all) of its obligations under the Contract.[4] *See* Dkt. No. 23 at 33-42, Countercl. Because Defendant failed to plead an essential element of its claim, its Counterclaim should be dismissed pursuant to Rule 12(b)(6). *See Redfield v. Cont'l Casualty Corp.*, 818 F.2d 596, 610 (7th Cir. 1987).

II. The Counterclaim should be dismissed because Defendant waived its right to bring a breach of contract claim against the City.

This Court also should dismiss the Counterclaim because Defendant waived its right to bring a breach of contract claim against the City. In addition, Defendant failed to follow the contractually agreed upon administrative dispute resolution procedures, which required Defendant to bring its Counterclaim to the CPO within 120 days of the expiration of the Contract. *See, e.g., My Baps Constr. Corp. v. City of Chicago*, 87 N.E.3d 987 (Ill. App. Ct., 1st Dist. 2017) ; Docket No. 1-1 at 72, Contract, § 3.64; Ex. 1. Indeed, by filing its Counterclaim, Defendant attempted

[4] Based on statements Defendant has already made in the course of this litigation, it is unlikely that Defendant can make this allegation.

"the proverbial 'end-run' around the [dispute resolution] process to which it is contractually bound." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor*, 194 F.R.D. 618, 623 (N.D. Ill. 2000).

As stated above, Defendant does not allege that it performed its obligations under the Contract, which would necessarily include its obligations under the Disputes Clause. For this reason alone, the Counterclaim should be dismissed. *See Lombardi v. Bd. of Trs. Hinsdale School Dist. 86*, 463 F. Supp. 2d 867, 872 (N.D. Ill. 2006) (finding that a party's failure to exhaust, "or, at the very least, fail[ing] to properly plead that the grievance procedures were followed and exhausted" is fatal to a breach of contract claim); *see also Premier Elec. Constr. Co. v. City of Chicago*, 512 N.E.2d 44, 47 (Ill. App. Ct., 1st Dist. 1987) (upholding dismissal of breach of contract counts of plaintiff's complaint for, among other things, "fail[ure] to sufficiently allege plaintiff's performance of all contractual conditions required of it[.]"). Because Defendant failed to plead that it fulfilled its obligations under the Disputes Clause, the Counterclaim should be dismissed.

Even if, *arguendo*, Defendant had generally pled that it performed its obligations under the Contract, the Counterclaim would still require dismissal. In *My Baps*, the contractor sought judicial review by common law *writ of certiorari* of a final determination by the CPO on a dispute about compensation arising under its contracts with the City, and it added two counts for breach of those City contracts. *My Baps*, 87 N.E.3d at ¶ 1. On appeal, the trial court's decision to grant the City's motion to dismiss the breach of contract counts for failure to state a claim was affirmed. *Id*. at ¶ 76. The appellate court found that in entering into its contracts with the City, which contained provisions that were materially the same as the Disputes Provision, the contractor

"knowingly, voluntarily, or intentionally waive[d] its right to pursue a breach of contract action against the City." *Id*. at ¶ 73. The same result is required here.

The Contract, which Defendant admits it agreed to, *see* Dkt. No. 23 at 37, Countercl. ¶ 17, included the Disputes Clause, which required Defendant to bring its Counterclaim to the CPO for a written decision and "specifically limited the resolution of any disagreement with the CPO's decision to 'judicial review by a common law writ of *certiorari*.'" *My Baps*, 87 N.E.3d at ¶ 70; *see also* Dkt. No. 1-1 at 72, Contract, § 3.64. By entering into the Contract, Defendant thus waived its right to bring a breach of contract action in this Court. *My Baps*, 87 N.E.3d at ¶ 73.[5]

This Court can dismiss the Counterclaim immediately. The Court can consider the terms of the Contract as part of Defendant's pleading because the Contract was incorporated by reference into Defendant's Counterclaim, s*ee* Dkt. 23 at ¶ 17; the Contract is thus part of the pleading for all purposes, *see* Fed. R. Civ. P. 10(c), and its unambiguous terms control over any contradictory allegations in the Counterclaim. *Graue Mill Dev. Corp v. Colonial Bank & Trust Co. of Chi.*, 927 F.2d 988, 991 (7th Cir. 1991) (quoting *Foshee v. Daoust Const. Co.*, 185 F.2d 23, 25 (7th Cir. 1950)). The Contract negates any allegations in the Counterclaim that Defendant is entitled to bring a breach of contract action; therefore, the Court is not required to credit those allegations. *Graue Mill Dev. Corp.*, 927 F.2d at 991 (citing *Bell v. Lane*, 657 F. Supp. 815, 817 (N.D. Ill. 1987)).

By the express terms of the Contract, Defendant waived its right to bring a breach of contract action against the City. *My Baps*, 87 N.E.3d at ¶ 125. Therefore, Defendant's Counterclaim should be dismissed with prejudice for failure to state a claim pursuant to Rule 12(b)(6).

[5] In fact, by failing to bring its dispute to the CPO within 120 days, Defendant waived its opportunity to bring it claims. *See* Ex. 1 at § 3.2; *see also My Baps*, 87 N.E.3d at ¶ 125.

III. The Counterclaim should be dismissed because the Contract did not obligate the City to purchase any set number of garbage trucks or give the Defendant the right to enforce the terms of the Grant.

In its Counterclaim, Defendant does not cite to any term of the Contract that the City allegedly breached by not purchasing five garbage trucks and not subjecting the trucks to the data collection, monitoring, and reporting. Dkt. No. 23 at 33-42, Countercl. This is because nothing in the Contract obligated the City to purchase any set quantity of trucks or to conduct data collection or reporting. Rather, by its express terms, the Contract was a "depends upon requirements" or "DUR" Contract, which means that "[a]ny quantities of specified vehicles . . . shown on the Proposal Page(s) are estimates" and that the City "reserved the right to increase or decrease quantities ordered" under the Contract. Dkt. No. 1-1 at 73, Contract, § 4.5.[6] The Contract expressly states that nothing in the Contract "will be construed as an intent on the part of the City to purchase any vehicles or equipment other than those determined by the Department of Fleet and Facility Management to be necessary to meet their current needs." *Id.* Finally, the Contract is clear that City is not obligated to pay Defendant for any garbage trucks that it did not order, receive delivery of, and accept. *Id.*

Instead of alleging that the City breached the Contract, Defendant alleges that the City breached a duty that it purportedly owed to Defendant under the Grant. Defendant's convoluted allegation is that the terms of the Grant were incorporated into the Contract, Dkt. No. 23 at 37, Countercl. ¶ 17, that the Grant documents "control and take precedence over any conflicting term or provision of the Contract[,]" *id.* at ¶ 19, and that the City breached the Contract by not adhering to the terms of the Grant, *id.* at ¶ 44. Specifically, Defendant alleges that the City breached the

[6] In addition to being reflected in Section 4.5 of the Contract, the DUR nature of the Contract is expressly indicated on the Contract Summary Sheet, Dkt. No. 1-1 at 30 and its "Proposal Acceptance By City" section, *id.* at 241, Contract, § 15.5.

terms of the Grant, by "not purchasing five complete experimental garbage trucks for use in real-word conditions and not subjecting the trucks to the contemplated data collection, monitoring and reporting phases." *Id*. at ¶ 44.

Defendant's attempt to enforce the terms of the Grant against the City, however, is based on a misstatement of Section 3.58 of the Contract. While Defendant broadly alleges that the Contract states that, as a general matter, the terms of the Grant "control and take precedence over any conflicting term or provision of the Contract[,]" *see id.*, that is not what the Contract actually says. Rather, Section 3.58 of the Contract only obligates Defendant, not the City, to follow the terms and conditions of the Grant. Dkt. No. 1-1 at 69, Contract, § 3.58 ("Contractor is subject to and must conform with all of the terms and conditions of the Grant Agreement . . ."). Moreover, Section 3.58 expressly states that the terms of the Grant control over the Contract, "except to the extent that [the Contract] contains provisions more favorable to the City . . . or onerous to [Defendant]." *Id*. The Contract is thus unambiguous: 1) it does not impose any obligations on the City to comply with the terms the Grant for the Defendant's benefit; and 2) it takes precedence over the Grant where the Contract's terms are more favorable to the City. *Id*.[7]

To state a claim for breach of contract, Defendant is required to allege that the City breached "a specific duty imposed by the contract other than the covenant of good faith and fair dealing." *City of Rockford v. Mallinckrodt ARD, Inc.*, 360 F. Supp. 3d 730, 768 (N.D. Ill. 2019) (citations omitted) (emphasis omitted). Here, the only duty that the Defendant alleges that the City

[7] Moreover, in addition to not creating any obligations for City, Section 3.58 only applies "in the event of a conflict or inconsistency" between the Contract and the Grant. *Id*. The Counterclaim does not identify any such inconsistency, presumably because no such inconsistency exists. *See* Dkt. No. 23 at 33-42, Countercl. This pleading failure is yet another fatal blow to the Counterclaim, requiring its dismissal pursuant to Section 12(b)(6).

breached is a purported duty imposed by the Contract to comply with the terms of Grant, Dkt. 23, Countercl. ¶ 44. However, the Contract simply does not create that duty.

The Court should not accept allegations in the Counterclaim that are negated by the Contract. *Graue Mill Dev. Corp.*, 927 F.2d at 991 (citing *Bell*, 657 F. Supp. at 817). Rather, "[w]here the allegations of a pleading are inconsistent with the terms of a written contract attached as an exhibit, the terms of the latter, fairly construed, must prevail over the averments differing therefrom." *Graue Mill Dev. Corp.*, 927 F.2d at 991 (quoting *Foshee*, 185 F.2d at 25). Because Defendant does not, and cannot, allege that the City breached a duty imposed by the Contract, its Counterclaim should be dismissed with prejudice pursuant to Rule 12(b)(6).

CONCLUSION

WHEREFORE, for all of these reasons, the City respectfully requests that the Court grant the City's Motion and dismiss Defendant's Counterclaim, with prejudice, for failure to state a claim pursuant to Rule 12(b)(6), and for such further relief as this Court deems proper.

Dated: June 12, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on June 12, 2019, I caused a copy of the forgoing **City of Chicago's Motion to Dismiss Counterclaim** to be filed with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants:

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