



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR FAILURE TO STATE A CLAIM: November 22, 2016

CBCA 5149

STRAWBERRY HILL, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Robert K. Stewart, Jr. of Davis Wright Tremaine LLP, Anchorage, AK, counsel for Appellant.

Leonard E. Lucas III, Office of General Counsel, General Services Administration, Nashville, TN, counsel for Respondent.

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

SOMERS, Board Judge.

In this appeal, Strawberry Hill, LLC (appellant or lessor) seeks payment of annual rent under a lease amendment between it and the General Services Administration (GSA or the Government). Pending before the Board is GSA's motion to dismiss for failure to state a claim upon which relief may be granted. After reviewing GSA's motion, appellant's opposition thereto, the reply, the pleadings, and supplemental briefing requested by the Board on the issue of jurisdiction over the amended claim, we grant the motion to dismiss the appeal.

Background

GSA and the lessor entered into a lease on April 29, 2010, for 3202 rentable square feet of general office space and reserved surface parking spaces. Part III of the lease agreement, entitled “Award,” stated, in bold type, that “This document is not binding on the Government of the United States of America unless signed below by authorized contracting officer.” Supplemental lease agreement no. 1 provided the following:

Terms and Conditions: All prior terms and conditions of this Lease as expressly contained herein represent the total obligations of the Lessor and the Government. Any agreements, written or oral, between the parties prior to the execution of this agreement are not applicable or binding. This agreement may be amended only by written instrument executed by the Lessor and the Government.

In December 2014, GSA submitted to the lessor a request for additional office space for the National Oceanic and Atmospheric Administration (NOAA or tenant agency). At the time of the request, the lessor had one office suite that could be made available to satisfy GSA’s request for additional space. The lessor determined that it would be in the lessor’s financial interest to accommodate NOAA’s new space needs by “entering into a lease agreement with GSA.” Soon thereafter, the lessor began to negotiate with a GSA project manager on leasing two spaces, office suite 109 and apartment 411. The lessor took the apartment and the office space off the market and began to prepare the spaces for NOAA’s planned move-in date. The parties agreed that the lessor would amortize the February and March rent over the first twelve months of the lease period, i.e., from April 2015 to March 2016.

In April 2015, the project manager sent draft lease amendments to the leasing contracting officer (the contracting officer or CO) for review. On April 10, 2015, the contracting officer sent the lease amendments to the lessor for its signature. The lessor signed the lease amendments and returned them to the contracting officer.

Several days later, NOAA informed GSA that it had received an offer from the Alaska State Troopers (the other agency) to sublease to NOAA used space in the same building. On May 12, 2015, NOAA formally notified appellant’s project manager that it no longer needed the office space. Shortly thereafter, the contracting officer informed the lessor that the tenant agency no longer needed the office suite and that GSA would not be signing the lease amendment. Ultimately, GSA signed a supplemental lease agreement to add apartment 411 to the lease, but did not sign the supplemental lease agreement for suite 109.

By letter dated June 12, 2015, the lessor submitted a claim to the contracting officer. In that claim, the lessor requested “the first year annual rent as defined in the original [lease agreement] of \$51,457.69 as compensation for the time that the office suite was taken off the market and for various cost[s] incurred to prepare the Suite for GSA.” Appellant certified the claim. GSA’s contracting officer denied the claim on October 8, 2015, stating, in part:

After sending the [supplemental lease agreement] to [the lessor] for signature, GSA was notified that NOAA no longer had a requirement to expand their current GSA lease in Dutch Harbor. Accordingly, in May of 2015, the [CO] notified you that the office space was no longer needed for NOAA/GSA. At no time was the [supplemental lease agreement] signed by the [CO] for GSA. Therefore, a binding lease was never entered into between you and GSA for the space in question.

GSA never directed [that] you “prepare the suite” for occupancy nor did GSA direct that you “take” the apartment and office space off the market. You took these actions unilaterally, hoping or anticipating entering into a lease with GSA, but without GSA’s direction or concurrence.

Appellant timely filed its notice of appeal on January 12, 2016. In this notice of appeal, appellant now asserts the following:

The original certified Assertion of Claim sought damages in the amount of \$51,457.69 for only the first year of the fixed four year term of Lease Amendment No. 7 as it relates to Suite 109. The claim was limited in an initial effort to compromise with the GSA. Because it is now less than certain that Strawberry Hill will be able to mitigate, it has amended its claim for damages to include all 4 years of the lease amendment for Suite 109 in the total amount of \$190,990.59, plus miscellaneous costs incurred in preparing Suite 109 for occupancy.

Appellant did not submit this “amended” claim for damages to the contracting officer. However, appellant submitted what it identifies as an amended certification of the claim to the contracting officer, which it attached as one of its exhibits to the notice of appeal in support of this “amended” claim.

Discussion

I. Standard of Review

GSA has moved to dismiss the lessor's appeal for failure to state a claim upon which relief may be granted, pursuant to Board Rule 8(c)(1) (48 CFR 6101.8(c)(1) (2015)). In considering this motion, "we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *ThinkGlobal Inc. v. Department of Commerce*, CBCA 4410, 16-1 BCA ¶ 36,489, at 177,791 (citing *Kiewit-Turner, a Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 14-1 BCA ¶ 35,705, at 174,846 (quoting *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006)). The complaint "must plead factual allegations that support a facially 'plausible' claim to relief in order to avoid dismissal for failure to state a claim." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the [tribunal] to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556), quoted in *Sioux Honey Ass'n v. Hartford Fire Insurance Co.*, 672 F.3d 1041, 1062 (Fed. Cir. 2012). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*; cf. *Engaged Learning, Inc. v. Salazar*, 660 F.3d 1346. (Fed. Cir. 2011) (where appellant alleges the existence of a contract between it and the Government, the Board should consider whether a contract existed between the parties under a motion to dismiss for failure to state a claim, rather than motion to dismiss for lack of subject matter jurisdiction).

We consider all attachments to the complaint, including the lease agreement, the relevant lease amendment, the claim, and the "amended certification of claim" to determine whether the complaint can survive the motion to dismiss for failure to state a claim without converting GSA's motion to a motion for summary relief. *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789.

II. No Contract Existed Between the Parties

The lessor argues that GSA breached a written, oral, and/or implied-in-fact contract when it refused to make payments for suite log under the lease amendment and to take occupancy of the office space. Specifically, the lessor asserts that a binding contract arose when the lessor's representative received the proposed lease amendment from GSA, signed the amendment, and returned the document to GSA. The Government counters that no contract had been created because the contracting officer, the only person authorized to bind the Government, never signed the documents on the behalf of the Government. Our task is

to determine whether the facts alleged by appellant, if proven, would offer a remedy under the law.

In order to establish the existence of a contract with the Government, appellant must allege and establish four elements: “(1) mutuality of intent to contract; (2) lack of ambiguity in offer and acceptance; (3) consideration; and (4) a government representative having actual authority to bind the United States in contract.” *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003); *See City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990); *JRS Management v. Department of Justice*, CBCA 2475, 12-1 BCA ¶ 34,962, at 171,876 (citing *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997)).

Here, the complaint alleged that the parties do not dispute that GSA sent to the lessor a lease amendment which had not been signed by the contracting officer. The lease amendment, which incorporated the terms of the original lease, required that the contracting officer sign the amendment in order to effectively modify the lease. Without the contracting officer’s signature, there is no contract. *See, e.g., JEM Transport, Inc. v. United States*, 120 Fed. Cl. 189, 195-96 (2015) (no contract extension when the contracting officer did not sign the proposed contract modification); *see also Neenan v. United States*, 112 Fed. Cl. 325, 329 (2013) (no valid contract formed in the absence of the contracting officer’s signature on a lease agreement), *aff’d*, 570 F. App’x 937 (Fed. Cir. 2014).

Appellant characterizes GSA’s presentation of an unsigned lease amendment as an offer. This characterization is inconsistent with the terms of the lease amendment, which expressly stated that “this document is not binding on the Government of the United States of America unless signed below by authorized contracting officer.” This language should have put the lessor on notice that GSA did not consider the presentation of the lease amendment to be an offer. *See, e.g., Linear Technology Corp. v. Micrel, Inc.*, 275 F.3d 1040, 1050 (Fed. Cir. 2001) (quoting Restatement (Second) of Contracts § 26 (1981)) (“A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.”).

Finally, given the facts alleged, lessor’s argument that the parties had verbally agreed to amend the lease, even if proven, does not suffice to establish an implied-in-fact contract. An express oral contract cannot exist where “applicable procurement regulations. . . require Government contracts to be in writing in order to be binding upon the parties.” *American General Leasing, Inc. v. United States*, 587 F.2d 54, 58 (Ct. Cl. 1978). Pursuant to the Federal Acquisition Regulation (FAR), a “contract modification means any written change in the terms of a contract (see 43.103).” 48 CFR 2.101(b) (FAR 2.101(b)); *Enterprise*

Information Services, Inc. v. Department of Homeland Security, CBCA 4671, 15-1 BCA ¶ 36,010, at 175,886. Any such modification must be in writing and signed by the contracting officer. FAR 43.103(a); *Mil-Spec Contractors, Inc. v. United States*, 835 F.2d 865, 869 (Fed. Cir. 1987) (recognizing that to be effective, an oral modification of a written contract may be modified only by bilateral written agreement). Here, the lease agreement required a formal bilateral modification of the contract, which, absent the contracting officer's signature, could not bind the Government. An express oral contract cannot arise under these circumstances. The averments in the complaint do not state a cause of action that would give rise to the relief sought, even if the contentions are taken to be true.

III. No Jurisdiction to Hear Appellant's Amended Claim

Even if we assume for the sake of argument that a contract existed between the parties, we do not possess jurisdiction to entertain appellant's "amended" claim. As noted above, appellant initially submitted a claim for payment of the first year of annual rent in the amount of \$51,457.69, "as compensation for the time that the office suite was taken off the market and for various cost[s] incurred to prepare the Suite for GSA," which GSA's contracting officer denied in the October 8, 2015 final decision. In its notice of appeal, appellant "amended" its claim "to include all 4 years of the lease amendment for Suite 109 in the total amount of \$190,990.59, plus miscellaneous costs incurred in preparing Suite 109 for occupancy." Although appellant certified the "amended" claim, it failed to submit this claim to the contracting officer for final decision.

Each "claim" brought under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7010-7109 (2012), must be submitted in writing to the contracting officer, with adequate notice of the basis for the claim. *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, at 174,564 (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, at 174,492.

Although a contractor may increase the amount of its claim pending an appeal before the Board, it may not raise any new claims not presented and certified to the contracting officer. *Santa Fe Engineers*, 818 F.2d at 858; see *Reliance Insurance Co. v. United States*, 931 F.2d 863, 866 (Fed. Cir. 1991). In determining whether a contractor's increase to the amount claimed raises new claims, we look at whether the new issue is based on the same operative facts as the claim presented to the contracting officer. See *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990). If the claim differs in its essential

nature or basic operative facts from the original claim, it is considered a new claim, *id.*, and, as such, could not have been considered by the contracting officer in his or her decision. In the absence of a contracting officer's decision on the new claim, the Board does not have jurisdiction to consider the claim. *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 10-2 BCA ¶ 34,479, at 170,056-57, *motion for reconsideration denied*, 10-2 BCA ¶ 34,498.

Here, lessor appeals new claims not previously presented to the contracting officer. Lessor "amended" its initial claim to include an additional three years under the supplemental lease agreement. The documentation necessary for the contracting officer to assess appellant's amended claim would inevitably change every year because, as GSA pointed out, the status of the rental market and the lessor's efforts to secure a leasing tenant would change with each passing year. Thus, the operative facts necessary to examine appellant's entitlement to the second, third, and fourth year under the supplemental lease agreement would change from those of the first year initially requested. The contracting officer, therefore, lacked the necessary operative facts to make a final decision on appellant's "amended" claim. Accordingly, the Board finds that because appellant failed to present its new claim to the contracting officer, the Board cannot consider appellant's "amended" claim.

Decision

For the foregoing reasons, the Government's motion is granted and the claim is **DISMISSED** for failure to state a claim.

JERI KAYLENE SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

RICHARD C. WALTERS
Board Judge