



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED IN PART FOR FAILURE TO STATE A CLAIM: April 15, 2020

CBCA 6655

WOODFIELD FINANCIAL CENTER, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Gregory S. Gann of The Law Offices of Gregory S. Gann P.C., Park Ridge, IL, counsel for Appellant.

Brett A. Pisciotta, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

**GOODMAN**, Board Judge.

Appellant, Woodfield Financial Center, LLC, has appealed a decision by a contracting officer of respondent, General Services Administration (GSA), denying appellant's certified claim arising from appellant's contract with respondent. With regard to appellant's claim for lost rent, respondent has filed a motion to partially dismiss the appeal for failure to state a claim for which relief may be granted. We grant the motion and dismiss that portion of the appeal.

### Background

The parties entered into lease no. GS-05P-LIL19262 (the lease) on July 3, 2017, for the use of office space located in a building (the premises) in Schaumburg, Illinois. Prior to lease commencement, appellant was to construct and install various tenant improvements. The lease term, of fifteen years (ten years firm), was scheduled to commence upon substantial completion and acceptance of the space by the Government. As negotiated by the parties, the first nine months of rent were abated.

On July 2, 2019, appellant submitted a certified claim to GSA's lease contracting officer, seeking additional compensation arising out of the construction of tenant improvements. It requested payments relating to a heating, ventilation, and air conditioning (HVAC) pump, Z ducts, carpet, return duct, paging system, and lost rent. Appellant asserted that the amount of \$157,757.17 in lost rent was caused by the Government's misdirection during construction of the improvements, which allegedly delayed the expected date for possession of the premises for five months, from November 2018 until April 2019.

With the exception of an agreement to pay \$4120.20, related to a return duct, appellant's claim was denied by the contracting officer on October 30, 2019. On November 13, 2019, appellant appealed the decision to this Board. In its complaint filed on December 12, 2019, appellant asserted that the lost rent during the five months of delay will not be recouped by appellant and requested compensation in the amount of the rent.

### Discussion

Respondent has filed a motion to dismiss the claim for lost rent for failure to state a claim for which relief can be granted. In *B.L. Harbert International, LLC v. General Services Administration*, CBCA 6300, et al., 19-1 BCA ¶ 37,335, we stated:

The standard to resolve a motion to dismiss for failure to state a claim is well established. The contractor must point to factual allegations that, if true, would state a claim to relief that is plausible on its face, when the Board draws all reasonable inferences in favor of the contractor. The Board decides legal issues, and may treat any document that is incorporated in or attached to the complaint as part of the pleadings. *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, [et al.], 19-1 BCA ¶ 37,272.

In its motion, respondent denies that appellant's completion of tenant improvements was delayed by the Government. However, even taking appellant's factual allegations of

delay as true, respondent contends that appellant's claim for lost rent seeks damages which are not recoverable under well-established case law. Case law supports respondent's contention.

In *Altmayer v. General Services Administration*, GSBCA 12639, 95-1 BCA ¶ 27,515, *aff'd in relevant part, Altmayer v. Johnson*, 79 F.3d 1129, 1132 n.\* (Fed. Cir. 1996), one of our predecessor boards addressed circumstances substantially similar to those in the instant appeal. A lessor of office space asserted claims arising out of renovation delays caused by the Government. The lessor sought damages for rent not received for the period between the anticipated completion date and the actual completion date. The Board held:

[W]hen Government delay occasions later-than-anticipated commencement of rental payments, compensation may be made only for increases in costs of performance; loss of rental income, although an economic detriment, is not a cost of performance and therefore is not compensable for the delay. *Coley Properties Corp. v. United States*, 593 F.2d 380, 385 (Ct. Cl. 1979); *see also S.S. Silberblatt, Inc. v. United States*, 3 Cl. Ct. 644, 647 (1983); *Savoy Construction Co. v. United States*, 2 Cl. Ct. 338, 342 (1983); *Southwest Marine, Inc.*, ASBCA 39472, 93-2 BCA ¶ 127,763.

*Id.* Similarly, in *6000 Metro LLC v. General Services Administration*, GSBCA 15725, et al., 04-1 BCA ¶ 32,510, a lessor who suffered Government-caused delays in performing improvements to leased premises was entitled to recover its increased performance costs. However, the Board, citing *Altmayer*, held that lost rent was not recoverable.

This Board, in *JDL Castle Corp. v. General Services Administration*, CBCA 4717, et al., 16-1 BCA ¶ 36,249, relied upon the case law cited above and held that a lessor claiming Government-caused delays to the design and construction process was entitled to increased costs as a result of the delays, but not to loss of rental income:

Compensable costs of performance are any unanticipated, extra out-of-pocket expenses that a contractor would not have incurred but for the Government's delay. *See Coley Properties Corp. v. United States*, 593 F.2d 380, 385-86 (Ct. Cl. 1979). Such expenses may include increases in interest on existing loans, or loans procured to cover the expenses caused by the delay. *See S.S. Silberblatt*, 3 Cl. Ct. at 646-47. "However, a claim for loss of rental income is far different than a claim for additional interest costs . . . . It has been held that loss of rental income . . . is not an additional cost of performance of the contract." *Id.* at 647 (citing *Coley Properties*, 593 F.2d at 385-86).

....

Because JDL has not provided any evidence of additional incurred cost and sought damages in the form of delayed rental payments, GSA is entitled to judgment as a matter of law.

Respondent asserts that the lease at issue includes a changes clause which authorizes an equitable adjustment if the lease contracting officer makes a change that “causes an increase or decrease in Lessor’s costs or time required for performance.” However, as the case law has held, the alleged economic detriment resulting from lost rental payments as the result of the rental period commencing later than anticipated is not an increase of appellant’s cost of performance of the contract.

In response to the motion to dismiss, appellant does not dispute the facts as stated or the holdings in the case law that conclude that lost rent is not compensable. Rather, it states:

[Appellant] acknowledges both the recitation and explanation by GSA of the case law concerning lost rent as recoverable damages. It is [appellant]’s position that the current state of case law on this issue is simply too harsh and non-reflective of the tremendous financial stress in the instant case . . . . The current state of case law on lost rents is inequitable: it does not reflect the modern day realities of in particular, smaller business owners/landlords who are financially stressed to take on unexpected costs at the actions of the GSA, of which the business owner/landlord has no control.

Appellant asserts further that, as a small business, it is not able to handle the financial fluctuations caused by delays attributable to respondent, it could not control respondent’s unilateral decision when to accept possession of the premises, and the five-month delay in taking possession resulted in real economic damage. Appellant states:

For example, [appellant] paid real estate taxes, insurance premiums, operating costs, building maintenance costs, snow removal, janitorial expenses and utilities for the five months it had anticipated that the GSA would be in possession of the Premises and ultimately paying rent. The anticipated rent would have covered all the aforementioned expenses [appellant] was forced to pay up front. . . . The law is clear that if the Government caused the delay, it is liable for resulting damages. *Altmayer v. General Services Administration*.

Pursuant to the case law, it is clear that, as a matter of law, the lost rental income alleged by appellant, as the result of delays in commencement of the lease period, is not recoverable as a cost of increased performance. The lease period was not shortened by the delay in commencement, and the total rent to be paid under the lease was not diminished. While appellant alleges its ongoing costs during the delay would have been paid by the rent had rent commenced as expected, this does not entitle appellant to receive compensation for its alleged lost rental costs.

Decision

Respondent's motion to dismiss the claim for lost rental costs is granted. The appeal is **DISMISSED IN PART FOR FAILURE TO STATE A CLAIM.**

Allan H. Goodman

ALLAN H. GOODMAN

Board Judge

We concur:

Erica S. Beardsley

ERICA S. BEARDSLEY

Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge