UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED:
August 7, 2019

CBCA 5997, 6464

SBC ARCHWAY HELENA, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Diana Parks Curran and Hadeel N. Masseoud of Curran Legal Services Group, Inc., Johns Creek, GA, counsel for Appellant.

Justin S. Hawkins, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before **VERGILIO**, **KULLBERG**, and **CHADWICK**.

VERGILIO, Board Judge.

The lessor, SBC Archway Helena, LLC, presented a contracting officer of the General Services Administration (agency) with what it styled as three claims (an initial and two revisions), each alleging it was entitled to relief because of agency-caused delay in issuing a notice to proceed. The lessor filed an appeal involving the first and third claims, but not the second. More than ninety days have elapsed since the lessor received the denial of its second claim. The agency moves to dismiss the two appeals, as it maintains that because the lessor did not appeal the decision on the second claim it is now precluded from prevailing at the Board on the first claim and on the third claim. The lessor opposes the motion.

The contractor timely filed an appeal of the decision denying the first claim. The second and third claims arise from the same operative facts, and although not identical to the first, represent the same basic claim. The revisions to the original claim do not constitute new claims, such that the Board does not attribute finality to the decision of the contracting officer on claim two. The Board denies the agency's motion.

Background

Under a contract with the agency, SBC Archway Helena, LLC (lessor) was to build and lease space to the Government. The lessor would receive rental payments after occupancy, but not payments before that time. The lessor asserts that the agency delayed issuing a notice to proceed, which resulted in damages the lessor incurred or anticipated as a result of the delay, that would not be compensated through the rental payments.

Claim 1. In claim one, the lessor alleged 289 days of Government-caused delay and sought $276,871.95 for what are categorized as (1) direct incurred costs during the period of delay (when no rent was received) with various subcategories of costs (local property taxes, operating costs, construction loan interest, return on capital costs, costs incurred as a result of inefficiencies and delays, and legal fees), and (2) an operating cost increase due to an increase in the tenant improvement budget. In January 2018, the lessor filed an appeal (CBCA 5997) of a contracting officer's denial.

Claim 2. In August 2018, the lessor submitted to the contracting officer what it styled as a revised claim seeking $349,714.31, based upon a shortened period of alleged delay (277 days). The revision included two new sub-categories of costs (one for insurance seeking $2534 and one for "mortgage" seeking $34,162) and adjusted some calculations. The contracting officer denied the claim in August 2018. The lessor did not file an appeal with the Board and has not filed an action at the Court of Federal Claims. More than ninety days, but fewer than twelve months, have elapsed since the lessor received the denial.

Claim 3. In March 2019, more than ninety days after receipt of the denial of the revised claim, the lessor submitted to the contracting officer what it styled as a second revised claim, seeking $395,474.58 (also based upon 277 days of delay). This was the same as claim two, except for additional legal fees and a new sub-category of costs (seeking $26,090 based upon a change in the consumer price index). The lessor filed an appeal (CBCA 6464) based upon a deemed denial.

Discussion

In seeking to dismiss the two appeals, the agency maintains that the contracting officer's decision denying claim two, which can no longer be appealed to this Board, precludes the lessor from prevailing on claims one and three. Citing 41 U.S.C. § 7103(g) (2018), on the finality of an contracting officer's decision if no appeal is taken, the agency argues that the decision on claim two is final and conclusive here, such that the lessor's appeals must be dismissed. The agency views as immaterial the lessor's assertions that claim two is not a new claim from claim one, and that claim three is not a new claim from claim one, as the agency maintains that the simple failure to appeal the denial of claim two to this Board divests the Board of jurisdiction over each appeal.

A contractor may not file an appeal at a Board more than ninety days after receipt of a contracting officer's decision, or revive a claim that is final and conclusive. *Bass Transportation Services, LLC v. Department of Veterans Affairs*, CBCA 4995, 16-1 BCA ¶ 36,464, at 177,688. But not every submission styled as a claim is a "new claim" (a term of legal significance for government contracts).

The test to determine if various requests actually constitute new claims is not absolute or rigid but requires analysis as directed in *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1005-06 (Fed. Cir. 2015) (citations omitted):

> Our longstanding demand that a claim adequately specify both the amount sought and the basis for the request implies that, at least for present purposes, we should treat requests as involving separate claims if they *either* request different remedies (whether monetary or non-monetary) *or* assert grounds that are materially different from each other factually or legally. . . . This approach, which has been applied in a practical way, serves the objective of giving the contracting officer an ample pre-suit opportunity to rule on a request, knowing at least the relief sought and what substantive issues are raised by the request.

The revised claims here do not constitute new claims, because they do not request different remedies or assert materially different grounds, factually or legally, for relief. Clearly a revised claim would never be identical to an original claim. Here there is a consistent remedy sought as well as underlying legal theory of relief, namely that the lessor seeks payment for what it describes as otherwise uncompensated costs that arose when the agency delayed issuing the notice to proceed. The lessor claims entitlement to its increased costs of performance that were not calculated in the rental payments. In ruling on claim one, the contracting officer knew the basic relief sought and the substantive issues. The information provided in claims two and three added few specifics in terms of support, and

did not dictate a different analysis by the contracting officer. The variation in the type and dollar value of relief sought occurs within categories and in new subcategories of costs, such that the basic operative facts in claims two and three are akin to claim one.

The variations in the revised claims are minor refinements of and additions to the contractor's description of costs it seeks. They are not materially different from the other subcategories of costs, and even the dollar values and required proof for the new subcategories are not disproportional to the original claim. *See Walker Development & Trading Group Inc. v. Department of Veterans Affairs*, CBCA 5907, 18-1 BCA ¶ 37,065 (while complaint expanded on factual and legal theories asserted in the claims, the allegations in the complaint arose from the same operative facts and were not materially different); *Cooper/Ports America, LLC*, ASBCA 61349, et al., 19-1 BCA ¶ 37,285 (nature of the claim remained the same when claim addressed misrepresentation in October and contractor wanted also to address misrepresentation in May when the same statements were made in each instance). An increase in the amount of relief sought does not, by itself, create a new claim. *E.g.*, *J.F. Shea Co. v. United States*, 4 Cl. Ct. 46, 54-55 (1983).

Materially different facts distinguish this case from the analysis and decision in a case relied upon by the agency, *JRS Management v. Department of Justice*, CBCA 3053, 13 BCA ¶ 35,235. There, the contractor failed to file a timely appeal of the initial claim and could not later file an appeal of a decision on a second claim which arose from the same operative facts. Here, the contractor timely filed an appeal of claim one. Claim two, not being a new claim, did not create finality for either claim one or claim three.

Because the lessor timely filed an appeal of the decision on claim one, the Board possesses jurisdiction over the two docketed appeals. The second appeal is superfluous and could be treated as a proposed amended complaint in the first appeal, but that is not how the contractor has proceeded.

Decision

The Board **DENIES** the agency's motion to dismiss these appeals.

Joseph A. Vergilio

JOSEPH A. VERGILIO
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge