



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: March 2, 2020

CBCA 6606

U.S. OVERSEAS HOUSING, LLC,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Paul F. Khoury and Lindy C. Bathurst of Wiley Rein LLP, Washington, DC, counsel for Appellant.

Kevin M. Gleeson and Erin M. Kriynovich, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Arlington, VA, counsel for Respondent.

Before Board Judges **KULLBERG**, **SULLIVAN**, and **LESTER**.

SULLIVAN, Board Judge.

U.S. Overseas Housing, LLC (USOH) appealed a decision of the contracting officer for the Department of State (DOS) in which the contracting officer found that USOH was in default of its obligations on a construction lease contract. DOS has moved to dismiss USOH's appeal for lack of jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), because the dispute centers upon the purchase of real property, to

which the CDA does not apply. We find that the Board does not have jurisdiction to resolve the dispute.¹

Background

I. Build-To-Lease Agreement and its Relevant Terms

In October 2013, USOH and DOS entered into a contract for the construction and lease of residential housing for embassy personnel in the Dominican Republic, referred to by the parties as a Build-To-Lease agreement (BTL agreement). Exhibit 1 at 1.² Pursuant to the BTL agreement, USOH would construct at its sole cost and expense the premises in accordance with specifications and drawings attached to the agreement, and DOS, upon completion of construction, would lease the premises for eleven years with options to extend. Exhibit 1 at 3.

DOS could request changes to the agreed-upon plans and specifications, and those changes would be documented in change orders. The contract defines change order as “a document signed by Landlord and Tenant pursuant to an express provision of [Exhibit B to the BTL agreement] which outlines (i) any Change in the Plans and Specifications agreed to by Landlord and Tenant, and (ii) the increase or decrease in Budgeted Construction Costs which are the result of such a change.” Exhibit 1 at 29. The total cost of these tenant-requested changes could not exceed \$750,000, and the cost of these changes would then be amortized over five years at a 7% per annum interest rate and “the impact on the Rent and Option to Purchase shall be as set forth on Exhibit D-3 and Exhibit H-2.” Exhibit 1 at 5. Exhibit D-3, titled “Modified Rent Due to Tenant Requested Changes,” provided that:

Landlord has set aside \$750,000 to cover the cost of Tenant requested changes. If such changes are made the Landlord and Tenant shall agree on the amount the rent is to be increased in accordance with the provisions of paragraph 4(c) of the BTL Agreement.

¹ DOS also moved to dismiss USOH’s claim for equitable estoppel, arguing that USOH’s claim is one for promissory estoppel, over which the Board lacks jurisdiction. Because we lack jurisdiction over the entire appeal, we do not reach this aspect of DOS’s motion.

² All exhibits are found in the appeal file, unless otherwise noted. The version of the BTL agreement in the appeal file (Exhibit 1) is not consecutively paginated. Instead, it is numbered in two parts, pages 1-75 and pages 1-30. The Board refers to the second set of page numbers as Exhibit 1a in this decision.

Exhibit 1a at 9. Exhibit H-2 to the BTL agreement was titled “Modified Option-To-Purchase Price Due To Tenant Requested Changes.” It stated that the price was “[t]o be determined in the event of tenant-directed changes.”³ *Id.* at 23.

Paragraph 25 of the BTL agreement gave DOS the option to purchase the property, in accordance with the terms of Exhibit H-1. Exhibit 1 at 16.⁴ Exhibit H-1, titled “Option to Purchase,” provides that DOS could notify USOH that it wanted to purchase the property, and USOH was required, within 120 days, to “execute and deliver to [DOS] a sale and purchase agreement strictly compliant with the then applicable provisions of Dominican law, conveying good title in and to the Premises.” Exhibit 1a at 18.⁵ DOS paid \$100 as consideration for the option to purchase. *Id.*

With regard to the purchase price, Exhibit H-1 provides that DOS “shall pay the Purchase Price, after all adjustments and prorations provided for in the Lease and any other prorations customary in such transactions.” Exhibit 1a at 20. The purchase price, labeled as the “option to purchase price,” was to be determined in accordance with the table in attachment 1 and would depend only upon the year that DOS exercised the option. *Id.* at 22.

The contract defined default by USOH as a failure to “fully and completely [] observe, keep, satisfy, perform and comply with, any material agreement, term, covenant, condition, requirement, restriction or provision of this Lease, [without curing] such failure within thirty (30) days after Tenant gives Landlord written notice thereof.” Exhibit 1 at 15.

Paragraph 26 outlines the dispute resolution provisions of the BTL agreement and specifically states that “[t]his Lease is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 7101-7109).” Exhibit 1 at 16-18. The paragraph further provides that, “except as provided in the Act, all disputes arising under or relating to this Lease shall be resolved under this clause,” and the decision of the DOS contracting officer “shall be final unless [USOH] appeals or files a suit as provided in the Act.” *Id.* at 17.

³ These changes are described in the agreement as “tenant-requested” changes except in this sentence in Exhibit H-2.

⁴ The option to purchase the property is mentioned in the heading to paragraph 4, “Rent and Option to Purchase Premises,” but the text of that provision contains no terms regarding the option to purchase. Exhibit 1 at 4-5.

⁵ The agreement contained other requirements for the conveyance of property, none of which are at issue in this appeal

II. Facts Leading to the Dispute

USOH contends that, during lease negotiations, DOS personnel represented that DOS would not seek to purchase the property because the Government “typically lacks funds to do so.” Complaint, ¶ 24. Based upon these representations, USOH asserts that it was “not concerned about the pricing schedule included in Exhibit H-1.” *Id.* ¶ 25.

USOH alleges that, “[a]fter construction began on April 17, 2017, the Government requested a total of nineteen changes and upgrades during the completion of the construction phase of the project.” Complaint ¶ 35. According to USOH, it submitted a cost analysis at the beginning of construction for several of DOS’s requested changes, and the parties agreed that the yearly rent would not change. *Id.* ¶ 38. USOH further explains that it did not seek to document the costs of tenant-requested changes during construction because it planned to recover the cost of these changes through rent payments over the course of the lease. *Id.* ¶ 61. The lease began in August 2017. *Id.* ¶ 34.

In September 2018, DOS notified USOH that it planned to exercise its option to purchase the property, with a closing date in January 2019. Complaint ¶ 39. DOS later sought to extend the closing to March 2019. *Id.* ¶ 43.

In response to this notice, USOH disputed the purchase price that DOS tendered because, in light of DOS-requested changes, the purchase price was to be determined in accordance with Exhibit H-2. Complaint ¶¶ 7, 41. In response, according to USOH, DOS insisted that H-1 was binding and that any price increase would be capped at \$750,000. *Id.* ¶ 42.

In May 2019, DOS asserted that USOH was in default under the lease agreement because USOH was “refusing to participate in the closing of [DOS’s] purchase of the Premises because [USOH] was insisting on renegotiating the Option-To-Purchase Price.” Exhibit 31 at 3. By letter dated August 20, 2019, the contracting officer issued a final decision finding that USOH’s “failure to work with [DOS] to close on the latter’s purchase of the Premises pursuant to the terms of Exhibit H-1 constitutes default under Article 20” of the parties’ agreement. *Id.* at 7.

USOH appealed this decision to the Board on September 18, 2019. USOH requests that the Board overturn the contracting officer’s determination of default and find that the parties’ agreement requires the parties to negotiate a price before exercising any right to purchase the property. Complaint at 19.

Discussion

USOH has appealed the contracting officer's decision that it was in default of its obligations under the BTL, specifically the option-to-purchase provisions of that agreement. USOH seeks to reverse that finding of default based upon its contention that DOS cannot seek to enforce the option to purchase until the parties negotiate the purchase price in light of the tenant-requested changes that were made during construction. USOH asserts that its defense requires the Board to interpret the interplay between paragraph 4, paragraph 25, and Exhibit H-2, which are all provisions in a lease agreement that the Board has jurisdiction to interpret.

DOS asserts that the contract is a dual-purpose contract, with both a lease and an option to purchase, and because the dispute revolves around the option to purchase provisions, this dispute falls within the exclusion for procurement of real property found in the CDA.

The CDA confers jurisdiction to the Board "to decide any appeal from a decision of a contracting officer . . . relative to a contract made by that agency." 41 U.S.C. § 7105. The Act limits the Board's jurisdiction to agency contracts made for the following four purposes:

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair, or maintenance of real property; or
- (4) the disposal of personal property.

Id. § 7102(a). "Procurement" in the CDA is defined as "an acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the federal government." *Bonneville Associates v. United States*, 43 F.3d 649, 653 (Fed. Cir. 1994). Conveyance of a pre-existing property interest is a contract for the "procurement of . . . real property" within the meaning of [41 U.S.C. § 7102(a)(1)]." *Id.* at 654.

The decision of the United States Court of Appeals for the Federal Circuit in *Bonneville* guides our analysis. Pursuant to that decision, we first determine the nature of the parties' contract. *Bonneville*, 43 F.3d at 654. Here, we have a contract for the construction and lease of housing for government employees. Disputes arising under construction and lease contracts are within the Board's CDA jurisdiction. *Forman v. United States*, 767 F.2d 875, 879 (Fed. Cir. 1985). However, within the agreement at issue here, the parties also negotiated an option to purchase the property. Thus, we have a dual-purpose contract.

Given the dual-purpose nature of the contract, we must “examine the nature of the dispute between the parties to resolve the jurisdictional dispute.” *Bonneville*, 43 F.3d at 654. The parties’ dispute centers around USOH’s failure to fulfill the terms of the option and whether its refusal is justified given the absence of an agreement on price in Exhibit H-2. USOH is correct that exercise of the option will require USOH to deliver a separate sale and purchase agreement for the purchase of the property. But the dispute here centers upon the price term for the real property transfer under that contract. Unlike *Bonneville*, where the dispute centered upon other work the landlord was supposed to do and the warranty provided for that work, *id.*, the dispute here centers upon the terms of the contract for the purchase of real property.

USOH argues that the dispute centers upon terms of the lease and requires the Board to interpret those terms to decide the dispute. In its complaint, however, USOH explains that the resolution of the dispute is not controlled by paragraph 4 and Exhibit H-1, as DOS contends. Instead, paragraph 4 controls the costs of the changes requested, not to the price to be paid in the event DOS exercised the option to purchase. Complaint ¶ 53. The parties negotiated one set of prices for that option, but left as an open term the price if DOS were to request changes. *Id.* ¶ 54. Construing USOH’s allegations in the most favorable light, Exhibit H-2 stands alone and requires the parties to negotiate a price for the purchase. *Id.* ¶ 55. However, the price for the purchase goes to the procurement of the real estate, which the Board lacks jurisdiction to decide.

This analysis does create an anomalous result wherein the Board would possess jurisdiction to interpret paragraph 4 if the dispute were about the rent increase due to tenant requested changes, but is without jurisdiction to decide questions involving the same provision as it relates to the sale. But the dispute is not over the costs of the changes themselves. Instead, USOH seeks to use these changes as the basis for the negotiation of the sale price as required by Exhibit H-2. Complaint ¶ 59. Regardless of the breadth to be applied in interpreting a remedial statute like the CDA, *Bonneville*, 43 F.3d at 655, this breadth is not enough to confer jurisdiction when the dispute centers upon the terms of the conveyance of real property. If we were to assume jurisdiction, the Board would directly contravene the terms of the CDA, which specifically excludes disputes over contracts for the procurement of real property.

Similarly, the fact that the Disputes clause references and the contracting officer invoked the CDA does not decide the matter. “Contractual language . . . cannot confer jurisdiction,” *Florida Power & Light Co. v. United States*, 307 F.3d 1364, 1370 (Fed. Cir. 2002), nor can the actions of the parties; jurisdiction is defined by statute. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-02 (1982).

Decision

DOS's motion is granted. The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge