



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: November 4, 2019

CBCA 5420, 5733

PEGASUS ENTERPRISES, LP,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Kyle E. Yaeger of Hickman & Robinson, LLP, San Diego, CA, counsel for Appellant.

James F. H. Scott, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Judges **GOODMAN**, **RUSSELL**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Appellant, Pegasus Enterprises, LP (Pegasus),¹ a California limited partnership, entered into a lease with the General Services Administration (GSA) to provide office space for two federal agencies. Toward the end of the lease, appellant filed two claims for overtime utilities costs totaling \$1,108,153. Since a portion of the claimed costs exceeded

¹ The record contains a substantial amount of evidence related to an entity called Square One Development Corporation (Square One). Square One is the management company for Pegasus and is a member of the limited partnership. All actions related to these appeals were taken by Square One on behalf of appellant. To prevent any confusion, the Board will only refer to Pegasus in this decision.

the six-year statute of limitations under the Contract Disputes Act (CDA), and we find no basis to toll it, we only grant the appeals in part.

Findings of Fact

The Lease

From 2002 to 2015, Pegasus leased office space to GSA at 7675 Daggett Street and 4542 Ruffner Street in San Diego, California.² The properties were occupied, respectively, by the Defense Contract Management Agency (DCMA) and the Defense Criminal Investigative Service (DCIS). Originally, and for many years thereafter, both properties were combined under a single lease (lease no. GS-09B-99044).

Lease Terms Pertaining to Overtime Utilities

A decade into the lease, Pegasus discovered that DCMA and DCIS had consumed hundreds of thousands of dollars in overtime utilities but had not paid for them. Under the terms of the lease, monthly rent payments included all utilities consumed during *normal* hours, defined as “daily, extending from 6:30 a.m. to 5:30 pm except Saturdays, Sundays, and Federal holidays.” The lease provided for overtime utilities as follows:

- (a) The Government shall have access to the leased space at all times without additional payment, including the use, during other than normal hours, of necessary services and utilities such as elevators, toilets, lights, and electric power.
- (b) If heating or cooling is required on an overtime basis, such services will be ordered orally or in writing by the Contracting Officer or Building Manager. When ordered, services shall be provided at the hourly rate established in the contract. Costs for personal services shall only be included as authorized by the Government.
- (c) When the cost of services is \$2,000 or less, the service may be ordered orally. An invoice shall be submitted to the official placing the order for certification or payment. Orders for services costing more than \$2,000 will be

² Pegasus’s predecessor in interest, IOP Limited ONE, LP, entered into lease no. GS-09B-99044 with GSA on July 19, 1999. That lease was transferred to Pegasus on June 23, 2002.

placed using a Form 300, Order for Supplies or Services. The clauses entitled “GSAR 552.232-71 Prompt Payment” and “GSAR 552.232-72 Invoice Requirements (Variation)” apply to all orders for overtime services.

(d) All orders are subject to the terms and conditions of this lease. In the event of a conflict between an order and this lease, the lease shall control.

An attachment to the original lease, dated July 19, 1999, established the following overtime utilities rates: \$15.00 per hour for the office areas; \$10.00 per hour for the ADP room; and \$5.00 per hour for the EPBX room. Because the EPBX and ADP rooms contained computers and computer equipment, those rooms operated twenty-four hours a day, seven days a week (24/7) and required constant cooling. Exhibit A of GSA Form 1364, “Proposal to Lease Under the Solicitation for Offers #99044,” identified the 24/7 operational requirement for these rooms. It stated, “It is understood that the EPBX and ADP rooms operate on a [24/7] basis and are billed accordingly on a quarterly basis in arrears. Currently, there is an established [reimbursable work account] . . . which allocates funds for reimbursement.”

Results of the Parties’ Respective Audits

In 2012, GSA conducted an audit of the lease and discovered a rent overpayment in the amount of \$56,324. GSA notified Pegasus of the overpayment, prompting Pegasus to conduct its own audit, which found more than \$550,000 in unpaid overtime utilities. GSA and Pegasus reached an agreement on the rent overpayment, but not on the overtime utilities charges. GSA informed Pegasus that the latter charges “[would] need to be disputed as required under the lease.”

Efforts to Resolve the Overtime Utilities Charges As Part of a Lease Renewal

Rather than immediately pursuing a claim for past-due overtime utilities charges under the lease’s Disputes clause (FAR 52.233-1), Pegasus sought to negotiate the claim as part of a lease renewal agreement for both properties. In a letter dated February 4, 2013, Pegasus stated, “What we have attempted to do is craft a new lease that incorporates the majority of the past charges, and all future [heating, ventilation and air conditioning] charges into one negotiated package.” Attachments to the letter provided detailed information about the proposal. GSA’s lease manager and contracting officer exchanged comments by email with the portfolio manager for Pegasus, resulting in several revisions to the proposal. In an effort to address some of GSA’s concerns about the overtime utilities costs, Pegasus provided GSA a photograph of the dedicated supplemental air conditioning unit on the roof. Pegasus also conveyed that the owners agreed to lower the rate for overtime utilities to \$7.50 per hour as

a “showing of good faith.” An updated proposal reducing the price per square foot was attached to the email, and Pegasus proposed a meeting between the parties to discuss the past-due overtime utilities charges. Although GSA’s contracting officer offered to draft a lease amendment to reflect the reduced overtime utilities rate through the end of the current lease term, he did not comment on the revised proposal. Instead, he merely stated, “I appreciate your offer to work with our field office to understand the material you presented for historic [overtime] [utilities] charges. I will be in touch.” At this point, a new contracting officer was assigned to the Pegasus lease. This contracting officer sent a lease amendment to Pegasus on February 27, 2013, reflecting the reduced rate.

Discussions regarding the overtime utilities charges continued in March and April 2013. On May 22, 2013, lease amendment no. 013 re-established all “Overtime Usage” rates for the Daggett street property consistent with the original contract rates, but acknowledged the September 6, 2012, termination request for overtime utilities in the EPBX room at that address, noting that if the Government wished to rescind that request and re-establish 24/7 HVAC in that room, the rate would be \$5.00 per hour. This amendment also adjusted the rate for the ADP room at the Ruffner Street property to \$7.50 per hour.

New Competition for DCMA’s Follow-On Lease

GSA began soliciting competitive proposals for a new DCMA lease in 2014. Pegasus submitted a proposal in response to the solicitation. After reviewing the proposal, which factored in the overtime utilities charges, the contracting officer provided Pegasus with a five-page “Deficiency and Offer Review Letter,” dated June 30, 2014, outlining the proposal’s deficiencies and weaknesses, and inviting Pegasus to discuss its offer, correct deficiencies to make it more competitive, and submit a revised offer, which it did. The revised final offer removed the past-due overtime utilities charges.

On July 30, 2013, a DCMA facilities manager contacted GSA by email after receiving an invoice for overtime utilities at the Daggett Street property specific to the ADP and EPBX rooms, stating, “It is my understanding that [my predecessor] cancelled this service some time ago, but the interpretation by GSA was only for the EPBX room.” DCMA expressed concern about the high cost of the service and also stated, “For clarification purposes and to supplement any instructions that [my predecessor] may have provided, please CANCEL after hours HVAC service for the ADP/LAN and EPBX rooms for Daggett Street immediately.”

On July 10, 2014, the parties executed a lease amendment, which extended the tenancies for another eighteen months. On October 20, 2014, Pegasus learned it was not selected as the successful offeror for DCMA’s follow-on lease. Pegasus won the follow-on

lease for DCIS, which was solicited separately from DCMA. On January 13, 2016, DCMA's lease at the Daggett Street property expired.

Pegasus's Claims for Overtime Utilities Costs and Subsequent Appeals to the Board

On March 7, 2016, Pegasus submitted a certified claim in the amount of \$916,012³ to the GSA contracting officer for overtime utilities at the Daggett Street property (the DCMA claim), asserting that after auditing the lease, it identified unpaid overtime HVAC service provided to the Government from June 27, 2002, through July 30, 2013. Because the contracting officer did not issue a timely decision, Pegasus appealed the contracting officer's deemed denial to the Board on July 29, 2016. The appeal was docketed as CBCA 5420.

In September 2016, the parties submitted a joint request to suspend the appeal to allow time for an informal resolution of the case. After it failed to resolve, Pegasus submitted a second claim to the contracting officer on November 15, 2016, and then submitted a revised claim to the contracting officer on November 21, 2016. The revised claim reduced the amount of the DCMA claim to \$607,705, and contained a second claim for overtime utilities services at the Ruffner Street property in the amount of \$521,182 (the DCIS claim). After Pegasus received a payment in the amount of \$20,734, it reduced the amount of the DCIS claim to \$500,448.

The parties informed the Board that they anticipated a contracting officer's final decision addressing *both* claims, and jointly requested to suspend further processing of CBCA 5420 until March 17, 2017. The contracting officer's final decision, dated March 9, 2017, denied the DCMA claim in its entirety based on the six-year statute of limitations under the Contract Disputes Act (CDA), 41 U.S.C. § 7103(a)(4)(A) (2012), and a release of claims contained in supplemental lease agreement (SLA) no. 12, dated April 10, 2013.⁴ The contracting officer approved a \$186 payment on the DCIS claim.

Pegasus appealed the decision to the Board on May 8, 2017. The appeal was docketed as CBCA 5733, and on August 8, 2017, the Board consolidated the appeals. In December 2018, the Board held a hearing in San Diego to address both appeals. Shortly before the hearing, Pegasus further revised its DCMA claim, from \$607,705 to \$304,460, after removing the portion of overtime charges attributed to the EPBX room at the Daggett Street

³ According to Pegasus, GSA owed \$971,920 in total overtime HVAC services, but since GSA paid Pegasus \$55,908, the claim was for the remaining balance of \$916,012.

⁴ Although the contracting officer's final decision referenced a release of claims, GSA abandoned this argument after the appeals were filed.

facility. Pegasus also revised its DCIS claim, from \$500,447 to \$322,207, after conceding that a certain time period covered by the claim would not be revived by its equitable tolling argument. In its post-hearing brief, Pegasus calculated the amount of its claim to be \$624,342, if the Board finds that the statute of limitations was tolled by GSA's actions, and \$226,692, if the Board finds that it was not. Since GSA disputed entitlement altogether, its position was that no amounts were due. GSA did not present alternative calculations.

Discussion

We have jurisdiction over appellant's timely appeals which seek to recover \$624,342 in overtime utilities provided to DCMA and DCIS from October 2005 through September 2012. The parties do not deny that Pegasus provided, and the agencies enjoyed, 24/7 air conditioning in their respective ADP and EPBX rooms—which is what the lease required. Their disagreement involves two issues: 1) the CDA's six-year statute of limitations, and 2) the import of the parties' actions on the terms of the lease.

GSA contends that the CDA's statute of limitations and the actions of the parties preclude any payment for overtime utilities in either office space. Pegasus, on the other hand, insists that the statute of limitations was tolled for a significant portion of time, maintaining that it relied in good faith on GSA's advice and assurances for recovering these costs without jeopardizing its standing in competing for follow-on leases. Although Pegasus does not discount the agency's 2006 email request to terminate all overtime utilities at the Daggett Street property, or the 2004 email from one of its own employees purporting to reduce the overtime utilities rate in the Ruffner Street property, Pegasus points to the obvious facts that the lease was never amended to reflect these changes, and, with free reign over the dedicated thermostat in the computer rooms, the tenant agencies continued to receive the benefit of 24/7 cooling for years. Accordingly, Pegasus asserts that it is contractually entitled to payment for the utilities consumed.

Under the CDA, “[e]ach claim by a contractor against the Government relating to a contract . . . shall be submitted within [six] years after the accrual of the claim.” 41 U.S.C. § 7103(a)(4)(A) (2012); *see* 48 CFR 33.206(a) (2004) (“Contractor claims shall be submitted, in writing, to the contracting officer for a decision within [six] years after accrual of a claim, unless the contracting parties agreed to a shorter time period.”); *JBG/Federal Center, L.L.C. v. General Services Administration*, CBCA 5506, et al., 18-1 BCA ¶ 37,019, at 180,277. “A party’s failure to submit a claim within six years of accrual is an affirmative defense to the claim.” *ThinkGlobal Inc. v. Department of Commerce*, CBCA 4410, 16-1 BCA ¶ 36,489, at 177,793 (citing *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789). GSA pled the statute of limitations as a defense to both claims and has the burden of proving that Pegasus’s claims were

untimely. Equitable tolling can defeat an affirmative statute of limitations defense if enforcing the limitation would be unjust. A litigant seeking equitable tolling must prove “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way’ and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Extraordinary circumstances were further defined by the Court to mean beyond a litigant’s control. *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 756 (2016); *see also Marty Indian School Board, Inc. v. Department of the Interior*, CBCA 2446-ISDA, 11-2 BCA ¶ 34,834, at 171,377-78 (Extraordinary circumstances may include where litigant has been victim of fraud or duress).

Pegasus filed two certified claims with the GSA: one on March 7, 2016, for overtime utilities charges incurred by DCMA from June 27, 2002, through July 30, 2013, and one on November 15, 2016,⁵ for overtime utilities charges incurred by DCIS from June 27, 2002, through September 30, 2016.⁶ Enforcing the CDA’s six-year statute of limitations would bar claims against the Government that arose prior to March 2010 for DCMA charges and November 2010 for DCIS charges. Under the facts here, we find no justification for tolling the statute of limitations. Although Pegasus diligently pursued its costs under the lease, none of the conduct complained of could be construed as an extraordinary circumstance that induced Pegasus into delaying its claim. Promises to investigate a claim, consider a proposal, or review documents are all conventional activities undertaken in the spirit of professional contract negotiations, not instances of bad faith. There is no evidence that the contracting officer misrepresented his authority to resolve the claims, nor an indication that there were circumstances beyond Pegasus’s control that impeded its ability to file a claim. Further, the contracting officer had no reason to believe that Pegasus was anything other than a sophisticated contractor who, in an exercise of business judgment, decided to try negotiating its claims with GSA before pursuing litigation.

Early on, GSA informed Pegasus that in order to recover the overtime HVAC charges, it needed to pursue its claims through the disputes provision under the contract. Pegasus

⁵ The second claim essentially combined the overtime utilities charges for both properties. It also modified the requested reimbursement period for the first claim by extending the end date from July 30 to September 30, 2013.

⁶ Shortly before the hearing, Pegasus agreed to waive those portions of its claims arising from services provided to DCIS from 2002 through 2005. It also abandoned its claim for overtime HVAC services in DCMA’s EPBX room. As a result, Pegasus reduced its total claim to \$626,667 (\$304,460 for the DCMA charges and \$322,207 for the DCIS charges).

admitted that pursuing a formal claim against GSA was not its preferred path to recovery since it was trying to negotiate a lease renewal with GSA, their largest tenant. Quite simply, Pegasus made a business judgment, and as such, we find no basis to toll the CDA's statute of limitations to permit recovery prior to March 2010 for the DCMA overtime HVAC charges, or prior to November 2010 for the DCIS charges.

Regarding the remainder of the claims, in the absence of a formal amendment to the lease to preclude payment for overtime utilities and the tenants' continued consumption of overtime utilities, we find that Pegasus is entitled to costs from March 2010 through March 2016 for overtime utilities charges incurred by DCMA, and costs from November 2010 through March 2016 for overtime utilities charges incurred by DCIS. We are not persuaded that email or telephone communications between the parties, without a formal modification to the contract by the contracting officer, merits a finding of an implied modification, particularly since the tenants enjoyed the benefit of overtime utilities. We have reviewed Pegasus's calculation of its costs without equitable tolling, which was not rebutted by GSA, and found it reasonable.

Decision

The appeals are **GRANTED IN PART**. GSA shall pay to Pegasus: the sum of \$119,980, plus CDA interest to run from March 7, 2016, until payment for the DCMA claim, and \$108,712, plus CDA interest to run from November 15, 2016, until payment for the DCIS claim.

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE

Board Judge

We concur:

Allan H. Goodman

ALLAN H. GOODMAN

Board Judge

Beverly M. Russell

BEVERLY M. RUSSELL

Board Judge