



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: January 5, 2022

CBCA 6961

RDG BRETON, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

John W. Inhulsen of Inhulsen Law PLC, Grand Rapids, MI, counsel for Appellant.

Alexander C. Vincent, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **RUSSELL**, **KULLBERG**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Appellant, RDG Breton, LLC (RDG or lessor), filed claims against respondent, the General Services Administration (GSA), for unanticipated costs incurred due to GSA's delays in meeting certain contractual deadlines. GSA moves for dismissal of RDG's carried interest claims on the basis that they are barred by sovereign immunity and the Board lacks jurisdiction to hear them. We disagree and deny the motion.

Background

GSA entered into a lease with RDG for the improvement and leasing of tenant space on behalf of the Social Security Administration. The lease required GSA to provide design drawings and a notice to proceed by specified contractual deadlines, which GSA admittedly

did not do. RDG contends that GSA's delays caused RDG to pay additional, unanticipated costs to continue performing the contract, including \$157,568 in carried interest on construction loans. RDG filed a claim to recover its costs, which the contracting officer denied. RDG timely appealed the contracting officer's decision to the Board. GSA moves to dismiss the carried interest portion of RDG's claim. GSA argues that even if its delays caused RDG to incur the carried interest costs, the Board lacks jurisdiction to consider them because the award of such interest is barred by sovereign immunity.

Discussion

The Contract Disputes Act (CDA) prescribes the Board's jurisdiction to decide disputes arising under federal government contracts. 41 U.S.C. §§ 7101–7109 (2018). “The Board has jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency . . . relative to a contract made by that agency.” *Id.* § 7105(e)(1)(B). The Act imposes procedural and substantive requirements that must be met to secure our jurisdiction, such as timeliness and a demand for a sum certain. Jurisdiction is a threshold matter, and where the Board lacks subject matter jurisdiction, it may not proceed to decide the merits of a case. *ARI University Heights, LP v. General Services Administration*, CBCA 4660, 15-1 BCA ¶ 36,085; *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928 (citing *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004)).

We do not agree that the Board is precluded from hearing the claim. Respondent incorrectly conflates a general waiver of sovereign immunity from suit with a specific waiver of sovereign immunity for the payment of interest. They are not the same. The CDA is an express waiver of sovereign immunity from suit of contract claims against the Government, which provides the Board with jurisdiction over claims like this one. The “no-interest rule,” on the other hand, prohibits the award of interest as a form of damages in claims against the Government. *England v. Contel Advanced Systems, Inc.*, 384 F.3d 1372, 1378 (Fed. Cir. 2004). Although the CDA provides for the payment of interest on claims, its application is limited to adjudicated awards “for the period beginning with the date the contracting officer receives the contractor's claim . . . until the date of payment of the claim.” 41 U.S.C. § 7109(a)(1). RDG seeks pre-judgment interest, also referred to as “interest damages” or “the cost of money.”

Simply because a contract claim seeks compensation in the form of interest, however, does not mean that the Board is without jurisdiction to entertain it. In *Art Property Associates, LLC v. General Services Administration*, CBCA 6493, et al., 21-1 BCA ¶ 37,866, the Board granted the agency's motion for summary judgment, after determining that a claim for breach of contract damages violated the no-interest rule. The claim requested compensation, in the form of interest, from the date of the offset until the date of claim

submission under the CDA. *Id.* Although the Board determined that it had jurisdiction to hear the claim, it ultimately held that “[n]either the CDA nor any other statute waives sovereign immunity with regard to interest that runs before a contracting officer receives a claim.” *Id.* In *SBC Archway Helena, LLC v. General Services Administration*, CBCA 5997, 19-1 BCA ¶ 37,207 (2018), the lessor sought relief for costs it incurred due to agency delays in issuing a notice to proceed with tenant improvements, including construction loan interest. In denying the agency’s motion for summary judgment, the Board determined, “[t]he lessor is not foreclosed from demonstrating that agency delays occurred that impacted the lessor’s costs during an extended period of performance prior to or during occupancy.” *Id.* In *JDL Castle Corp. v. General Services Administration*, CBCA 4717, et al., 16-1 BCA ¶ 36,249, the Board granted the agency’s motion for summary judgment on the carried interest claims after finding that JDL “failed to provide any evidence that these loans were procured because of, or were affected by, the delay.”

In each of the above cases, the Board’s jurisdiction was not at issue, even where the relief sought violated the no-interest rule. That is because the CDA gives the Board jurisdiction over such claims. Whether the relief sought is barred by sovereign immunity, however, is a separate question that must be decided on the merits. For the foregoing reasons, we find that the Board has jurisdiction to hear RDG’s claims for carried interest.

Decision

The motion to dismiss is **DENIED**.

Kathleen J. O’Rourke

KATHLEEN J. O’ROURKE
Board Judge

We concur:

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge