



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: August 26, 2016

CBCA 4377

SUFFOLK CONSTRUCTION COMPANY, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

James R. Newland, Jr., and Anthony J. LaPlaca of Seyfarth Shaw, LLP, Washington, DC, counsel for Appellant.

James F.H. Scott and Justin S. Hawkins, Office of General Counsel, General Services Administration, Washington, DC; and Nancy E. O'Connell and Meaghan Q. LeClerc, Office of Regional Counsel, General Services Administration, Boston, MA, counsel for Respondent.

Before Board Judges **SOMERS**, **WALTERS**, and **ZISCHKAU**.

ZISCHKAU, Board Judge.

On December 5, 2014, the Court of Federal Claims (COFC) issued an order transferring to the Board an action filed at the COFC on April 25, 2014, by Suffolk Construction Company, Inc. (Suffolk), challenging a General Services Administration (GSA) contracting officer's final decision. *Suffolk Construction Co. v. United States*, No. 12-350C (Fed. Cl. Dec. 5, 2014) (transfer order). GSA at the time concurred in the transfer. The transferred action was docketed at the Board as CBCA 4377 and consolidated with six other appeals Suffolk had previously filed with the Board relating to different claims but involving

the same contract. GSA recently filed a motion to dismiss CBCA 4377, asserting that the Board lacks jurisdiction over the appeal because Suffolk did not initiate its action at the COFC within ninety days of receipt of the contracting officer's final decision. For the reasons stated below, we deny GSA's motion to dismiss.

Background

In 2001, Suffolk and GSA entered into contract no. GS01P05BZC3010 (the contract) for the renovation of the John W. McCormack Building, a twenty-two story "historic art deco structure" located in Boston, Massachusetts. Complaint ¶¶ 10, 31; Answer ¶¶ 10, 31. This firm-fixed-price contract was awarded for \$136,153,445 and had a period of performance from October 1, 2006, to April 16, 2009. Complaint ¶ 34; Answer ¶ 34.

Under the contract, Suffolk was to renovate the building with an emphasis on "environmental sustainability and historic preservation." Complaint ¶ 32; Answer ¶ 32. Suffolk renovated the building's existing entrances, lobbies, stairways, fixtures, libraries, and courtrooms. Complaint ¶ 35. Suffolk also abated hazardous materials, modernized elevator systems, refurbished finishes, accommodated new tenant spaces, and removed existing mechanical and electrical systems. *Id.* ¶ 36.

Suffolk's Appeals to the Board

Following the completion of the contract, Suffolk submitted a number of claims to GSA's contracting officer (CO) for the contract and appealed six of the CO's final decisions to the Board.

On January 25, 2012, Suffolk submitted its first claim to the CO. Complaint ¶ 16; Answer ¶ 16. The claim sought to recover \$3,167,997 for "additional costs incurred [by Suffolk] while performing out-of-scope work." Complaint ¶ 16. The CO issued a final decision rejecting Suffolk's claim in full. *Id.* ¶ 17; Answer ¶ 17. Suffolk appealed the CO's final decision to the Board, and the appeal was docketed as CBCA 2954 (General Conditions Claim). Suffolk subsequently reduced the amount it is seeking under the General Conditions Claim to \$2,966,229.

Suffolk submitted a second claim to the CO on April 23, 2012. Complaint ¶ 19; Answer ¶ 19. This claim requested \$1,050,957 for additional costs incurred by Suffolk "on account of GSA's directive to perform post-completion remedial and reconstruction work" on the building to repair damage caused by a major rainstorm. Complaint ¶ 19. The CO's final decision denied Suffolk's claim, and Suffolk appealed the final decision to the Board. *Id.* ¶ 20; Answer ¶ 20. The appeal was docketed as CBCA 2955 (Cistern Leak Claim).

Suffolk subsequently reduced the amount it is seeking under the Cistern Leak Claim to \$1,008,638.

On May 31, 2012, Suffolk submitted a claim to the CO requesting \$5,724,126 in additional compensation for one of Suffolk's subcontractors, N.B. Kenney Company, Inc. Complaint ¶ 11; Answer ¶ 11. This claim was denied in full by CO final decision. Complaint ¶ 12; Answer ¶ 12. Suffolk appealed the CO's final decision to the Board, and the appeal was docketed as CBCA 2953 (Kenney Claim). Suffolk subsequently submitted a revised claim to the CO, reducing the amount it was seeking to \$5,128,960. Complaint ¶ 13. The CO issued a final decision rejecting the revised claim in full, and Suffolk appealed the final decision to the Board. *Id.* ¶ 14. The Board docketed Suffolk's appeal as CBCA 5006 (Revised Kenney Claim).

Suffolk submitted a claim for additional compensation of \$8,214,471 on behalf of another one of its subcontractors, City Lights Electric Company, Inc., on April 30, 2013. Complaint ¶ 22; Answer ¶ 22. The CO issued a final decision denying this claim, and Suffolk appealed the CO's final decision to the Board, which docketed the case as CBCA 3596 (City Lights Claim).

On May 7, 2014, Suffolk submitted a claim seeking to recover \$3,020,421 for proposed change orders (PCOs), as GSA had allegedly issued "both additive and deductive change orders" to Suffolk. Complaint ¶ 28; Answer ¶ 28. The CO's final decision rejected Suffolk's claim in full. Complaint ¶ 29; Answer ¶ 29. Suffolk appealed the CO's final decision, and its appeal was docketed at the Board on October 1, 2014, as CBCA 4175 (Second PCO Claim).

The Board consolidated the General Conditions Claim, Cistern Leak Claim, Kenney Claim, Revised Kenney Claim, City Lights Claim, and Second PCO Claim on October 3, 2014.

The First PCO Claim Submitted to the COFC

On February 13, 2013, Suffolk submitted a claim seeking to recover \$3,064,133 for additive and deductive PCOs allegedly ordered by GSA (First PCO Claim). Complaint ¶ 25; Answer ¶ 25. This claim is distinct from the Second PCO Claim that is the subject of the appeal in CBCA 4175. The First PCO Claim used "the narrative portion of the General Conditions [] Claim," which Suffolk submitted to GSA in January 2012. Appellant's Memorandum in Opposition to Motion to Dismiss, Exhibit 1 at 1. On April 26, 2013, the CO issued a final decision. *Id.* at 3-4. Just under one year later, on April 25, 2014, Suffolk

challenged the CO's final decision by filing an action at the COFC. Complaint ¶ 26; Answer ¶ 26.

On December 4, 2014, Suffolk filed an unopposed motion with the COFC to transfer to the Board the COFC case involving the First PCO Claim. In its motion, Suffolk requested that the claim be transferred to the Board pursuant to 41 U.S.C. § 7107(d) (2012), so that the claim could be consolidated with Suffolk's six other appeals pending at the Board. Suffolk explained that the appeals presently before the Board arose under the same contract. Suffolk further explained that its General Conditions Claim "relies in part on additional work [Suffolk] alleges was ordered by [GSA]" and that the Second PCO Claim involved the "same types of additional work" as the First PCO Claim. GSA notes that the First PCO Claim is separate and distinct from Suffolk's other six claims that were pending at the Board. Motion to Dismiss at 5.

On December 5, 2014, the COFC issued an order granting Suffolk's unopposed motion to transfer its claim to the Board "for good cause shown." Two weeks later, Suffolk's First PCO Claim was docketed as CBCA 4377 and consolidated with Suffolk's six other appeals pending before the Board.

On July 6, 2016, GSA filed a motion to dismiss CBCA 4377. In its motion, GSA concedes that "[Suffolk] did appeal to [the] COFC within that tribunal's appeal period" and "concur[red] that transfer to this Board is proper." Motion to Dismiss at 1, 4. GSA, however, asserts that the Board lacks subject matter jurisdiction over CBCA 4377 because Suffolk did not appeal the CO's final decision to the Board within ninety days of receipt of the CO's final decision. *Id.* at 2-5. GSA further states that the COFC's transfer order did not "revive this Board's organic power to render judgment." *Id.* at 1.

Suffolk filed a memorandum in opposition to GSA's motion to dismiss, arguing that the Board has "no authority to overturn a COFC order transferring or consolidating cases," and, alternatively, that the transfer order vested the Board with derivative jurisdiction. Memorandum in Opposition at 5-9.

Discussion

GSA moves to dismiss CBCA 4377, involving Suffolk's First PCO Claim, on the ground that Suffolk brought suit in the COFC challenging the CO's final decision beyond the Contracts Disputes Act's (CDA's) ninety-day limitation for timely appeals to the Board. Motion to Dismiss at 2-6; *see* 41 U.S.C. § 7104(a). Suffolk and GSA agree that Suffolk timely brought an action on the CO's final decision to the COFC and that the COFC properly

transferred the case to the Board pursuant to 41 U.S.C. § 7107(d).¹ Motion to Dismiss at 1, 4; Memorandum in Opposition at 4-6. GSA contends that the “COFC’s transfer does not automatically imbue the Board, as the transferee tribunal, with subject matter jurisdiction.” Motion to Dismiss at 6.

A contractor may appeal a CO’s final decision to an agency board within ninety days of receipt of the final decision. 41 U.S.C. § 7104(a). Alternatively, a contractor may bring an action directly on the claim in the COFC within twelve months from the date of receipt of the final decision. *Id.* § 7104(b). Where, as here, a contractor initiates an appeal at an agency board and later files an action at the COFC relating to an independent claim, the court may order the transfer or consolidation of the appeals. The CDA provides:

If 2 or more actions arising from one contract are filed in the [COFC] and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the [COFC] may order the consolidation of the actions in that court or transfer any actions to or among the agency boards involved.

41 U.S.C. § 7107(d). The COFC has broad discretion over transferring an action to the Board, and the COFC can decline to transfer an action if the COFC determines that the action is not sufficiently related to an appeal before an agency board. *See Joseph Morton Co. v. United States*, 757 F.2d 1273, 1280 (Fed. Cir. 1985); *Nova Group/Tutor-Saliba v. United States*, No. 15-885C, 2016 WL 4009886, at *3 (Fed. Cl. July 22, 2016).

The Court of Appeals for the Federal Circuit has distinguished the deadlines that the CDA imposes on a contractor for timely appeals to an agency board from the COFC’s authority to transfer a timely action to such a board. In *Glenn v. United States*, the Federal Circuit vacated a decision by the COFC’s predecessor, the United States Claims Court, that denied the transfer of an action to the Armed Services Board of Contract Appeals, stating:

¹ In its brief, GSA seems to assert that the claims are not sufficiently interrelated to justify the COFC’s transfer to the Board. Motion to Dismiss at 5-6. If GSA wanted to oppose the transfer of the First PCO Claim from the COFC to the Board, GSA needed to raise its argument with the COFC. GSA, however, never opposed the transfer of the First PCO Claim, and the Board lacks the authority to review the propriety of an order from the COFC transferring a claim to the Board. *See Technical Services, GmbH*, ASBCA 44457, 96-2 BCA ¶ 28,338, at 141,511 (“We cannot address the merits of that objection inasmuch as we are not authorized to review the propriety of the Court’s order. . . . Objections on that basis must be addressed to, and resolved by, the Court.”); *see* 41 U.S.C. § 7107(d) (“*the [COFC] may order the . . . transfer [of] any actions to . . . the agency boards involved*” (emphasis added)).

We disagree with the Claims Court’s view that a transfer here would “distort the appeal procedure” “erected in the Contract Disputes Act.” Section 609(d) [now codified at 41 U.S.C. § 7107(d)] applies broadly to all suits in the Claims Court and agency boards. The Claims Court’s reasoning would without authority read a 90 day limit into that section – that is, no case could be transferred to and consolidated before the board (whatever the circumstances) if the contractor had appealed to the Claims Court more than 90 days after receiving notice of the CO’s decision. In our view, section 609(d) is not so limited

858 F.2d 1577, 1581 (Fed. Cir. 1988).

Accordingly, the COFC’s authority to transfer actions to agency boards under 41 U.S.C. § 7107(d) is not limited to only those actions filed with the COFC within ninety days of receipt of the CO’s final decision. *Id.*; see also *Southwest Marine, Inc. v. United States*, 680 F. Supp. 327, 329 (N.D. Cal. 1988) (“Section [7107(d)] does not require that a suit be filed in court within ninety days in order to be transferable.”); *Logics, Inc.*, ASBCA 46914, *et al.*, 01-2 BCA ¶ 31,482, at 155,419 (“our jurisdiction in a transfer case is predicated on timely suit rather than a notice of appeal”). Indeed, the COFC has transferred actions to agency boards even when the action was filed in excess of ninety days from the receipt of the CO’s final decision. See, e.g., *CH2M Hill Hanford Group, Inc. v. United States*, 82 Fed. Cl. 139, 143 (2008) (transferring to an agency board an action filed with the COFC more than four months after receipt of the CO’s final decision); *Blount, Inc. v. United States*, 15 Cl. Ct. 146, 147 (1988) (transferring to an agency board an action filed with the Claims Court almost one year after receipt of the CO’s final decision).

In the present case, GSA confuses the CDA’s requirement for initiating a timely Board appeal with the COFC’s authority to transfer an action to the Board.² Suffolk’s failure

² The Federal Circuit reserved ruling on whether the filing deadlines in the Contract Disputes Act are jurisdictional, but noted that the Supreme Court “has repeatedly emphasized that ‘filing deadlines ordinarily are not jurisdictional.’” *Guardian Angels Medical Service Dogs, Inc. v. United States*, 809 F.3d 1244, 1252-53 (Fed. Cir. 2016) (quoting *Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817, 819 (2013)). The COFC recently declined to transfer an action to an agency board because the action at the COFC was an “entirely separate claim, based upon different occurrences, at a different time, seeking different relief” and the “uncertainty surrounding whether the CDA’s 90-day and 12-month filing deadlines are jurisdictional.” *Nova Group/Tutor-Saliba*, 2016 WL 4009886, at *3-4; see *Coburn Contractors, LLC v. Department of Veterans Affairs*, CBCA 5033, 15-1 BCA ¶ 36,177; *Estes Brothers Construction, Inc. v. Department of Transportation*, CBCA 4963, 15-1 BCA ¶ 36,166.

to bring an action in the COFC on the First PCO Claim within ninety days of receipt of the CO's final decision does not divest the Board of jurisdiction over the First PCO Claim. *See PAE GmbH Planning & Construction, ASBCA 39749, et al.*, 92-2 BCA ¶ 24,920, at 124,256 ("It is black letter law that an adverse decision timely appealed to the [COFC] should be transferred to an appeals board for consideration with any other appeals for the same contract pending before that tribunal." (citing *Glenn*)). Simply because Suffolk challenged the CO's final decision in the COFC just under a year after receipt of the final decision does not prevent the Board from exercising jurisdiction over the First PCO Claim. *See Glenn*, 858 F.2d at 1581.

Thus, the Board has jurisdiction over the First PCO Claim, as Suffolk timely brought an action on the claim in the COFC, and the COFC, on the basis of an unopposed motion supported by good cause, transferred the action to the Board pursuant to 41 U.S.C. § 7107(d).

Decision

GSA's motion to dismiss CBCA 4377 is **DENIED**.

JONATHAN D. ZISCHKAU
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

RICHARD C. WALTERS
Board Judge