



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS TO DISMISS AND TO EXCLUDE FILING DENIED: September 10, 2019

CBCA 6161

WSSA BIRMINGHAM, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Diana Parks Curran and Hadeel N. Masseoud of Curran Legal Services Group, Inc.,
Johns Creek, GA, counsel for Appellant.

Jay Bernstein, Office of General Counsel, General Services Administration,
Washington, DC, counsel for Respondent.

Before **DRUMMOND, SHERIDAN, and O'ROURKE.**

DRUMMOND, Board Judge.

This appeal arises out of a lease between WSSA Birmingham, LLC (WSSA) and the General Services Administration (GSA). WSSA alleges 274 days of Government-caused delay in convening the design intent drawing (DID) workshop and seeks to recover \$269,249.93 for various cost increases that it claims arose out of the delay.¹ GSA filed a motion to dismiss the appeal for failure to state a claim upon which relief can be granted. In

¹ GSA accepts full responsibility for the delay in convening the DID workshop, which extended beyond 274 days.

addition, WSSA filed a motion to exclude GSA's reply to WSSA's opposition brief. For the reasons set forth below, we deny both motions.

Background²

On April 24, 2017, GSA and WSSA entered into a contract for the lease of space in an office building located in Birmingham, Alabama, to be used by the Internal Revenue Service (IRS). The lease includes a Changes (MAR 2013) clause and a Disputes (MAY 2014) clause. The lease term is for ten years (five years firm) beginning upon acceptance by GSA of the premises. The annual rent consists of amounts for shell rent, real estate taxes, tenant improvements, occupancy costs, and building specific amortized capital costs. WSSA would receive rental payments after occupancy, but no payments before that time. Among other obligations, the lease requires GSA to convene a three-day DID workshop within five to ten working days³ after award. The DID workshop was a prerequisite step to GSA's acceptance of the space under the lease. The lease schedule provided for a total of 194 working days between contract award and occupancy.

On December 14, 2017, WSSA sent a notice of delay and claim letter to GSA. In that letter WSSA asserted that GSA's continuing delay in convening the DID workshop was causing it to incur unanticipated cost increases. WSSA invited GSA to mitigate its damages by convening the DID workshop, amending the lease to extend the delivery and related schedule dates, and to negotiate an equitable adjustment for delay costs incurred to date.

In a letter dated January 30, 2017, WSSA submitted a request for an equitable adjustment (REA) and certified claim to the contracting officer alleging 274 days of Government-caused delay in convening the DID workshop and requesting \$269,249.93 for what it characterized as increased per diem costs or additional costs. The per diem costs include operating expenses (\$296.23/day), overhead costs (\$186.20/day), local property taxes (\$95.50/day), and construction loan interest (\$113.58/day). The additional costs include increases to shell construction costs (\$71,250), additional builder's risk insurance (\$2500 for 2017), and legal fees (\$4645.90).

² We base this summary on the complaint's factual allegations, which we treat as true for this purpose, and on contract and claim documents attached to or integral to the complaint.

³ The lease defines working days as "weekdays, excluding Saturday and Sundays and Federal holidays."

The contracting officer denied WSSA's claim in its entirety on March 29, 2018, asserting that no payment is owed to WSSA for the alleged delay. WSSA timely appealed the contracting officer's final decision to the Board. WSSA avers that it has and will continue to incur increased costs to perform the lease because of GSA's delay in convening the DID workshop. Specifically, WSSA states that the delay has resulted in higher base amounts for local property taxes, operating costs, and overhead costs—costs for which it is liable throughout the occupancy—as well as increased costs for construction loan interest, builder's risk insurance, shell construction, and legal fees.

Discussion

Motion to Dismiss for Failure to State a Claim

GSA has moved to dismiss WSSA's appeal for failure to state a claim. Under Board Rule 8(e)(48 CFR 6101.8(e)(2018)), "[a] party may move to dismiss all or part of a claim for failure to state grounds on which the Board could grant relief." "The granting of [such] a motion . . . is appropriate when the facts asserted by the claimant do not entitle it to a legal remedy." *Kiewit-Turner, a Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 14-1 BCA ¶ 35,705, at 174,846. "Dismissal . . . should not be granted unless it appears beyond doubt that the appellant cannot prove any set of facts in support of its claim that would entitle it to relief." *Id.* "[W]e must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *Id.* (quoting *Anaheim Gardens v. United States*, 444 F.3d 13090, 1314–15 (Fed. Cir. 2006)).

GSA argues that WSSA's costs have not increased as a result of the delay in a manner that relief would be available. GSA characterizes the claim as implicitly one for lost rent, stating that the lessor seeks compensation for obligations that it would have incurred regardless of the delay. "[T]he purpose of the Changes clause is to compensate for the unanticipated and extra out-of-pocket expenses incurred in performing the contract, and . . . the loss of expected income during a period of delay does not represent an out-of-pocket expense. However, . . . the [contractor has the] ability to recover impact costs arising from a delay." *SBC Archway Helena, LLC v. General Services Administration*, CBCA 5997, 19-1 BCA ¶ 37,207, at 181,144–45 (2018) (citing *Coley Properties Corp. v. United States*, 593 F.2d 380, 385–86 (Ct. Cl. 1979)). In the instant appeal, WSSA has asserted its claim as seeking compensation for costs it has paid or will be obligated to pay that will not be recovered through the rental payments. Reimbursement of such costs is not necessarily

prohibited under the lease or case law. *See id.* WSSA will still need to prove entitlement to the claimed costs.

GSA also argues that WSSA is precluded from recovery because certain claimed costs were incurred within the period of time that the contract had scheduled for design and construction activities. For support, GSA points to the analysis in *PJB Jackson-American, LLC v. General Services Administration*, CBCA 3628, 16-1 BCA ¶ 36,248. That appeal arose out of a cancellation of a lease. The appellant claimed delay costs for every day that had passed from the design intent drawings' approval date to the date of cancellation. *Id.* at 176,848–49. The Board subtracted the scheduled “base time”—the total number of days scheduled for design and construction—from the total number of days claimed to determine the number of potential days of recoverable delay. *Id.* at 176,849 (“The appellant cannot be paid extra for those days.”). However, the decision in *PJB Jackson-American* does not support the premise that costs incurred during the base period are necessarily unrecoverable. GSA’s argument is not persuasive.

GSA’s motion to dismiss also cannot succeed because GSA admits to failing to schedule the DID workshop in a timely manner. “[T]he notion that terms of a contract are to be enforced” is well established. *Carmazzi Global Solutions, Inc. v. Social Security Administration*, CBCA 6264, et al., 19-1 BCA ¶ 37,340, at 181,595. The Board concludes that because GSA “acknowledges that it failed to satisfy the terms of the contract[,]” WSSA has “established its right to relief beyond the speculative level,” which is “sufficient to defeat the motion to dismiss for failure to state a claim upon which relief can be granted.” *Id.* at 181,595–96.

WSSA’s allegations support a facially plausible claim and allow us to draw the reasonable inference that GSA is liable for some delay and properly established costs. Whether the claimed costs are solely attributable to the delay in convening the DID workshop is something that WSSA will have to prove to prevail on the merits, but at this stage of the proceedings, it is premature for us to decide. We find that WSSA has presented sufficient factual allegations to survive a motion to dismiss for failure to state a claim upon which relief may be granted. *See Strawberry Hill, LLC v. General Services Administration*, CBCA 5149, 16-1 BCA ¶ 36,561, at 178,063 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Motion to Exclude

WSSA seeks to exclude GSA’s response to WSSA’s opposition to GSA’s motion to dismiss. WSSA argues that the Board’s scheduling order did not permit GSA to file a response, and therefore, absent the Board’s permission, the response may not be considered by the Board. GSA opposes WSSA’s motion. We find it unnecessary to address WSSA’s

motion to exclude. Given our decision on GSA's motion to dismiss, we consider WSSA's motion to exclude to be moot.

Decision

The Board **DENIES** respondent's motion to dismiss for failure to state a claim. The Board also **DENIES** appellant's motion to exclude as the matter is now moot.

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge