



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION TO DISMISS DENIED;
APPELLANT'S MOTION TO AMEND THE PLEADINGS GRANTED:
August 11, 2021

CBCA 6149, 6396, 7069, 7070, 7071, 7072, 7074, 7075, 7082, 7083, 7085, 7086, 7087

ALARES LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Douglas L. Patin and Lee-Ann Brown of Bradley Arant Boult Cummings LLP, Washington, DC, counsel for Appellant.

Jennifer Hedge, Office of General Counsel, Department of Veterans Affairs, Pittsburgh, PA; Donald C. Mobly, Office of General Counsel, Department of Veterans Affairs, Denver, CO; and Kathleen Ellis Ramos, Office of General Counsel, Department of Veterans Affairs, Batavia, NY, counsel for Respondent.

Before Board Judges **RUSSELL**, **DRUMMOND**, and **ZISCHKAU**.

DRUMMOND, Board Judge.

These appeals arise from a contract between appellant, Alares LLC, and respondent, the Department of Veterans Affairs (VA), for work to replace/relocate the Intensive Care Unit at the Providence VA Medical Center in Providence, Rhode Island. Before the Board are two motions submitted by the VA—a motion to dismiss, which alleges the Board lacks jurisdiction over the appeals, and a motion to stay all proceedings pending a ruling on the motion to dismiss. Appellant opposes both motions. Appellant has also filed a motion

seeking to substitute Alares Construction, Inc. (Alares Construction) as the appellant in these appeals. Respondent opposes appellant's motion.

Sometime after award of the contract, Alares LLC requested that the VA approve a novation of the contract from Alares LLC to Alares Construction. On May 25, 2016, the VA approved and formalized the novation agreement through bilateral contract modification P00001. Pursuant to the novation agreement, Alares LLC waived any claims and rights it had under the contract, and Alares Construction was recognized as the successor in interest to the contract.

During performance of the contract, a number of disputes arose between Alares Construction and the VA. As a result of these disputes, Alares Construction submitted several requests for equitable adjustment (REAs) to the VA. The REAs were subsequently converted into claims for which the VA contracting officer issued contracting officer's final decisions (COFDs) to Alares Construction. Although the COFDs were all issued to Alares Construction, when the appeals of the COFDs were subsequently filed at the Board, they were filed under the name Alares LLC.

Discussion

In its motion to dismiss, the VA argues that the appeals filed by Alares LLC must be dismissed due to a lack of privity of contract between Alares LLC and the VA. According to the VA, because of the May 2016 novation agreement, Alares LLC is not a "contractor" within the definition of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018). In response, Alares LLC does not contest the contract novation. Instead, Alares LLC proffers that the use of Alares LLC instead of Alares Construction when filing the appeals was simply an inadvertent misnomer and requests to amend the pleadings to substitute Alares Construction as the appellant. The VA subsequently filed a brief, addressing the motion to dismiss and Alares LLC's request to substitute, in which the agency again focused on the novation agreement and how that agreement should result in these appeals being dismissed.

While our Board rules do not specifically address the correction of a misnomer as grounds for amending a pleading, Rule 17 of the Federal Rules of Civil Procedure, which the Board has previously applied in a situation comparable to the one here, provides that tribunals "may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action," and any substitution relates back for statute of limitations purposes to the original filing date of the suit or appeal. *Eastco Building Services v. General Services Administration*, CBCA 5272, 17-1 BCA ¶ 36,670 (quoting Fed. R. Civ. P. 17(a)(3)). In the past, we have allowed the substitution of an

appellant mistakenly named in the appeal when such action will not prejudice the agency. *Id.*; *Triad Realty Trust*, GSBCA 10568, 92-1 BCA ¶ 24,413. An agency is not prejudiced by the substitution of an appellant mistakenly named in the appeal when the agency receives “full and timely notice of the appeal.” *Triad Realty*. Full and timely notice of appeal is given when the notice of appeal informs the agency of the contract in question and the COFD from which the appeal is taken, by author and date; a copy of the COFD is attached to the notice of appeal; and notice is given within the CDA’s ninety-day filing requirement. *Id.*

Here, apart from CBCA 6149, which was appealed as a deemed denial, the notice of appeal for each of these consolidated appeals contains the contract number, identifies the COFD from which the appeal is taken, attaches a copy of the COFD, and was filed within the CDA’s ninety-day filing requirement. Similarly, the notice of appeal for CBCA 6149 identifies the contract number and attaches the REA that was deemed denied. Moreover, each REA or certified claim that was submitted to the contracting officer was transmitted on Alares Construction’s letterhead and was signed by Don Maggioli, the president of Alares Construction. Therefore, we believe that the VA received full and timely notice of each appeal.

Because the substitution of Alares Construction for Alares LLC as the appellant does not prejudice the Government, and because we believe such an amendment to the pleadings is permitted under Rule 17 of the Federal Rules of Civil Procedure, we deny respondent’s motion to dismiss and grant appellant’s motion to amend the pleadings. Respondent’s motion for a stay is now moot.

Decision

The VA’s motion to dismiss is **DENIED**; Alares LLC’s motion to amend the pleadings to substitute Alares Construction, Inc. as the appellant is **GRANTED**. The caption for these consolidated appeals will be amended to reflect “Alares Construction, Inc.” as the party appellant. All future submissions shall reference the name Alares Construction, Inc.

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

CBCA 6149, 6396, 7069, 7070, 7071, 7072, 7074, 7075,
7082, 7083, 7085, 7086, 7087

4

We concur:

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Board Judge