



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF
JURISDICTION DENIED: April 11, 2012

CBCA 2618

ASP DENVER, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Neal J. Sweeney and Tyler P. Scarbrough of Kilpatrick Townsend & Stockton LLP, Atlanta, GA, counsel for Appellant.

Lori R. Shapiro, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

HYATT, Board Judge.

This appeal concerns the claim of appellant, ASP Denver, LLC (ASP), for reimbursement of real estate taxes in the amount of \$457,072.38 in connection with a lease of office and related space at the Stapleton Redevelopment Area in Denver, Colorado. Respondent, the General Services Administration (GSA), has filed a motion to dismiss the appeal for lack of subject matter jurisdiction. For the reasons stated, we deny the motion.

Background

On December 18, 2007, GSA entered into a lease agreement with Alex S. Palmer & Company under which that company was to design and construct a new office facility, annex, and secured parking garage, to be leased to GSA for occupancy by the Federal Bureau of Investigation (FBI).¹ The site for the facility was located in the Stapleton Redevelopment Area in Denver, Colorado. GSA occupied the facility and commenced rental payments on March 12, 2010. A certificate of occupancy was issued for the facility on April 26, 2010.

The Tax Escalation clause in the lease provided that GSA would reimburse ASP for real estate taxes paid over the amount established for base year taxes. Upon receipt of the bill for the 2010 real estate taxes, ASP contacted GSA and inquired whether GSA wanted to appeal the assessment on its own or through ASP, as provided under the lease. The matter was discussed with the contracting officer. ASP understood from its conversation with the contracting officer that it should pursue an appeal on GSA's behalf.² An appeal of the assessment was taken and is pending.

On April 29, 2011, ASP paid the 2010 real estate taxes due on the property and, on May 9, 2011, invoiced GSA for its share of the taxes paid. On August 10, 2011, ASP submitted a certified written claim to the contracting officer seeking the amount of \$457,072.38, the invoiced share of taxes that ASP maintains is owed by GSA. On October 19, 2011, the contracting officer denied the claim in its entirety and ASP timely appealed to the Board.

Discussion

GSA has filed a motion to dismiss this appeal for lack of jurisdiction on the ground that ASP's claim does not state a "sum certain." The Contract Disputes Act (CDA) requires

¹ Subsequently, the parties entered into the first supplemental lease agreement (SLA) amending the lease to reflect ASP as the lessor.

² GSA disputes this understanding, asserting that ASP undertook the appeal on its own, without being instructed or authorized to do so. This disagreement is not material to resolving the jurisdictional question raised by GSA. In addition, GSA maintains that, under the lease, a tax appeal requires an agreement between ASP and GSA identifying how the costs of the appeal and any tax savings are to be allocated and advises that there is no agreement of this nature. This issue also has no bearing on whether a sum certain has been stated by ASP.

that a contractor submit a written claim to the contracting officer for decision. 41 U.S.C.A. § 7103(a) (West Supp. 2011). Since the Act does not define the term “claim,” the definition that is set forth in Federal Acquisition Regulation (FAR) 2.201, 48 CFR 2.201 (2007), is relied on by tribunals. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc); *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1581-82 (Fed. Cir. 1992), cert. denied, 506 U.S. 953 (1992). FAR 2.201, in pertinent part, defines a 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.” No particular wording is required for a claim, but the demand must contain “a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.” *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987); *accord Whiteriver Construction, Inc. v. Department of the Interior*, CBCA 2349, 12-1 BCA ¶ 34,938; *Red Gold, Inc. v. Department of Agriculture*, CBCA 2259, 12-1 BCA ¶ 34,921 (2011).

To comply with the sum certain requirement for a valid claim, a fixed amount must be stated. *Red Gold, Inc.* (citing *G & R Service Co. v. General Services Administration*, CBCA 1876, 10-2 BCA ¶ 34,506 (a “not to exceed” amount is indefinite and does not qualify as a sum certain); *Sandoval Plumbing Repair, Inc.*, ASBCA 54640, 05-2 BCA ¶ 33,072 (modifying phrase like “no less than” does not satisfy the requirement to specify a sum certain)).

GSA asserts that, although ASP purports to seek a sum certain, the circumstances of this case dictate otherwise. In particular, GSA contends that the outstanding appeal of the tax assessment converts the claim amount to a “not to exceed” number because a successful appeal could result in a lesser amount actually being owed by GSA. GSA, citing *G & R Service Co.*, thus reasons that the Board lacks jurisdiction to hear the appeal.

GSA’s reliance on *G & R Service Co.* is misplaced. In that case, the claimant carved its claim into three parts and sought to recover amounts not to exceed, respectively, \$15,000, \$10,000, and \$10,000. Because the amounts claimed were rendered indefinite by the qualifying language in the claim, the Board held that a sum certain had not been stated and the Board therefore lacked jurisdiction over the appeal. Here, appellant seeks to recover the exact amount it has paid in taxes that are compensable under the lease. GSA’s argument that ASP may ultimately recover less than this amount if its appeal is unsuccessful raises a question of quantum, which must be resolved on the merits. *See Heritage of America, LLC v. Department of Veterans Affairs*, CBCA 1945, 12-1 BCA ¶ 34,888 (2011) (rejecting the argument that allegations supported by estimations, approximations, and guesswork, despite having figures assigned, failed the requirement to state a sum certain); *Computer Sciences Corp.*, ASBCA 56165, et al., 10-2 BCA ¶ 34,572; *MACH II*, ASBCA 56630, 10-1 BCA ¶ 34,357 (holding that the jurisdictional validity of a claim is determined at the time of

submission to the contracting officer and the accuracy of the sum certain amount claimed goes to the merits of the claim, not to its validity as a claim).

In short, ASP unequivocally identified the amount of \$457,072.38 in its submission to the contracting officer, providing the requisite notice of the amount claimed. There are no qualifying phrases used. The existence of an appeal of the tax assessment that could ultimately affect the amount of ASP's recovery does not de facto render the stated sum to be a "not to exceed" amount and does not deprive the Board of jurisdiction.

Decision

GSA's motion to dismiss for lack of jurisdiction is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

RICHARD C. WALTERS
Board Judge