Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

MOTION TO DISMISS GRANTED IN PART: August 1, 2002

GSBCA 15822, 15844

MIDWEST PROPERTIES, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Donald L. Cox of Lynch, Cox, Gilman & Mahan, P.S.C., Louisville, KY, counsel for Appellant.

David M. Smith, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **HYATT**, and **GOODMAN**.

HYATT, Board Judge.

These consolidated appeals challenge the termination for default of a build-to-suit lease awarded by respondent, the General Services Administration (GSA), to appellant, Midwest Properties, LLC, for the construction of a facility in Chattanooga, Tennessee, to be occupied by the Immigration and Naturalization Service (INS), and the subsequent assessment of $125,000 in liquidated damages under the same lease. In its consolidated complaint, appellant asserts that GSA wrongfully terminated the lease and imposed liquidated damages (Counts I and III), and seeks reinstatement of the lease and damages in excess of $375,000 (Count I) or, in the alternative, damages exceeding the amount of $1,500,000 (Count II). Respondent has filed a motion to dismiss portions of these counts for lack of jurisdiction. For the reasons stated, we grant respondent's motion to dismiss the claims for reinstatement of the lease and for money damages. We deny respondent's motion to the extent it seeks dismissal of the appeal of the assessment of liquidated damages.

Background

On January 25, 2000, lease number GS-04B-40024, for the rental of 3851 usable square feet of office and related space, to be constructed on a designated parcel of land in Chattanooga, Tennessee, was awarded to Midwest Properties, LLC, of London, Kentucky. Appeal File, Exhibits 1-2.

On October 22, 2001, the GSA contracting officer terminated the lease for default. Appeal File, Exhibit 41. Appellant, asserting that the termination action was unjustified, requested a meeting to discuss its position with the Government. The Government asked appellant to identify specific items to be discussed in such a meeting. In a letter dated November 1, 2001, appellant provided a list of discussion topics. After considering appellant's proposed discussion topics, rather than convene a meeting, the contracting officer, in a letter dated December 19, 2001, affirmed the Government's decision to terminate the lease for default. Id., Exhibits 42-44. Midwest's timely appeal of that decision is docketed as GSBCA 15822.

Subsequently, in a letter dated March 22, 2002, the contracting officer informed Midwest that, pursuant to the default clause in the lease, GSA was seeking $125,000 in liquidated damages for delay in delivery of the leased space for occupancy. The letter explained how the amount claimed was calculated and stated that the damages "are hereby due and payable to the Government within thirty days following the date this notice is received." Appeal File, Exhibit 45. Midwest's appeal of the assessment of liquidated damages is docketed as GSBCA 15844.

On April 30, 2002, the Board consolidated the two appeals. On May 3, 2002, appellant filed a consolidated complaint. In Count I of the complaint, appellant claims that GSA wrongfully terminated the lease, alleges that it is entitled to reinstatement of the lease, and seeks damages in excess of $325,000. Count II of the complaint alleges in the alternative that Midwest is entitled to damages in excess of $1.5 million. Count III challenges the assessment of liquidated damages.

Discussion

GSA has filed a motion to dismiss GSBCA 15822 in part and GSBCA 15844 in its entirety for lack of jurisdiction over (1) appellant's claims for monetary relief; (2) appellant's request for reinstatement of the lease; and (3) the appeal of the assessment of liquidated damages. In support of its motion GSA asserts that (1) the claims for monetary relief have not been presented to the contracting officer for decision as required by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (2000); (2) the Board has no authority to grant the remedy of specific performance; and (3) there has been no final decision issued by the contracting officer regarding the Government's claim for liquidated damages under the lease. GSA's position is that the only issue properly pending before the Board is the appellant's challenge to the decision to terminate the lease for default.

With respect to the claims for monetary damages, GSA points out that neither the claim for $325,000 nor the claim for $1.5 million have been certified and submitted to the contracting officer for decision as required by the CDA. 41 U.S.C. §§ 605-607. As such, the Board lacks jurisdiction to entertain these claims. See, e .g., Sprint Communications Co., L.P. v. General Services Administration, GSBCA 15139, 01-2 BCA ¶ 31,464; Maritime Equipment & Sales, Inc. v. General Services Administration, GSBCA 15266, 00-2 BCA ¶ 30,987. In responding to GSA's motion, Midwest concedes that these claims have not yet been submitted to the contracting officer for decision and that they are premature.

Likewise, GSA contends that Midwest's request for reinstatement of the lease must also be dismissed because the Board lacks authority to grant relief of this nature, which essentially seeks specific performance of the contract. See, e.g., Maritime Equipment; Western Aviation Maintenance, Inc. v. General Services Administration, GSBCA 14165, 98-2 BCA ¶ 29,816. Again, in responding to GSA's motion, Midwest agrees that the Board lacks jurisdiction to grant this relief.

Where the parties disagree is with respect to whether the Board has jurisdiction to entertain the appeal of GSA's assessment of liquidated damages. As respondent points out, the assessment of liquidated damages constitutes a Government claim, which must, like a contractor's claim, be the subject of a contracting officer's final decision before the contractor may take an appeal. 41 U.S.C. § 605(a)[1]; see, e.g., McDonnell Douglas Corp. v. United States, 754 F.2d 365, 370 (Fed. Cir. 1985); Paragon Energy Corp. v. United States, 645 F.2d 966, 971 (Ct. Cl. 1981); Johnson Controls World Services, Inc. v. United States, 43 Fed. Cl. 589, 592 (1999); Litton Systems, Inc. v. United States, 27 Fed. Cl. 306 (1992). GSA, without further explanation, contends that its letter to the contractor asserting entitlement to

[1] The CDA provides that "[a]ll claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. . . ." 41 U.S.C. § 605(a). The CDA further requires that "[t]he contracting officer . . . issue his decisions in writing, and . . . furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided . . . [under the CDA]. . . ." Id.

liquidated damages did not qualify as the requisite contracting officer "final decision" on a Government claim; Midwest argues that it did.

Because the CDA does not define the term "claim," any challenge to jurisdiction based on whether a claim has been asserted should be evaluated in terms of the regulations implementing the Act, the relevant contract language, and the facts of the case. E.g., Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995); J. & E. Salvage Co. v. United States, 37 Fed. Cl. 256, 261 (1997); Volmar Construction, Inc. v. United States, 32 Fed. Cl. 746, 751 (1995). The Federal Acquisition Regulation (FAR) defines "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. . . ." 48 CFR 33.201 (1998) (FAR 33.201). The Disputes clause of the lease also contains the definition set forth in the FAR. Appeal File, Exhibit 2 at 182.

Here, the Government has sent a letter to the contractor, unequivocally asserting entitlement to liquidated damages in the amount of $125,000 and demanding that the contractor remit that amount forthwith. The issue we are faced with is whether the contracting officer's letter is tantamount to a contracting officer decision within the meaning of the CDA so as to permit the contractor to take an appeal.

When the Government issues a written demand for payment, specifying the amount the Government asserts entitlement to and unequivocally informing the contractor that payment is now due, the requirements for a contracting officer decision are generally deemed to have been met such that the contractor may appeal. The Board has spoken to this issue previously, in the context of a Government claim consisting of deductions taken under a fixed price contract:

> A contracting officer issues a decision on a government claim for deduction when the contracting officer determines both liability and damages. . . . The decision is no less final because it fails to include "boilerplate language usually present for the protection of the contractor," i.e., notification of appeal rights.

Sprint Communications Co. v. General Services Administration, GSBCA 13182, 96-1 BCA ¶ 28,068 (1995). There, the Board held that a letter written to Sprint by the contracting officer, asserting entitlement to a deduction of $50,000 as consideration for "shortcomings in contract performance, followed by the withholding of that amount from an invoice submitted for services, served as a "final decision" on the Government claim sufficient to permit the contractor to bring an appeal. Id.; see also Hamilton Securities Advisory Services, Inc. v. United States, 43 Fed. Cl. 566 (1999); Volmar Construction; Outdoor Venture Corp., ASBCA 49756, 96-2 BCA ¶ 28,490.

GSA does not explicitly say so, but presumably its position is premised on the fact that the contracting officer's letter does not actually state that it is the contracting officer's "final decision." We recognize that there is at least one decision in which the failure to characterize a written communication as a "final decision" on the Government's claim was

a factor in determining that no "final decision" giving rise to CDA jurisdiction had been issued. Sharman Co. v. United States, 2 F.3d 1564 (Fed. Cir. 1993), overruled on other grounds, Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1578-79 & n.10 (Fed. Cir. 1995). In Sharman, however, the contracting officer asserted entitlement to a sum certain but then invited the contractor to submit a proposal for deferment of payment or disputing the Government's entitlement. Accordingly, the Court reasoned that the written communication relied upon by the contractor was simply a tentative determination of liability intended to trigger the negotiation process. Id. The decision, thus, did not turn on the failure to denote the letter a "final decision," but rather on the lack of finality of the contracting officer's letter.

In contrast, nothing in the contracting officer's letter to Midwest suggests that the contracting officer's assessment of $125,000 in liquidated damages is tentative or open to negotiation. There is no suggestion that Midwest might dispute the amount demanded by tendering a counterproposal or that the contracting officer might be willing to change his mind. The previous dealings of the parties in connection with the termination decision, in which the contracting officer determined it was unnecessary to meet and negotiate with Midwest, and instead simply reaffirmed his decision, would further support the conclusion that the letter assessing liquidated damages was in essence a final decision, ripe for appeal.

Decision

The Government's motion to dismiss is **GRANTED IN PART**, in accordance with the above discussion. The issues remaining before the Board are the challenge to the decision to terminate the lease for default and the appeal of the assessment of liquidated damages.

CATHERINE B. HYATT
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

ALLAN H. GOODMAN
Board Judge