



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON
FEBRUARY 13, 2017**

MOTION TO DISMISS DENIED: January 24, 2017

CBCA 3760, 4822, 5281

SMITH MANAGEMENT CONSTRUCTION, INC.,

and

BRC LEASE COMPANY, L.L.C.,

Appellants,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Richard A. DeTar of McAllister, DeTar, Showalter & Walker, Easton, MD, counsel for Appellants.

Brian C. Caney, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

Before Board Judges **DRUMMOND**, **ZISCHKAU**, and **BEARDSLEY**.

BEARDSLEY, Board Judge.

Respondent, the Department of Health and Human Services, National Institutes of Health (NIH or Lessee), has moved to dismiss these appeals for lack of subject matter jurisdiction. For the reasons set forth below, the motion is denied.

Statement of Facts for Purposes of the Motion

On June 15, 2001, NIH and FSK Land Corporation (FSK or lessor) entered into lease no. NIH-LRP-060197 (lease), pursuant to which lessor agreed to construct a research facility (Bayview Research Center) at the Johns Hopkins Bayview Medical Campus in Baltimore, Maryland. These appeals arise from the construction of the Bayview Research Center.

As required by the lease and supplemental lease agreement (SLA) no. 1, FSK entered into a development management services agreement (DMSA) with Smith Management Construction, Inc. (SMCI) in December 2001. The DMSA required SMCI, as development manager, to perform pre-construction, development, and construction services for the Bayview Research Center. By its terms, the DMSA was a subcontract under the lease, and NIH was not a party to the agreement.

The lease stated:

Notwithstanding any degree of participation by the Government in the development of the Plans . . . and the review of the construction documents or the utilization of Construction Inspection Services . . . or the acceptance of any services, the Government shall have no liability for the design and construction of the Premises, nor shall such participation by the Government relieve any other party or person of their legal or contractual responsibility for such design, construction, or services. . . .

Lessor acknowledges . . . and regardless of Government review, approval, or concurrence of any type, that the Lessor (or as shall be more particularly set forth in the Development Management Services Agreement, Lessor's subcontractors, including Development Manager) shall be responsible for all errors and omissions, including any additional cost and/or delay.

Appeal File, Vol. 2, Exhibit 31 at 39-41. The lease also required FSK to furnish payment bonds.

The DMSA stated:

NIH is an intended third-party beneficiary of this Agreement and may enforce all duties and obligations hereunder against Development Manager. Notwithstanding NIH's approval rights, NIH's status as a third party beneficiary, or any other provision of this Agreement, nothing in this Agreement shall waive any privileges or immunities of NIH. Neither the status of NIH as a third party beneficiary, nor any other condition or term of this Agreement, shall make NIH responsible for any obligations under this Agreement or liable to the Development Manager or Lessor under this Agreement. The foregoing sentence shall not preclude Development Manager from exercising Lessor's rights through Lessor against NIH pursuant to Section 10.2(a) below.

Appeal File, Vol. 2, Exhibit 32 at 43-44. Section 10.2(a) stated, "In the event Lessor fails to cooperate with the Development Manager in presenting a claim to the Government, then Development Manager shall have the right to proceed with such claim against the Government in the name of the Lessor to the extent permitted by law." *Id.* at 47.

On May 20, 2004, BRC Lease Company, L.L.C. (BRC) became the successor-in-interest to FSK and the effective lessor pursuant to an assignment and novation agreement. Also on May 20, 2004, BRC and NIH executed SLA no. 14, and FSK and SMCI executed an amendment to the DMSA. Neither SLA no. 14 nor the amendment to the DMSA modified SMCI's status as a subcontractor or section 10.2(a) of the DMSA. The May 2004 amendment to the DMSA stated:

In any instance where the [DMSA] refers to a consent, approval or other action by [BRC], such consent, approval or other action shall instead be provided or taken, as the case may be, by NIH and Ambac. Accordingly, [SMCI] acknowledges and agrees that it will not be relying in any manner upon any advice, expertise or direction from [BRC] or any [BRC] Entity . . . in connection with the Facility.

[T]he Lessor, BRC Lease Company, LLC, . . . shall not be entitled to and shall not possess the authority to approve, deny, or condition any requests for payment, changes to the design and construction work, or time for performance in connection with the construction of the Facility.

Appeal File, Vol. 2, Exhibit 36 at 2. In SLA no. 14, NIH approved the modifications to the DMSA.

On October 15, 2013, SMCI submitted to NIH a certified claim in the amount of \$953,595.64. This claim requested “unpaid balances under specific contracts issued directly from the NIH beginning in May of 2008 for work completed, and for the recovery of specific reimbursable amounts due under the DMSA, as previously approved and authorized for reimbursement.” Appeal File, Vol. 1, Exhibit 1 at 1. Specifically, SMCI claimed \$565,049.37 as detailed in requisition no. 58 (A-1) and \$388,546.27 for unpaid legal fees incurred by SMCI defending the project against claims filed by the general contractor, Skanska USA Building, Inc. (Skanska), for which SMCI claimed NIH agreed to reimburse it. SMCI appealed an adverse final decision in SMCI’s name. The appeal was docketed as CBCA 3760.

On September 29, 2014, SMCI submitted a second claim as both a direct claim against NIH and also on behalf of BRC pursuant to section 10.2(a) of the DMSA. This second claim was for the same unpaid balances and legal fees claimed in the first claim. SMCI supplemented its second claim by submitting a corrected certification dated October 16, 2014. The corrected certification indicated that SMCI was “duly authorized to certify the claim on behalf of BRC Lease Co., LLC and Smith Management Construction, Inc.” Appellant’s Supplemental Appeal File, Exhibit 23. On October 23, 2014, SMCI submitted an amended certified claim that did not add new facts to the September 29, 2014, claim but “merely explains in more specific detail” that the contractual relationship between NIH and BRC pursuant to the lease created privity. *Id.*, Exhibit 25. BRC did not respond to requests by SMCI to sponsor this claim. SMCI directly and “in the name of and through BRC” appealed a deemed denial of this claim. This appeal was docketed as CBCA 4822.

SMCI lastly appealed the denial of its claim sponsored and certified by BRC. The claim consisted of SMCI’s October 23, 2014, amended claim with an October 12, 2015, sponsorship letter and certification from BRC. In its sponsorship letter, BRC stated that to the extent that SMCI’s claims were based on supplemental agreements and understandings between SMCI and NIH, those agreements could be for work not originally called for under the DMSA, and BRC was not a party to or aware of the supplemental agreements between NIH and SMCI.¹ More specifically, BRC only agreed to sponsor SMCI’s claims that were for work under the DMSA. BRC clarified its position by letter dated December 18, 2015, stating that BRC was willing to sponsor and pass through SMCI’s entire claim for \$953,595.64. This appeal was docketed as CBCA 5281. All three appeals were consolidated.

¹ On May 2, 2008, NIH entered into contract HHSN2922007001115L (the 115L contract) with SMCI, pursuant to which SMCI performed work in support of the Bayview Research Center construction project. Appellant has indicated that none of its claims arise out of this contract.

BRC assigned its leasehold interest to NIH Bayview Acquisition, LLC (NIH Bayview) by substitute trustee's deed of assignment dated September 8, 2015, as the result of a court-ordered foreclosure sale. The substitute trustees conveyed to NIH Bayview "all right, title and interest of the said Substitute Trustees in and to the leasehold estate in land and premises . . . together with all of the leasehold interest in the buildings, structure, fixtures and improvements located thereon." Respondent's Second Motion to Dismiss, Exhibit 4. The September 8, 2015, novation agreement among the substitute trustees, NIH Bayview, and NIH stated that "[t]he Government . . . has entered into certain contracts with the Transferor [substitute trustees], as successor in interest to BRC Lease Company, LLC, namely: a U.S. Government Lease for Real Property formerly known as lease number LRP-060197." Respondent's Second Motion to Dismiss, Exhibit 6. The term "the contracts" referred to:

the above lease [lease no. LRP-060197], and all supplemental lease agreements pertaining thereto made between the Government and the Transferor [substitute trustees] or its predecessor [BRC] before the effective date of this Agreement (whether or not performance and payment have been completed and whether or not releases have been executed if the Government or the Transferor [substitute trustees] has any remaining rights, duties, or obligations under such contracts). Included in the term "the contracts" are also all modifications made under the terms and conditions of these contracts and purchase orders between the Government and the Transferee, on or after the effective date of this Agreement.

.....

The Transferor [substitute trustees] confirms the transfer to the Transferee [NIH Bayview], and waives any claims and rights against the Government that it now has or may have in the future in connection with the contracts.

Id.

The construction project was completed before NIH Bayview acquired the leasehold interest. Prior to the assignment and the novation agreement, NIH confirmed and represented to NIH Bayview in a statement of lease dated September 4, 2015, that supplemental lease agreements 1 through 25, including SLA no. 1 dated March 13, 2002, which established the DMSA, and SLA no. 14, had been canceled prior to the 2015 novation agreement. In this same statement of lease, NIH assigned a new contract number to the lease, changed the lessor from BRC to NIH Bayview, and restated the lease, lease rider, rent schedule, general clauses, ground lease, and exhibits.

In March 2016, NIH Bayview refused to sponsor SMCI's claim for the reason that it had acquired only BRC's leasehold interest in the property as a result of the foreclosure sale, and NIH Bayview did not become a party to or assume obligations or liabilities under the DMSA.

Discussion

The appellant bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing *McNutt v. General Motors*, 298 U.S. 178, 189 (1936)). When the Board considers a motion to dismiss for lack of subject matter jurisdiction, the allegations of the complaint should be construed favorably to the appellant. *Academy Partners, Inc. v. Department of Labor*, CBCA 4947, 16-1 BCA ¶ 36,463, at 177,683 (quoting *801 Market Street Holdings, L.P. v. General Services Administration*, CBCA 425, 08-1 BCA ¶ 33,853, at 167,566). However, the Board may also look beyond the pleadings and "inquire into jurisdictional facts" to determine whether jurisdiction exists. *Lewinger v. Department of Veterans Affairs*, CBCA 4794, 16-1 BCA ¶ 36,413, at 177,545 (citing *Rockies Express Pipeline LLC v. Department of the Interior*, CBCA 1821, 10-2 BCA ¶ 34,542, at 170,355); *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991).

CBCA 5281

NIH asserts that the October 12, 2015, certification and sponsorship by BRC of SMCI's claim and appeal was ineffective and defective due to the fact that on or about September 8, 2015, BRC was replaced by NIH Bayview as the prime contractor under the lease. We disagree. BRC remains in privity of contract with NIH for any claims arising out of the DMSA.

An assignor cannot be held to have transferred claims "unless he expressly so stated." *Summit Commerce Pointe, LLC v. General Services Administration*, CBCA 2652, et al., 13 BCA ¶ 35,370, at 173,570 (quoting *Ginsberg v. Austin*, 968 F.2d 1198, 1201 (Fed. Cir. 1992)). Even if the assignment is valid, "accrued causes of action do not automatically pass to an assignee." *Id.* In order for NIH Bayview to have standing to sponsor SMCI's claims, SMCI's claims under the DMSA must have been validly assigned to NIH Bayview and NIH must have accepted the assignment, constructively or expressly by agreement. *Id.*

There was no assignment of the DMSA or the DMSA claims. The deed of assignment did not even mention the DMSA or the DMSA claims. Instead, the deed of assignment expressly transferred only "a very specific and limited interest in the property as a result of

the foreclosure sale, namely, BRC's Leasehold Interest," to NIH Bayview.² Appellant's Opposition to Respondent's Second Motion to Dismiss, Exhibit 19. For this reason, NIH Bayview refused to sponsor SMCI's claim.

NIH points to the 2015 novation agreement to support its position that the DMSA and accrued claims under the DMSA were assigned to NIH Bayview. The novation agreement, however, confirmed only the transfer of certain "contracts," not the DMSA or the DMSA claims, to NIH Bayview. The "contracts" expressly identified included the lease and SLAs under which the transferor or NIH had to have "remaining rights, duties or obligations." Neither NIH nor NIH Bayview had any remaining rights, duties, or obligations under the SLAs because NIH represented that the SLAs had been canceled prior to the assignment. The cancellation of SLA no. 1 or no. 14, however, did not cancel the DMSA because these SLAs were only vehicles by which NIH approved the DMSA or amendments to the DMSA. Similarly, the assignment of the lease did not assign the DMSA because the lease only contemplated the execution of the DMSA. The DMSA was a separate subcontract between BRC and SMCI, and it had to be expressly mentioned to be assigned. Thus, BRC remains in privity of contract with NIH and SMCI for the purpose of certifying and sponsoring claims arising out of the DMSA. Consistently, the release in the 2015 novation agreement does not release claims accrued under the DMSA. It only waives claims in connection with the "contracts," which we have established consisted of the lease but not the DMSA.

We possess subject matter jurisdiction over this appeal.

CBCA 3760 and CBCA 4822

NIH asserts that the Board does not have jurisdiction to hear CBCA 3760 or CBCA 4822. Given that the claims appealed in CBCA 3760 and CBCA 4822 are the same claims appealed in CBCA 5281, and in the interest of judicial economy, the Board declines to decide whether the Board has jurisdiction over these two appeals at this time.

² The substitute trustees acquired only BRC's leasehold interest in the property as a result of the foreclosure. Therefore, NIH Bayview could only acquire the leasehold interest from the substitute trustees.

Decision

For the foregoing reasons, respondent's motion is **DENIED**.

ERICA S. BEARDSLEY
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

JONATHAN D. ZISCHKAU
Board Judge