UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 23, 2013

CBCA 2652, 2845

SUMMIT COMMERCE POINTE, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Bret S. Wacker, Richard A. Sundquist, and Andrew M. Mast of Clark Hill PLC, Washington, DC, counsel for Appellant.

Lesley M. Busch, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **HYATT**, and **SHERIDAN**.

STERN, Board Judge.

These appeals were filed by Summit Commerce Pointe, LLC (Summit or appellant) from the decisions of a contracting officer of the General Services Administration (GSA or respondent). The decisions terminated a portion of the lease between GSA and 1818 Australia Avenue LLC (AALLC) and denied damages for the termination. Subsequent to the termination, AALLC sold the building and attempted to assign the lease to Summit. Appellant claims that the termination was improper, and it seeks $3.8 million in damages. The parties filed cross-motions for summary relief and have extensively briefed the issues. Subsequent to the filing of these briefs, the Board, *sua sponte*, raised the issue of the Board's

jurisdiction over the appeals. The parties have now briefed that issue, which the Board addresses at this time.

Background

1. On May 1, 2008, GSA leased 14,380 square feet of office space in a building owned by AALLC in West Palm Beach, Florida. The lease term was for the period from May 1, 2008, to April 30, 2018. The lease provided for tenant occupancy by May 1, 2008. GSA leased the space on behalf of the Drug Enforcement Administration (DEA), which would become the actual occupant of the rented space.

2. The lease required that AALLC furnish certain materials and services for the build out (also called "tenant improvements") of the leased space, in accordance with plans and drawings provided by GSA. The lease provided specific requirements for the completion of certain work, including the doors, ceilings, floors, plumbing, HVAC (heating, ventilating, and air conditioning), electrical supply, and lighting.

3. The lease allowed for its termination by GSA, in whole or in part, at any time on or after May 1, 2013. However, the lease also provided for termination in the event of non-delivery of the leased premises:

> With respect to Lessor's obligation to deliver the premises substantially complete by the delivery date, time is of the essence. If the Lessor fails to work diligently to ensure its substantial completion by the delivery date or fails to substantially complete the work by such date, the Government may by notice to the Lessor terminate this lease.

Appeal File, Exhibit 1 at AF1-47 (Federal Acquisition Regulation (FAR) 552.270-18(a)).

4. In addition, a failure to perform any requirement of the lease which remained "uncured for a period of thirty days" gave GSA the right to terminate the lease for default. (FAR 552.270-22). Appeal File, Exhibit 1 at AF1-49.

5. Amendment one to the lease, dated January 27, 2009, provided for an increase in rental payments as a result of improvements by GSA to the leased space. The parties, in amendment one, also changed the earliest date upon which GSA could terminate the lease without cause from May 1, 2013, to December 1, 2013.

6. At a subsequent time GSA sought to rent additional space in appellant's building for the DEA. The parties executed supplemental agreement number 2 (mod 2) on

November 23, 2009, providing for the lease of an additional 12,221 square feet of space. The parties agreed that the "lease is amended effective upon acceptance of tenant improvements." Mod 2 deleted the paragraph in the base lease providing for a rental of 14,380 square feet of space, and in its place, inserted a provision for the rental of a "total of 26,601 rentable square feet" in appellant's building. The space rented was now described as block A (the original rented space) and block B (the added new space). Mod 2 provided for an increase in rental payments upon the acceptance of the tenant improvements. The lease did not establish a required occupancy date for block B.

7. Mod 2 also added the following termination provision: "The Government may terminate Block B of this lease, in whole or in part, at any time on or after five years after the date of occupancy date by giving the Lessor at least sixty (60) days notice in writing."

8. The GSA contracting officer, assigned to administer the construction of the tenant improvements, filed a declaration in support of "Respondent's Opposition to Appellant's Motion for Summary Relief." Declaration of Louise Long (July 17, 2012). The declaration sets forth certain facts regarding events pertaining to the financing of the tenant improvements. Appellant indicated no disagreement with any of the facts from that declaration that we set forth herein.

9. On September 13, 2010, the contracting officer sent an email message to AALLC asking for costs for certain added items of work. The message also stated, "I can not give you a Notice to Proceed on this project until we have a complete scope/costs/financing in place." Long Declaration, Exhibit 4.

10. On November 18, and December 17, 2010, GSA sent letters to AALLC requesting certain information, including a bank commitment of funds to complete the tenant improvements. Appeal File, Exhibits 6, 7. Because AALLC did not respond in writing to these letters, the contracting officer placed a telephone call to AALLC. As a result of items discussed in that call, as well as prior events, the contracting officer was concerned that AALLC would not be able to fund the tenant improvements. Long Declaration.

11. At a later time, the contracting officer suggested that GSA complete the required tenant improvements, other than the HVAC work, which the contracting officer believed that GSA had no authority to complete as it would involve a building capital improvement. Long Declaration, Exhibit 2.

12. As of January 18, 2011, GSA had not approved the final design plans for the tenant improvements. Long Declaration, Exhibits 1, 2.

13. In a meeting on May 26, 2011, AALLC was asked to provide information regarding the potential completion by AALLC of the HVAC work. Long Declaration. The contracting officer sent an email message to AALLC on June 1, 2011, asking for a time frame on getting a price on the HVAC project work and a loan commitment. Long Declaration, Exhibit 1.

14. GSA sent letters to AALLC during July 2011 requesting information regarding AALLC's ability to perform the project. On August 31, 2011, GSA issued a "Notice of Final Opportunity to Cure" to AALLC. In the notice, GSA required that AALLC submit to it information on HVAC costs and a funding commitment indicating AALLC's ability to complete the project.

15. On September 13, 2011, GSA issued a notice of default to AALLC. The portion of the lease that was added by mod 2, pertaining to the block B area, was terminated. AALLC was advised of its right to appeal to the Board or to the United States Court of Federal Claims.

16. On November 3, 2011, appellant, after purchase of the mortgage loan and foreclosure on the note, took legal title to the property. On November 10, 2011, GSA set forth certain terms that would have to be met prior to GSA amending the lease reflecting the new owner. One item required by GSA was a waiver by AALLC of all rights and claims under the lease. No such waiver by AALLC was made prior to the time of the appeal by appellant of the termination. On November 14, 2011, Summit notified GSA that it assumed and adopted the lease and that it agreed to be bound by its terms. On November 16, 2011, Summit wrote the contracting officer and requested a meeting to address concerns raised in the letter partially terminating the lease for default. The parties arranged to meet on December 7, 2011.

17. On November 22, 2011, AALLC and Summit executed an "Assignment of Leases" pursuant to which AALLC assigned the lease at issue in these appeals to Summit. The parties expressly agreed that AALLC was waiving all rights and claims against GSA under the lease, except that "*nothing in this Assignment shall waive Assignor or Assignee's rights or claims with respect to the Lessee's final decision to terminate"* the lease. (Emphasis in original.)

18. On December 6, 2011, Summit filed its first appeal with the Board. (Docket number CBCA 2652.) The meeting previously scheduled by the parties for December 7, 2011, was canceled by GSA.

19. GSA made no lease payments to appellant for any part of the premises until after it executed a novation agreement accepting appellant as the successor in interest on February 13, 2012. In the novation agreement, AALLC waived all rights and claims against the government and GSA acknowledged that the agreement did not affect the claim involved in the appeal before the Board. On May 4, 2012, GSA made its rent payments for December 2011 and January 2012, for that portion of the building that DEA still occupied (block A).

20. Summit filed a claim, dated March 23, 2012, with GSA requesting damages in the amount of $3,814,719.00 for the improper termination of the lease. The GSA denied that claim by decision dated May 22, 2012. Summit appealed that denial to the Board on May 25, 2012. (Docket number CBCA 2845.)

21. AALLC at no time filed an appeal to the Board.

Discussion

We first address whether the Board has jurisdiction over CBCA 2652. Summit contends that the execution of the novation agreement gave appellant standing to pursue the appeal and thereby waived any prohibitions against assignment of the lease. Summit argues that GSA breached the lease and the breach is ongoing. GSA argues that appellant does not have standing to appeal the termination since it was not a "contractor," as defined by the Contract Disputes Act (CDA), 41 U.S.C. § 7103 (Supp. IV 2011), at the time that the appeal was filed.

The Court of Appeals for the Federal Circuit has held that the CDA, 41 U.S.C. §§ 7101-7109, which gives the Board jurisdiction over this appeal, is a statute that must be strictly construed because it waives sovereign immunity. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982). A "contractor" may appeal a contracting officer's decision to the Board. 41 U.S.C. § 7104. A "contractor" is defined as "a party to a Federal Government contract other than the Federal Government." 41 U.S.C. § 7101. Thus, "those who are not in privity of contract with the government cannot avail themselves of the CDA's appeal provisions." *Winter v. Floorpro, Inc.*, 570 F.3d 1367, 1371 (Fed. Cir. 2009).

Here, GSA executed the lease with AALLC. Subsequent to the partial termination of the lease by GSA, AALLC sold the building and attempted to assign the lease and some rights of its claim to Summit. We must determine the validity of the assignment of those rights. If the assignment is not valid, Summit has no standing since it would not have privity of contract with GSA. Standing is determined at the time of commencement of an action. *Rothe Development Corp. v. Department of Defense*, 413 F.3d 1327, 1334 (Fed. Cir. 2005).

The Anti-Assignment Acts generally refer to two statutes. One statute at 41 U.S.C. § 6305 (2006) invalidates the transfer of a government contract:

> The party to whom the Federal Government gives a contract or order may not transfer the contract or order, or any interest in the contract or order, to another party. A purported transfer in violation of this subsection annuls the contract or order so far as the Federal Government is concerned, except that all rights of action for breach of contract are reserved to the Federal Government.

41 U.S.C. § 6305(a). The other statute declares null and void the attempted assignment of a claim against the United States Government. 31 U.S.C. § 3727 (2006).

The statutes serve the purpose of preventing individuals or companies from accumulating claims against the Government and of thereby requiring the Government to deal with persons or concerns other than the party the Government agreed to deal with. *Tuftco Corp. v. United States*, 614 F.2d 740 (Ct. Cl. 1980). Despite the bar created by these statutes, it has been held that the Government may recognize an assignment as valid, either directly or constructively, through its actions. The most direct recognition is through a novation agreement by which the Government expressly agrees to the substitution of another party to its contract. Constructive waivers of the Anti-Assignment Acts depend on the individual circumstances of each case. In *Tuftco*, the assignee made deliveries directly to the Government, which accepted the deliveries and paid the assignee for the deliveries, consistent with the assignment. The court found that the totality of the circumstances established the Government's recognition of the assignment. The case law establishes that the waiver of the Anti-Assignment Acts must be clear. In *Ham Investments, LLC v. United States*, 388 F. App'x 958 (Fed. Cir. 2010), where there was no showing that the Army clearly assented to an assignment, though it had offered to cooperate in the assignment, there was no waiver of the Anti-Assignments Acts. The court held that until the assent is manifest, the assignment is invalid. *See Westinghouse Electric Co. v. United States*, 56 Fed. Cl. 564 (2003). Without both knowledge and assent there can be no waiver of the protections of the statutes. *Insurance Co. of the West v. United States*, 100 Fed. Cl. 58 (2011).

In *Riviera Finance of Texas, Inc. v. United States*, 58 Fed. Cl. 528 (2003), the court found that since the Government knew of the assignment, modified the contract, and actually paid the assignee, it had recognized the assignment and became obligated to fulfill the terms of the contract with the assignee. However, in *CBI Services, Inc.*, ASBCA 34983, 88-1 BCA ¶ 20,430 (1987), the Armed Services Board of Contract Appeals found an attempted assignment of a claim invalid even though the Government had dealt with the assignee. The totality of all circumstances in *CBI* did not establish Government recognition of the assignment.

The cases are clear in demanding positive acts by the Government indicative of acceptance of the assignment. The Supreme Court carved out an exception to the prohibition against the assignment of a Government contract in a situation involving the transfer of a lease where "the lessor is not required to perform any service for the Government, and has nothing to do, in respect to the lease, except to receive, from time to time, the rent agreed to be paid." *Freedman's Savings and Trust Co. v. Sheppard*, 127 U.S. 494, 504-05 (1888). This ruling does not apply to the contemporary lease (like the one before us) involving a host of services and supplies to be furnished by the lessor. *Broadlake Partners*, GSBCA 10713, 92-1 BCA ¶ 24,699 (1991).

In addition, even if an assignment is valid, accrued causes of action do not automatically pass to an assignee. In a case involving an action for the back rent that had accrued prior to an assignment, the Court of Appeals for the Federal Circuit held that an action for that rent could only be brought by the assignor. The Court stated that the assignor could not be held to have transferred the back rent claim "unless he expressly so stated." *Ginsberg v. Austin*, 968 F.2d 1198, 1201 (Fed. Cir. 1992). The FAR attempts to avoid this problem by requiring that a novation agreement that is executed by a contracting officer agreeing to an assignment, ordinarily provide that the transferor (assignor) "waives all rights under the contract against the Government." 48 CFR 42.1204(h)(2).

Here, AALLC signed the lease with GSA. During the course of performance, GSA terminated part of the lease. The termination commenced the running of the ninety-day period under the CDA for AALLC, the contractor, to appeal the termination to the Board. Within that period, AALLC sold the building to Summit and, thereafter, executed an assignment of the lease to Summit reserving to itself any rights it had to pursue claims arising out of the termination by GSA. The assignment also attempted to transfer to Summit the right to pursue such an action against GSA. Subsequently, Summit appealed the termination. In order for Summit to have standing in this appeal, the claims must have been validly assigned to Summit and GSA must have accepted the assignment, constructively or expressly by agreement, at the time of the appeal.

As noted above, the assignment itself did not absolutely transfer to Summit all of AALLC's rights regarding the termination. The regulation permitting GSA to execute a novation agreement required a waiver by AALLC of all claims and rights it possessed against GSA. GSA informed Summit of this requirement. However, here, by the express language of the assignment, AALLC sought to retain its rights and claims against GSA with regard to the termination. Even if the assignment itself was not flawed, the facts demonstrate that GSA had not accepted the assignment at the time of appeal.

The only relevant interaction between GSA and Summit, subsequent to the assignment, was an agreement to meet and discuss the sale and assignment between AALLC and Summit. Prior to that meeting, this appeal was filed. The meeting was then canceled. Terms acceptable to GSA, previously transmitted to Summit, had not been fulfilled. There is simply no evidence in the record of a positive act by GSA indicating an acceptance of the assignment at the time of the appeal. The totality of the circumstances show no acceptance of the assignment. Summit was not a "contractor" within the meaning of that term as used in the CDA and was not in privity of contract with GSA. Summit had no standing to file the appeal.

Regarding CBCA 2845, since Summit had no standing to pursue the termination claim, it lacks standing to pursue a claim for damages arising from that termination.

Decision

The appeals are **DISMISSED FOR LACK OF JURISDICTION**.

JAMES L. STERN
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

PATRICIA J. SHERIDAN
Board Judge