



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPEAL RE-CAPTIONED; MOTION TO DISMISS DENIED: October 26, 2022

CBCA 7135

THE HEIRS OF BAHAWOUDDIN, SON OF NEYAZ MOHAMMAD,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Roia Shefayee of Wellspring Advisers, PC, Alameda, CA, counsel for Appellant.

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

Before Board Judges **BEARDSLEY** (Chair), **VERGILIO**, and **SULLIVAN**.

SULLIVAN, Board Judge.

Respondent, Department of State (DOS), moves to dismiss this appeal for lack of jurisdiction on three grounds. First, DOS asserts that the claim and appeal were filed by Mr. Mohammad Tariq Baha in his individual capacity, rather than as the representative of the landlord, the Heirs of Bahawouddin, Son of Neyaz Mohammad (Heirs), the party to the lease. Because Mr. Baha as an individual is not in privity with the Government, DOS argues that the Board lacks jurisdiction to decide the appeal. Second, in response to show cause orders issued by the Board, DOS raised a separate issue—whether Mr. Baha has capacity through a power of attorney to file the appeal. Relying upon Afghan law and facts that arose prior to the claim, DOS asserts that Mr. Baha was not authorized to assert the claim or bring the appeal and, therefore, the suit must be dismissed. Third, DOS argues that the claim fails

to state a sum certain. We re-caption the appeal in the name of the Heirs and deny the motion to dismiss.

Background

In December 2013, DOS entered into a lease for a period of ten years beginning March 2014 for residential property in Kabul, Afghanistan. Appeal File, Exhibit 1 at 12.¹ The lease listed the Heirs “acting through Mohammad Tariq, Power of Attorney (Exhibit B)” as the landlord. Exhibit A to the lease was described as “ID of Landlord” and appears to be Mr. Baha’s passport. The lease was signed by “the LANDLORD, The Heirs of Bahawouddin, Son of Neyaz Mohammad acting through their Power of Attorney, Mohammad Tariq.” *Id.* at 12.

Exhibit B to the lease was described as the power of attorney and appears to be the original document and a version translated into English. In response to the first show cause order issued by the Board, Mr. Baha’s counsel certified that the power of attorney is written to grant broad authority to Mr. Baha: the Heirs “name, appoint, and authorize our son and brother Mohammad Tareq, who is also one of the heirs, as attorney with trust and give him unfettered and unconditional authority to make decisions about, and supervise, and maintain, and rent” the property. This same translation was offered in a case before the Court of Federal Claims, in a lease dispute with the United States Army for the same property. *Baha v. United States*, 2020 WL 3045955, at *3 (Fed. Cl. June 4, 2020).²

Pursuant to the lease, payments were to be made to “Mohammad Tariq” and notices were to be provided to “Mohammad Tariq, POA.” Exhibit 1 at 2, 10. The lease also contained a choice of law provision that instructed that “[t]he terms of this Lease shall be construed in accordance with the local laws of Afghanistan.” *Id.* at 10.

The lease contained a Disputes Resolution clause that defined a claim as “a written demand or written assertion by the LANDLORD or TENANT seeking, as a matter of right, the payment of money in a sum certain.” Exhibit 1 at 7. The clause provided the language by which the Heirs, as landlord, would certify the claim:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount

¹ Exhibits cited are found in the appeal file, unless otherwise noted.

² In another translation, dated 2002 and attached to the lease, the Heirs authorized “Mohammad Tareq who is also one of the heirs to act on our behalf. He has authority to rent a house located [description of property].” Exhibit 1 at 18.

requested accurately reflects the Lease adjustment for which the LANDLORD believes the TENANT is liable; and that I am duly authorized to certify the claim on behalf of LANDLORD.

Id. at 8. The clause also permitted that “[t]he certification may be executed by any person duly authorized to bind the LANDLORD with respect to the claim.” *Id.*

In March 2019, DOS withheld the rent payment because it received an inquiry from another one of the Heirs about the rent payments. Exhibit 7. This individual claimed that Mr. Baha did not represent the Heirs and asked that DOS provide the rental payments to him, instead, after the execution of a new lease. *Id.* DOS repeatedly asked for confirmation that this individual represented the Heirs instead of Mr. Baha, but there is no documentation in the record indicating that DOS received this confirmation. *Id.* In June 2019, DOS assigned the lease and the obligation to pay rent to the Republic of Germany. Exhibit 8.³

In October 2020, Mr. Baha, through counsel, submitted a claim in the amount of \$500,000 for unpaid rent and damages from the demolition of structures on the property. Exhibit 2 at 24. Mr. Baha sought “[p]ayment of rent in the amount of \$10,000 per month from March 1, 2017, until paid.” *Id.* Mr. Baha certified the claim, using the language required by the lease. *Id.* at 43. When the claim was denied, Mr. Baha timely appealed to the Board, where the appeal was captioned in Mr. Baha’s name.

Discussion

The Heirs Are in Privity with DOS and Have Capacity to Bring this Appeal

DOS initially sought dismissal of the appeal, arguing that Mr. Baha brought this suit as an individual, rather than pursuant to his power of attorney to represent the Heirs. Because Mr. Baha was not in privity with the Government, DOS asserted that the Board lacked jurisdiction to decide the appeal. Respondent’s Motion to Dismiss for Lack of Jurisdiction at 5-6.

DOS is correct that Mr. Baha is not in privity with DOS on the lease contract. Pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), a contractor is the “party to a Federal Government contract other than the Federal Government.” *Id.* § 7101(7). “An entity that does not meet that definition of a ‘contractor’ is ‘not in privity of contract with the Government’ and ‘cannot avail [itself] of the CDA’s appeal provisions’”

³ Exhibit 8 contains an email reference to the assignment but not the actual document said to be attached to the email

Eastco Building Services v. General Services Administration, CBCA 5272, 17-1 BCA ¶ 36,670, at 178,555 (quoting *Winter v. FloorPro, Inc.*, 570 F.3d 1367, 1371 (Fed. Cir. 2009)). However, the contracting officer read too narrowly the claim submitted on behalf of Mr. Baha as reflecting a claim in his personal capacity. Consistent with the lease and the certification, the claim properly is read to reflect a claim on behalf of the lessor, the Heirs, who are in privity with DOS. Therefore, the Board denies this aspect of DOS's motion to dismiss.

However, for clarity, the Board re-captions the case to reflect the proper appellant. The Heirs are the real party in interest in the appeal. Federal Rule of Civil Procedure (FRCP) 17(a)(1). Pursuant to FRCP 17(a)(3), the Board may re-caption the appeal to substitute the Heirs for Mr. Baha. *Eastco Building*, 17-1 BCA at 178,558. Neither party objected to the Board's suggestion that the appeal be re-captioned, and the Board discerns no prejudice to DOS because the properly presented claim, as discussed below, provided adequate notice of the nature of the dispute.

Mr. Baha requests that the Board re-caption the matter as "The Heirs of Bahawouddin, Son of Neyaz Mohammad, acting through Mohammad Tariq Power of Attorney." We decline the suggestion because the Heirs are the ones who are in privity with the Government, pursuant to the language of the contract. Although one of the Heirs himself, Mr. Baha's individual role in the contract is one of an agent on behalf of the Heirs, and he is not in privity with the Government. The power of attorney does not bring him into privity with the Government. See *Triton Group, Ltd. v. United States*, 10 Cl. Ct. 128, 133 (1986).

Similarly, to ensure that the Heirs are properly represented, DOS requests that we join all of the other Heirs individually as required parties, pursuant to FRCP 19(a).⁴ The Board lacks the authority to join the individual heirs. *Gulf Apparel Corp.*, ASBCA 27784, 83-2 BCA ¶ 16,823, at 83,692. Moreover, the Government's liability is to the Heirs as a group, not any individual heir. See *Lessors of Abchakan Village, Logar Province, Afghanistan*, ASBCA 61787, 21-1 BCA ¶ 37,953, at 184,326.

⁴ Although not stated in its briefs, DOS apparently seeks to prevent another representative from challenging the decision of the Board resolving this matter or from bringing a separate suit on behalf of the Heirs. This issue is resolved by the re-captioning of the appeal. Claims pursued by another potential representative of the Heirs would be examined through the doctrines of claim and issue preclusion to protect DOS from a potential double recovery. See *SBBI, Inc. v. International Boundary and Water Commission*, CBCA 4994, 17-1 BCA ¶ 36,772, at 178,815.

Mr. Baha Properly Certified the Claim

DOS does not object to the Board re-captioning the appeal but asserts that re-captioning does not address Mr. Baha's lack of authority to certify the claim and bring the appeal. Respondent's Response to the Board's Second Show Cause Order at 2-3. DOS asserts, pursuant to Afghan law, that Mr. Baha's authority through the power of attorney to act on behalf of the Heirs is limited to administrative matters. Respondent's Reply Brief at 4. To file suit, according to DOS, Afghan law requires that the individual exercising a power of attorney obtain specific permission from those who granted the power of attorney. Exhibit 11 (Translation of Civil Code of the Republic of Afghanistan, Section 1560). DOS argues that, with this limit on authority, Mr. Baha lacked the necessary authority to certify the claim, pursuant to the CDA, thereby eliminating the Board's jurisdiction to decide the resulting appeal.

Although the lease states that Afghan law will be followed in interpreting the lease contract itself, the issue of who may properly sign the claim certification is a matter of federal procurement law. We follow these precedents in determining the validity of Mr. Baha's claim certification, "the type of question that must be resolved by reference to uniform Federal law, rather than variable foreign law." *Sam Gray Enterprises, Inc. v. United States*, 43 Fed. Cl. 596, 601 (1999), *aff'd*, 250 F.3d 755 (Fed. Cir. 2000); *see also Inversa, S.A. v. Department of State*, CBCA 440, 08-2 BCA ¶ 33,924, at 167,891 (discussing the "desirability of maintaining uniform rules of public contract law.").

Pursuant to the CDA, a contractor must certify that "(A) the claim is made in good faith; (B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief; (C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and (D) the certifier is authorized to certify the claim on behalf of the contractor." 41 U.S.C. § 7103(b)(1). A claim "may be executed by an individual authorized to bind the contractor with respect to the claim." *Id.* § 7103(b)(2). The dispute resolution provision of the lease contains these same requirements, and Mr. Baha's certification meets them. The translation of the power of attorney states that the Heirs gave Mr. Baha "unfettered and unconditional authority to make decisions about" the property that is the subject of the lease and DOS contracted with the Heirs on the basis of this authority. While "a power of attorney should be strictly construed, . . . such an instrument should also be given a construction which will give effect to the intent of the parties." *Deep Joint Venture v. General Services Administration*, GSBCA 14511, 02-2 BCA ¶ 31,914, at 157,678 (citing *A.W. & Associates, Inc.*, 69 Comp. Gen. 737 (1990), and *J.W. Bateson Co.*, B-189848, 77-2 CPD ¶ 472 (Dec 16, 1977)). We find that the grant of authority stated in the power of attorney is sufficient for Mr. Baha to certify the claim.

Similarly, the CDA provides that an appeal may be filed at the Board by “a contractor, within 90 days from the receipt of a contracting officer’s decision” upon a properly certified claim. 41 U.S.C. § 7104(a). This right of appeal is not conditioned upon a grant of authority or any other restriction that DOS would have us impose. DOS’s repeated assertions that Mr. Baha lacks the capacity to file an appeal are resolved by both the conclusion that under the lease he possessed the authority to certify and file the claim and the re-captioning of the appeal in the name of the Heirs.

Although we deny the motion to dismiss, having found that the requirements to bring an appeal pursuant to the CDA have been met, DOS stopped paying rent and seeks dismissal of this appeal because of its concern that Mr. Baha no longer represents the Heirs. To address this concern, we direct Mr. Baha, through counsel, to provide notice to the Heirs of the Board’s decision. If, upon receipt of this notice, the Heirs somehow disavow Mr. Baha’s authority as stated in the power of attorney, the Board may reexamine this issue. *See U.S. Army Tactical Supply v. Department of State*, CBCA 6417, 22-1 BCA ¶ 37,996, at 184,517 (2020) (holding that issues of appellant’s legal right to collect invoice payments required further development of the record); *Afghan Washington Construction Co.*, ASBCA 60856, 18-1 BCA ¶ 37,009, at 180,242 (dismissing appeal upon receipt of evidence that the party that filed the appeal did not represent the contractor).

The Heirs’ Claim States a Sum Certain

DOS also moves to dismiss, asserting that the claim did not demand payment of a “sum certain” as required under the CDA. Respondent’s Motion at 7-9. Specifically, DOS objects to the language at the end of the claim that demands payment of rent at “\$10,000 per month from March 1, 2017, until paid.” *Id.* at 8-9. DOS argues that the “until paid” language is imprecise and that the claim seeks “an open ended, unascertainable amount of rent” and, therefore, fails to meet the sum certain requirement. *Id.* at 9.

To satisfy the sum certain requirement, a contractor must provide a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim. *Creative Management Services, LLC v. United States*, 989 F.3d 955, 963 (Fed. Cir. 2021). Here, the sum certain was ascertainable at the time the claim was submitted—the monthly rent of \$10,000 per month multiplied by the number of months since DOS had ceased rent payments plus \$500,000 for the alleged damage to the property. The amount specified in the claim is a sum certain.

Decision

DOS's motion to dismiss is **DENIED**. On or before **November 15, 2022**, Mr. Baha shall notify the Board that notice to the Heirs, as described above, has been provided. On the same date, the parties shall file a proposed joint schedule for further proceedings in this appeal.

Marian E. Sullivan

MARIAN E. SULLIVAN

Board Judge

We concur:

Erica S. Beardsley

ERICA S. BEARDSLEY

Board Judge

Joseph A. Vergilio

JOSEPH A. VERGILIO

Board Judge