



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 6689 DISMISSED FOR LACK OF JURISDICTION;
CBCA 6784 DENIED: November 12, 2020

CBCA 6689, 6784

MIAMI-DADE AVIATION DEPARTMENT,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Altanese Phenelus, Assistant County Attorney, Aviation Division, Miami-Dade County Attorney's Office, Miami, FL, counsel for Appellant.

James F. H. Scott, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **SULLIVAN**, and **CHADWICK**.

SULLIVAN, Board Judge.

The Miami-Dade Aviation Department (MDAD) twice appealed the denial of its claim for underpayment of rent for space occupied by federal agency tenants under a lease with the General Services Administration (GSA). MDAD alleged that, in 2011, one agency vacated less space than GSA indicated in its notice of termination and, therefore, MDAD is owed rent for the space that remained occupied between 2012 and 2017. The Board dismisses for lack of jurisdiction MDAD's first appeal, docketed as CBCA 6689, which was of the contracting officer's decision on an uncertified claim. The Board cannot review the second claim, docketed as 6784, because MDAD submitted it more than six years after the claim accrued

and, thus, the claim is barred by the six-year statute of limitations in the Contract Disputes Act (CDA). 41 U.S.C. § 7103(a)(4) (2018). We grant GSA's motion for summary judgment and deny MDAD's second appeal.

Background

I. Relevant Contract Terms

In August 2005, GSA executed a lease for office space to be occupied by three federal agency tenants, including the Food and Drug Administration (FDA), near the Miami International Airport. Exhibit 1 at 1.¹ GSA leased from MDAD 56,597 rentable square feet in exchange for the payment of annual rent of more than \$1 million. *Id.* (paragraph 3). The lease also stated the amount of space that each of the three federal agencies would occupy, including 14,103 rentable square feet by FDA. *Id.*

GSA had the right to measure the square footage to ensure that all of the space offered was delivered by the lessor:

5. Rental is subject to the Government's measurement of plans submitted by the Lessor or a mutual on-site measurement of the space and will be based on the rate, per [Building Owners and Managers Association (BOMA)] useable square foot (PUSF) as noted in paragraph 3 above, in accordance with Clause 26 (PAYMENT), GSA form 3517, General Clauses. The lease contract and the amount of rent will be adjusted accordingly, but not to exceed the maximum BOMA useable square footage requested in Solicitation for Offers (SFO) [], Paragraph 1.1, (Amount and Type of Space). Rent for a lesser period shall be prorated.

Exhibit 1 at 2. The lease incorporated the terms of the solicitation for offers (SFO), which contained paragraph 26, clause 552.270-20 PAYMENT (SEP 1999) (VARIATION), which provided for measurement of the space at the beginning of the lease. *Id.* (SFO, General Clauses).

Paragraph 4 of the lease provided that, "except as provided for in paragraph 17," GSA could terminate the lease, in whole or in part, after five years with 120 days notice. Exhibit 1 at 1. Paragraph 17 of the lease further provided that GSA could terminate increments of

¹ "Exhibit X" refers to the exhibits submitted by the parties in support of their briefs and joint statement of facts, unless otherwise noted.

10,578 rentable square feet of space at any time after the first twelve months of the lease. *Id.* at 3.

The lease also contained a Disputes clause, FAR 52.233-1, which required, in part, that “[a] claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within [six] years after accrual of the claim to the Contracting Officer for a written decision.” Exhibit 1 (SFO, General Clauses).

II. Events Leading To Dispute

In November 2011, GSA notified MDAD that the FDA would be vacating its portion of the space under lease; 10,578 rentable square feet would be vacated immediately and 3525 rentable square feet would be vacated the following March.² In March 2012, MDAD notified GSA that the amount of space vacated by FDA was less than the amount set forth in GSA’s notice. Notice of Appeal (CBCA 6784), Claim at 2, Exhibit C). Beginning in April 2012, MDAD invoiced GSA for 40,140 useable square feet, including the space that it believed was still occupied; GSA paid less than the amount invoiced, an amount calculated based upon 34,568 square feet. *Id.*, Claim at 2-3, Exhibit H.³

In August 2012, MDAD again emailed GSA to reiterate that the space vacated was less than GSA stated and reported that a representative of one of the tenant agencies had verified this information by conducting a walk-through of the space. Exhibit 11b. MDAD asked whether GSA wanted to conduct a walk-through of the space prior to executing a “supplemental agreement.” *Id.* In December 2014, the same tenant agency representative walked the space with MDAD and “confirmed that the space vacated by the FDA was the same as that indicated by MDAD since 2012.” Notice of Appeal (CBCA 6784), Claim at 2; Exhibit 16.

