UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: February 25, 2019

CBCA 6199, 6200, 6201

444 BRICKELL PARTNERS, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Seamus Curley of Stroock & Stroock & Lavan LLP, Washington, DC, counsel for Appellant.

Catherine Crow, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

BEARDSLEY, Board Judge.

Respondent, the General Services Administration (GSA), has moved to dismiss this appeal for lack of subject matter jurisdiction. For the reasons set forth below, the motion is granted.

Statement of Facts

This appeal arises from three contracts between 444 Brickell Partners, LLC (Brickell) and GSA to lease office spaces in Miami, Florida. The contracts were originally awarded

to Rivergate Investors, LLC (Rivergate). Brickell later became the lessor under each of the leases. All three of the leased spaces are located in one of the two buildings found at the property.

On December 11, 2017, Dion Reid, identifying himself as the contracting officer, issued a letter to Brickell under each of the three leases demanding payment of alleged overpayments billed by Brickell and Rivergate for real estate tax reimbursements between 2010 and 2016. Mr. Reid asserted that the amount due for lease LFL42861 was $365,368.50, for lease LFL 43832 was $763,007.84, and for lease LFL43833 was $713,126.07. Attached to each letter was a tax reconciliation which described the reason for the miscalculation and overpayment and provided three different ways to "correctly calculate the tax adjustments." Mr. Reid asked that Brickell "[p]lease help us resolve this account by sending payment in full within 30 days." The letter also stated that "if payment is not received within 30 days, the General Services Administration will pursue collecting the amount owed by offsetting any future payments that are due to your company." The letters, however, were not labeled as final decisions and did not apprise Brickell of its appeal rights.

In three near-identical letters dated February 5, 2018, Brickell responded to GSA, acknowledging that it had miscalculated the tax reimbursement amounts owed by GSA. Brickell alleged that rather than overbilling GSA, it had actually underbilled GSA for tax reimbursement in the amounts of $2905.12, $61,719.09, and $50,093.78, respectively. Brickell argued also that neither party could make claims regarding the tax reimbursements for 2010 or 2011, as such claims would be past the statutory six-year limit. The letter concluded by stating, "We look forward to working with you to resolve this matter in a timely fashion." Brickell also indicated that it had not received the December 11 letters "until recently" because the letters were "not sent according to the definition of 'Notice' under GSA Form 3517 which is part of the Lease."

Additional discussions followed, and the parties scheduled a conference call with the lease contracting officer (LCO) for April 18, 2018. On the day of the meeting, GSA cancelled the meeting, and Mr. Reid advised Brickell by email that a GSA auditor "will contact you with the [LCO's] final determination."[1] The next day, Chase England of PRGX USA, Inc., GSA's auditor, advised Brickell in an email that it still owed GSA for overpayments in the amounts of $212,200.59 for lease LFL 42861, $638,872.42 for lease LFL 43832, and $596,738.19 for lease LFL 43833. Mr. England, however, stated that he

[1] In the April 18 email, Mr. Reid's signature block no longer identified him as the contracting officer but instead identified him as "Lead Lease Transaction Analyst." Mr. Reid also indicated in this email that he was not the LCO, but he would be talking to the LCO about the issues before any meeting with appellant.

agreed to drop the 2010 and 2011 tax adjustment claims from the debt owed and that "[t]his analysis has been discussed with and agreed upon by the LCO and it is their decision." The revised claim amount in the April 19 email from Mr. England reflected the deduction for the years 2010 and 2011, and the amount previously withheld for January and February 2018 rent ($92,577.40) for lease LFL 42861. Mr. England indicated that if payment was not made "within the proper time frame" these debts would be turned over to the United States Treasury for collection.

Brickell filed an appeal with the Board on July 18, 2018, for each of the three leases.

Discussion

The Board has jurisdiction to adjudicate contract disputes pursuant to the Contract Disputes Act (CDA). 41 U.S.C. § 7105(e)(1)(b) (2012). The CDA strictly limits this jurisdiction by imposing certain prerequisites for appeals. *Greenbrier Valley Economic Development Corp. v. Department of Veterans Affairs*, CBCA 5897, 18-1 BCA ¶ 37,068, at 180,429. Specifically, "jurisdiction . . . requires both a valid claim and a contracting officer's final decision on that claim." *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

I. December 2011 Letters

GSA contends that its letters dated December 11, 2017, are not appealable government claims because the letters were each a demand for payment rather than a contracting officer's final decision. We disagree.

The Federal Acquisition Regulation (FAR) 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, the adjustment or interpretation of contract terms, or other relief arising or relating to the contract." 48 CFR 2.101 (2017) (FAR 2.101); *see Piedmont-Independence Square, LLC v. General Services Administration*, CBCA 5605, 18-1 BCA ¶ 37,107, at 180,614 (quoting *Connor Bros. Construction Co.*, VABCA 3593, et. al., 95-1 BCA ¶ 27,409, at 136,643 (1994)) ("A government claim exists 'whenever the Government itself seeks an adjustment of the contract price.'"). The December 11 letters were valid government claims. Each letter sought payment of money in a sum certain arising from the leases.

GSA's December 11 letters were also final, written decisions of a contracting officer. The CDA requires that a "claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer." 41 U.S.C.

§ 7103(a)(3). A "contracting officer's decision shall state the reasons for the decision reached and shall inform the contractor of the contractor's rights as provided in this chapter." *Id.* § 7103(e). The December 11 letters described the dispute, referenced pertinent contract terms, stated the factual areas of disagreement, stated the contracting officer's decision, with supporting rationale, and made a demand for payment as required for a final decision. *See* FAR 33.211(a)(4). The failure to include language that labeled the letters as final and apprised the contractor of its appeal rights did not destroy the finality of the decision. A "decision is no less final because it failed to include boilerplate language usually present for the protection of the contractor." *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990).

We reject GSA's argument that the December 11 letters were demands for payment and not final decisions. Unlike the letters in *Sharman Co. v. United States*, 2 F.3d 1564, 1570 (Fed. Cir. 1993), *overruled on other grounds*, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc), cited by GSA, the December 11 letters did not lack finality. *See id.* (finding that the written communication relied upon by the contractor was simply a tentative determination of liability and not a final decision because the contracting officer invited the contractor to submit a proposal for deferment of payment or dispute the government's entitlement); *see also Midwest Properties, LLC v. General Services Administration*, GSBCA 15822, 03-2 BCA ¶ 32,344. Instead, the December 11 letters asserted that GSA was owed payment within thirty days or GSA would offset the amount owed.

II. The Finality of the December 11 Decisions Was Vitiated

The Board lacks jurisdiction to decide GSA's claims because the contracting officer's reconsideration vitiated the finality of the December 11 decisions. *See Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 36,117, at 176,318; *Devi Plaza, LLC v. Department of Agriculture*, CBCA 1239, 09-1 BCA ¶ 34,033, at 168,338 (finding the contracting officer's decision was not final because the contracting officer "indicated that he was willing to continue a meaningful and productive dialogue" about the claim). "The contracting officer's act of [reconsidering] eliminates the accrual of the time for appeal because there is no 'final' decision from which the time for appeal can run." *Safe Haven,* 15-1 BCA at 176,318; *see also Bass Transportation Services, LLC v. Department of Veterans Affairs*, CBCA 4995, 16-1 BCA ¶ 36,464, at 177,689.

To determine whether the decision was vitiated, we must look to whether the contractor "reasonably or objectively could have concluded" that the contracting officer was reconsidering the decision. *Devi Plaza*, 09-1 BCA at 168,337. "To make [the] determination, the Board must look for some timely affirmative conduct by the contracting

officer himself – either express or implied – that indicates to the contractor a willingness to revisit the previously issued 'final' decision." *Safe Haven*, 15-1 BCA at 176,320 (emphasis omitted) (citing *Merritt Lumber Co.*, AGBCA 88-313-1, et al., 89-2 BCA ¶ 21,676, at 109,009-10).

Applying this objective "reasonable person" standard to the facts here, we find that appellant reasonably could have concluded that the LCO was reconsidering the December 11 decisions. The LCO agreed to meet with appellant to discuss the issues, indicated a willingness to reduce the debt owed, and chose not to withhold rent to satisfy the debt. The Board lacks jurisdiction to decide GSA's claims because the LCO's reconsideration vitiated the finality of the December 11 decisions.

III. GSA's April 19 Email Was Not a Final Decision

A GSA contracting officer has yet to issue a new final decision after the reconsideration. Mr. England, a contractor, is not a contracting officer and lacks authority to issue a final decision. Therefore, Mr. England's April 19 email to Brickell was not a final decision from which Brickell must appeal. *See* 41 U.S.C. § 7103(a)(3). Only once the contractor receives a new final decision does the time to appeal begin to run again, with the deadline being effectively reset. *Safe Haven*, 15-1 BCA at 176,322.

IV. Brickell's February 2018 Letters Were Not Claims

The CDA requires that "each claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision." 41 U.S.C. § 7103(a)(1). A proper contractor claim must request a contracting officer's decision. *See Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1576-77 (Fed. Cir. 1992). This request may be express or implied from the context of the submission. *See id.* at 1577 ("All that need be shown is an 'expression of interest,' which may be made implicitly."). In determining whether the contractor made such a request, "[t]he intent of the communication governs, and the Board must use a common sense analysis to determine whether the contractor communicated its desire for a contracting officer's decision." *Moss Card Consulting, Inc. v. General Services Administration*, CBCA 5193, 16-1 BCA ¶ 36,291, at 176,989.

Nowhere in Brickell's February 2018 letters to GSA is there an indication that it was requesting a contracting officer's final decision. In fact, each letter concluded with the following statement: "We look forward to working with you to resolve this matter in a timely fashion." We acknowledge that "[t]here is no necessary inconsistency between the existence of a valid CDA claim and an expressed desire to mutually work toward a claim's resolution."

Transamerica, 973 F.2d at 1579. However, under a "common sense analysis," *Moss Card Consulting*, 16-1 BCA at 176,989, we find neither an express nor an implied request for a decision.

Decision

For the foregoing reasons, this appeal is **DISMISSED FOR LACK OF JURISDICTION**.

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge