UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART, DISMISSED FOR LACK OF JURISDICTION IN PART:
July 1, 2014

CBCA 3423

QWEST COMMUNICATIONS COMPANY, LLC,[1]

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Thomas O. Mason and Christopher J. Kimball of Cooley LLP, Washington, DC, counsel for Appellant.

Dalton Phillips and Elyssa Tanenbaum, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **STEEL**.

DANIELS, Board Judge.

Qwest Communications Company, LLC (Qwest) claims entitlement to payments for rental of space in a building it owns and for electricity provided to that space. The General

[1] Qwest Communications Company, LLC changed its name to CenturyLink Communications, LLC, on April 1, 2014. Appellant has requested that the Board continue to refer to it as "Qwest Communications Company, LLC" in this appeal.

Services Administration (GSA), respondent, acknowledges that it owes this money, but questions its liability for interest. We resolve the interest matters in favor of Qwest.

In a first amended complaint, Qwest seeks reimbursement for the costs it allegedly incurred in having its personnel pursue the payments to which GSA now agrees. We do not have jurisdiction to consider this matter, since it was not raised in the claim which was presented to the contracting officer.

Background

On November 21, 2008, GSA entered into a contract with Dulles-Wilder Court, LP (DWC), in which the agency agreed to lease space in a building owned by DWC in Sterling, Virginia. The contract covered a five-year period which was later specified as beginning on November 22, 2008. Rent was to be paid at the rate of $1,250,000 annually (or $104,166.70 per month in arrears). (The rate was adjusted slightly at various times.) The cost of electricity provided to the space was also to be payable by the agency.

On December 18, 2009, DWC transferred ownership of the building to Qwest. These two parties and GSA signed a novation agreement dated December 24, 2009. Under this agreement, Qwest assumed all obligations and liabilities of DWC, and GSA recognized Qwest as DWC's successor in interest, with "all rights, titles, and interests of [DWC] in and to the contract arising on or after the date of the transfer." The agreement also provided that "[t]he Government shall, as soon after the date of this Agreement as reasonably possible, make all payments and reimbursements under the contract to [Qwest] and shall deliver all notices pursuant to the contract to [Qwest]."

After executing the novation agreement, Qwest began invoicing GSA, on a monthly basis, for rent and electricity charges pursuant to the terms of the contract. At no point did GSA object to or reject any of the invoices it received from Qwest. GSA did not make any of the invoiced payments to Qwest; however, it did make some rental payments to DWC, and DWC remitted virtually all of those payments to Qwest.

Representatives of Qwest and GSA signed a supplemental lease agreement (SLA) dated March 4, 2011, "to reflect the change of ownership of the leased premises."

By letter dated November 9, 2012, Qwest sent to the GSA contracting officer a certified claim for $1,001,190.30, plus Prompt Payment Act interest on that amount, "for amounts invoiced to, but unpaid by, [GSA] for rent and utility charges under [the contract]." The contracting officer received the claim and told Qwest, "we'll evaluate and respond in

accord with the lease." The contracting officer never issued a decision, however, and on June 18, 2013, Qwest appealed from the deemed denial of the claim.

Discussion

The parties have filed cross-motions for summary relief. In these motions, they agree that GSA owes Qwest $970,085.78 – $766,036.74 for rent and $204,049.04 for electricity charges. The parties also agree that GSA owes Qwest interest pursuant to the Prompt Payment Act, 31 U.S.C. §§ 3901-3907 (2012) (PPA), on the rental amount, and interest pursuant to the PPA and the Contract Disputes Act, 41 U.S.C. §§ 7109 (CDA), on the amount for electricity charges. The parties disagree, however, as to three issues:

1. Does the agency owe interest pursuant to the CDA on the rental amount?

2. Should the PPA interest on the electricity charges amount run from the date of the novation agreement or the date of the SLA which reflected the change in ownership of the building?

3. Does the Board have jurisdiction over the claim for the cost Qwest says it incurred due to its personnel attempting to have GSA remit payments which were due under the contract?

We resolve each of these matters below.

CDA interest. The CDA provides, "Interest on an amount found due a contractor on a claim shall be paid to the contractor for the period beginning with the date the contracting officer receives the contractor's claim . . . until the date of payment of the claim." 41 U.S.C. § 7109(a)(1). GSA asserts that it need not pay interest under this statute because the agency has never disputed Qwest's entitlement to payment of the rental amount; rather, it has merely been delinquent in paying the rent. As Qwest points out, this argument makes little sense. GSA did not make payment in response to Qwest's invoices, and a dispute ensued by virtue of the contractor submitting a claim and the claim having been deemed denied. In any event, GSA has still not made payment for the amount it acknowledges to be due. The plain application of the statute is that CDA interest is due on the claim, from the date the contracting officer received the claim until the date the agency makes payment.

PPA interest. The PPA requires that "an agency acquiring property or services from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due." 31 U.S.C. § 3902(a). The "required payment date" is

"30 days after a proper invoice for the amount due is received," since "a specific payment date is not established by [this] contract." *Id.* § 3903(a)(1)(B). GSA maintains that for two reasons, PPA interest should not begin to accrue until the date of the SLA which reflected a change in ownership of the building: first, because the earlier novation agreement did not amend the contract, and second, because the agency did not have information necessary to allow it to pay Qwest directly, such as the number of the contractor's bank account, until the SLA was signed. Again, as Qwest contends, this argument is unconvincing. In the novation agreement, GSA promised that "[t]he Government shall, as soon after the date of this Agreement as reasonably possible, make all payments and reimbursements under the contract to [Qwest]." It strains credulity to believe that fifteen months later -- the time taken to write the supplemental agreement – was "as soon . . . as reasonably possible." We hold GSA to its promise by requiring it to make PPA interest payments on all now-uncontested invoices submitted by Qwest after the novation agreement was signed.

Claim for personnel costs. An action brought under the Contract Disputes Act . . . must be "based on the same claim previously presented to and denied by the contracting officer." *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003) (quoting *Cerberonics, Inc. v. United States*, 13 Cl. Ct. 415, 417 (1987)). It must arise from the same operative facts and claim essentially the same relief. *Id.*; *see also EHR Doctors, Inc. v. Social Security Administration*, CBCA 3522 (June 11, 2014); *Ketchikan Indian Community v. Department of Health & Human Services*, CBCA 1053-ISDA, et al., 13 BCA ¶ 35,436, at 173,808. If the claim differs in its essential nature or basic operative facts from the original claim, it cannot have been considered by the contracting officer in his decision. Without a decision on the claim, the Board does not have the jurisdictional prerequisite to consider the matter. *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 10-2 BCA ¶ 34,479, at 170,056-57, *reconsideration denied*, 10-2 BCA ¶ 34,498.

The claim presented to the contracting officer was for amounts due for rent and electricity charges. It did not include any amount for costs of employees' time. Qwest notes that the claim says that in an effort to secure payment, the company had "made countless communications . . . to . . . the GSA Contracting Officer responsible for contract administration of the Lease." This observation does not suffice, however, to bring the demand for personnel costs within the original claim. To determine whether GSA is obligated to reimburse Qwest for the costs, which are alleged to be $17,540.38, we would have to examine the documentation the company has presented in support of the claim, and the reasonableness of the costs. These are not the same operative facts which underlie the original claim for rent and electricity charges; the amount alleged is separate from the amount asserted for rent and electricity. The contracting officer has not had an opportunity to review this matter. Thus, the Board does not have jurisdiction to consider it.

Decision

The appeal is **GRANTED IN PART** and **DISMISSED FOR LACK OF JURISDICTION IN PART**.

GSA shall pay to Qwest $970,085.78 – $766,036.74 for rent and $204,049.04 for electricity charges – plus Prompt Payment Act and Contract Disputes Act interest on that amount. PPA interest shall accrue from the date of submission of proper invoices following the date of the novation agreement. CDA interest shall accrue from the date the contracting officer received the claim until the date of payment.

The Board does not have jurisdiction over the assertion in Qwest's first amended complaint that the agency also owes $17,540.38 to compensate the company for costs it incurred in having its personnel attempt to secure the awarded amount.

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STEPHEN M. DANIELS
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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CANDIDA S. STEEL
Board Judge