² With this partial termination, the rentable square feet under the lease was 42,494 (56,597 - 14,103). MDAD alleged in its claim that GSA’s notice was defective because GSA did not provide the required 120-day notice. With its notice, GSA properly partially terminated the lease for 10,578 square feet immediately, as permitted by lease paragraph 17, and terminated another 3525 square feet after 120 days, as permitted by lease paragraph 4.

³ The lease states the space under lease in both rentable and useable square feet, with the useable square feet as the smaller amount. While the parties used both terms and figures in the course of the lease, the use of one figure over another is not material to the dispute.

In October 2013, the parties executed lease amendment 2, with which the parties sought to “increase 42,494 rentable square feet (34,548 ANSI/BOMA office area square feet) to 44,310 rentable square feet (36,318 ANSI/BOMA office area square feet)” and increase the annual rent amount. Exhibit 3 at 1-2. Thereafter, the parties executed a series of lease amendments, which increased the annual rent and/or extended the lease term, but the rentable square footage remained the same. Exhibit 4 at 2 (SLA 3); Exhibit 5 (SLA 4); Exhibit 6 (SLA 5); Exhibit 7(SLA 6). Despite these amendments, MDAD continued to invoice GSA for amounts greater than GSA paid in rent. Notice of Appeal (February 2020 Claim, Exhibit H).

Before executing lease amendments 5 and 6 in March 2016, MDAD sent a letter to the contracting officer, putting GSA on notice that the square footage amount set forth in those proposed lease amendments was in dispute and reserving its rights to seek unpaid rent. Exhibit 18 at 1. The contracting officer acknowledged the reservation with his signature on MDAD’s notice, *id.*, and the parties executed lease amendments 5 and 6.

In September 2017, the parties executed lease amendment 8, in which the useable square feet figure was changed to 40,141, and the annual rent was set at \$999,709.49, for the period March 1, 2017, through February 28, 2019. Exhibit 9. According to MDAD, this lease amendment resolved the discrepancy in the space under lease and the amount MDAD invoiced GSA for rent matched the amount that GSA paid. Notice of Appeal (Feb. 2020 Claim at 3).

In June 2019, MDAD submitted an uncertified claim to the contracting officer for the difference between what it invoiced versus what GSA paid in rent from April 2012 through February 2017. The contracting officer issued a decision in August 2019, which MDAD received in September 2019 and appealed on December 19, 2019 (docketed as CBCA 6689). Counsel for the parties, having identified the jurisdictional defect in the appeal, sought a stay of the Board’s consideration of that appeal while MDAD submitted a properly certified claim to the contracting officer on February 27, 2020. Order (Jan. 9, 2020). On March 31, the contracting officer issued a decision denying the certified claim and MDAD filed its second appeal on April 6, 2020 (docketed as CBCA 6784).

Discussion

I. The Board Lacks Jurisdiction In CBCA 6689

MDAD first appealed the contracting officer’s decision on its uncertified claim to the Board. “The contracting officer’s decision on an uncertified claim is a nullity and may not serve as a basis for Board jurisdiction.” *Hillcrest Aircraft Co. v. Department of Agriculture*,

CBCA 2233, 11-1 BCA ¶ 34678 (citing *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1552-53 (Fed. Cir. 1993)); *Whiteriver Construction, Inc. v. Department of the Interior*, CBCA 2045, 10-2 BCA ¶ 34,582; 41 U.S.C. § 7103(b)(1), (f)(2)). Although GSA has not moved to dismiss this appeal, both parties acknowledged this jurisdictional defect in proceedings before the Board and the Board sua sponte dismisses CBCA 6689 for lack of jurisdiction.

II. The Six-Year Statute of Limitations Forecloses the Board’s Review of MDAD’s Second Claim

The issue presented by GSA’s motion is when did MDAD’s claim accrue? GSA asserts that MDAD’s claims prior to the execution of lease amendment 2 are barred by the six-year statute of limitations contained in the Contract Disputes Act (CDA). We agree. However, we also find that, because MDAD’s claim accrued prior to February 27, 2014, the Board’s consideration of MDAD’s entire claim is barred by the statute of limitations.⁴

Pursuant to the CDA and the lease at issue, “[e]ach claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within 6 years after accrual of the claim.” 41 U.S.C. § 7103(a)(4); *see* 48 CFR 33.206(a) (“Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period.”). “Whether and when a claim has accrued is determined according to the Federal Acquisition Regulation (FAR), the language of the contract, and the facts of the particular case.” *Electric Boat Corp. v. Secretary of the Navy*, 958 F.3d 1372, 1375 (Fed. Cir. 2020).

The FAR defines claim accrual as “the date when all events that fix the alleged liability on either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.” 48 CFR 33.201. “[O]nce a party is on notice that it has a potential claim, the limitations period begins to run.” *Thinkglobal, Inc. v. Department of Commerce*, CBCA 4410, 16-1 BCA ¶ 36,489 (quoting *Cardinal*

⁴ In its motion, GSA argues that the claims before lease amendment 2 are barred by the six-year statute of limitations and the claims for amounts after the lease amendment are barred by the terms of the lease amendment 2 and subsequent lease amendments. Respondent’s Motion at 9. Because the statute of limitations forecloses our review of MDAD’s entire claim, we do not reach this issue. However, we do address MDAD’s arguments in response to this argument as well as the statute of limitations argument. Appellant’s Opposition at 13-17.

Maintenance Service, Inc., ASBCA 56885, 11-1 BCA ¶ 34,616, at 170,610 (2010)). “Claim accrual does not depend on the degree of detail provided. . . . It is enough that the [party] knows, or has reason to know, that some costs have been incurred, even if the amount is not finalized or a fuller analysis will follow.” *Raytheon Co., Space & Airborne Systems*, ASBCA 57801, et al., 13 BCA ¶ 35,319, at 173,377.

“A party’s failure to submit a claim within six years of accrual is an affirmative defense to the claim.” *Thinkglobal, Inc.* GSA asserts statute of limitations as a defense to MDAD’s claim, thus it bears the burden of proving MDAD’s claim is untimely. *Id.*

The legal basis for MDAD’s claim is that federal tenants continued to occupy space in its building after GSA partially terminated its lease, space for which MDAD asserts it was owed rent. Beginning in April 2012, MDAD invoiced GSA but did not receive payment for this additional space. These facts, asserted in MDAD’s claim, establish that MDAD knew the basis for its claim and suffered some injury more than six years prior to the submission of its February 2020 claim. On this basis, GSA has established that MDAD’s claim was untimely.

Lease Measurement Provision Does Not Establish a Pre-Claim Procedure. MDAD urges the Board to consider the contract provisions regarding measurement of the space and find that GSA’s failure to comply with these provisions was a “mandatory pre-claim procedure” that precluded the filing of a claim and precluded the running of the statute of limitations. Opposition at 10 (citing *Kellogg Brown & Root Services Inc. v. Murphy*, 823 F.3d 622, 628 (Fed. Cir. 2016)). According to MDAD, GSA was obligated to measure the space at MDAD’s request following the partial termination and the six-year statute of limitations could not run until GSA measured the space (through a tenant agency representative) in December 2014.

The measurement provision allows GSA to measure the space at the beginning of a lease term to confirm that the lessor has been provided all the space offered in response to the solicitation of offers. The measurement provision incorporates a second provision (provision number 27) of the SFO which discusses drawings provided by the lessor in response to the solicitation and grants the contracting officer the right to decide whether to measure the space. This interpretation is logical since the lessor is a position to know the space occupied in its building; GSA needs the right to measure to confirm. Nothing in the terms of the measurement provision suggests that GSA had an obligation to measure the space or that the measurement of the space was a necessary pre-condition to MDAD’s ability to file a claim. Moreover, MDAD was able to invoice GSA beginning in April 2012 for the difference in the rent; MDAD did not need GSA to measure the space to determine the additional amount that it believed it was owed as a result of the continued use of the space.

MDAD's Claim is Not a Continuing Claim. MDAD also suggests that its claim is a continuing claim and its claims within six years of the February 2020 claim survive. Opposition at 10 (citing *JBG/Federal Center LLC v. General Services Administration*, CBCA 5506, 18-1 BCA ¶ 37,087). “Where a claim is based upon a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongly withheld in breach of the contract.” *Id.* (quoting *Oceanic Steamship Co. v. United States*, 165 Ct. Cl. 217, 225 (1964)). The continuing claim doctrine does not assist MDAD in overcoming the statute of limitations. MDAD's claim arose when federal tenants continued to occupy greater space. Unlike in *JBG*, where the government's obligation to pay taxes did not arise until the lessor presented a paid tax bill, here the space did not change from 2012 and was reiterated in the bilateral amendment in 2013. While GSA had an obligation to pay rent monthly, in arrears, the space for which MDAD invoiced GSA was fixed when the federal tenant failed to vacate all of the space identified in the notice of termination.

No Basis for Equitable Tolling. MDAD also asserts that the six-year limitation should be equitably tolled because it had to wait for GSA to measure the space. Opposition at 12. To establish a basis for equitable tolling, MDAD must establish that “(1) it has been pursuing its rights diligently, and (2) that some extraordinary circumstances” prevented the timely filing of its claim. *Pegasus Enterprises, LP v. General Services Administration*, CBCA 5420, 19-1 BCA ¶ 37,459 (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). As already discussed, GSA was not required to measure the space before MDAD could submit its claim. MDAD has offered no other explanation as to why it could not submit a timely claim; thus, there is no basis on which to equitably toll the statute of limitations.

Reservation of Rights Cannot Toll Statute of Limitations. In response to GSA's arguments regarding the binding effect of lease amendments, MDAD provides evidence of its reservation of rights prior to the execution of lease amendments 5 and 6. While this reservation may have precluded the enforcement of the terms of bilateral lease amendments 5 and 6 had MDAD filed a timely claim, it does not toll the six-year statute of limitations.

No Basis for Equitable Estoppel. MDAD also asserts that GSA should be equitably estopped from asserting the statute of limitations as a bar to its claims because it refused to measure the space, despite MDAD's requests that it do so, and it “unilaterally inserted” square footage figures into the bilateral lease amendments executed by the parties. Appellant's Opposition at 17. MDAD has failed to show the “affirmative misconduct” on the part of GSA, necessary for GSA to be estopped. *MLJ Brookside, LLC v. General Services Administration*, CBCA 4963, 15-1 BCA ¶ 36,166. GSA was not obligated to measure the space. Moreover, GSA's insertion of square footage amounts to which MDAD

registered an objection prior to execution of lease amendments 5 and 6 does not demonstrate “affirmative misconduct.”

MDAD Did Not Assert Mistake in its Claim. MDAD also asserts for the first time that it made a unilateral mistake in “its reading of the square footage and rent in the SLAs.” Appellant’s Opposition at 16. Each “claim” brought under the CDA must be submitted in writing to the contracting officer, with adequate notice of the basis for the claim. *Strawberry Hill, LLC v. General Services Administration*, CBCA 5149, 16-1 BCA ¶ 36,561 (citing *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987)). An action brought under the CDA “must be ‘based on the same claim previously presented to and denied by the contracting officer.’” *Qwest Communications Co. v. General Services Administration*, CBCA 3423, 14-1 BCA ¶ 35,655 (citing *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003)). “It must arise from the same operative facts and claim essentially the same relief.” *Id.*; see *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3522, 14-1 BCA ¶ 35,630. MDAD did not allege unilateral mistake nor assert the facts necessary to establish this defense in its claim to the CO. Thus, the Board lacks jurisdiction over such a claim and it cannot be the basis for a defense to GSA’s motion.

Decision

CBCA 6689 is **DISMISSED FOR LACK OF JURISDICTION**. GSA’s motion for summary judgment in CBCA 6784 is granted and the appeal is **DENIED**.

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

We concur:

Joseph A. Vergilio

JOSEPH A. VERGILIO
Board Judge

Kyle Chadwick

KYLE CHADWICK
Board Judge