UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART FOR LACK OF JURISDICTION: August 31, 2015

CBCA 4660

ARI UNIVERSITY HEIGHTS, LP,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Howard C. Rubin of Kessler & Collins, P.C., Dallas, TX, counsel for Appellant.

Shana T. Vinson, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **KULLBERG**, and **WALTERS**.

SOMERS, Board Judge.

Respondent, General Services Administration (GSA), has filed a motion for partial dismissal for lack of jurisdiction because, GSA asserts, appellant, ARI University Heights, LP (ARI), did not state a sum certain in the monetary claim it submitted to the GSA contracting officer. ARI opposes the motion. For the reasons stated below, we grant GSA's motion.

Background

On June 26, 2014, GSA and ARI entered into a fifteen-year lease, lease number GS-07P-LTX17317 (2014 lease), for office and related use space, on behalf of the United States Geological Survey (USGS). The lease provides, in part:

> 6.02 UTILITIES (APR 2011)
> The Lessor is responsible for providing all utilities necessary for base Building and tenant operations as part of the rental consideration.
>
> 6.03 ~~UTILITIES SEPARATE FROM RENTAL/BUILDING OPERATING PLAN (AUG 2011)~~ INTENTIONALLY DELETED

Appeal File, Exhibit 5 at 32.

ARI avers that under a previous lease for the same premises, GSA never paid ARI, through rent, for electrical utility expenses; rather, the utility provider metered and charged GSA directly for the electric utility usage. ARI alleges that at a kickoff meeting following the execution of the 2014 lease, GSA and ARI representatives discussed apportioning the electrical utilities for the premises between GSA and USGS, at which time the GSA contracting officer stated that all costs, including electrical utilities, were included in the lease rate. ARI argues that the 2014 lease should preserve the arrangement under the previous lease with respect to electrical utilities. GSA maintains that the 2014 lease requires ARI to furnish a fully serviced lease, including electrical utilities.

ARI submitted a claim to the GSA contracting officer on November 10, 2014, "as it relates to the payment for electrical usage" at the leased premises. The claim provides:

> Subsequent to being told that GSA had interpreted [ARI's] qualifying statement that the lease rate included electrical usage, [ARI], upon request, received the historical power usage by USGS. [ARI] has no way of knowing if this historical pattern will change with the addition of [a second tenant, Fish and Wildlife Service,] to the premises, but per the information provided, the cost to the landlord, based on the average of the last 3 years of use, which includes annualizing 2014 year to date, the estimates are that the cost is likely to be around $20,140 per year, without taking into account the uncontrollable aspect of utility cost increases. Based on a [capitalization (cap)] rate of 7.5%, this reduces the value of the property by approximately $268,533.

> Based on the above, [ARI] makes this claim and respectfully requests that the lease be interpreted so that it requires that the GSA or USGS pay the service provider directly for electrical usage in the Premises and that the rental consideration specifically excludes electrical consumption at the Premises; and that a lease amendment be executed specifically that memorializing [sic] same. Alternatively, [ARI] makes this claim for payment of a minimum of $268,533 for the diminution of the property's value as a result of the inclusion of the cost of electrical service in the rental consideration.

Appeal File, Exhibit 10 at 2. The contracting officer denied ARI's claim in its entirety.

ARI appealed the contracting officer's final decision to this Board on April 2, 2015, and we docketed the matter as CBCA 4660.

Discussion

Parties' Arguments

GSA asserts that the Board lacks jurisdiction over the monetary portion of ARI's claim because ARI has not stated a sum certain. ARI opposes the motion, arguing that the monetary claim is a sum certain derived from calculations presented in its claim.

Standard of Review

The Contract Disputes Act (CDA) delineates the Board's jurisdiction. 41 U.S.C. §§ 7101-7109 (2012). "The strict limits of the CDA constitute jurisdictional prerequisites to any appeal." *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,603 (citing *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004)). Jurisdiction is a threshold matter, and where the Board lacks subject matter jurisdiction, we may not proceed to decide the merits of the case. *See McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,969 (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998)).

GSA has moved to dismiss in part ARI's appeal for lack of subject matter jurisdiction. When considering such a motion, we "[accept] as true the undisputed allegations in the complaint and [draw] all reasonable inferences in favor of the plaintiff." *McAllen*, 14-1 BCA at 174,969 (citing *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011) (applying the standard for a motion to dismiss for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1)). However, once a party has presented

sufficient facts to challenge the Board's jurisdiction to hear a dispute, the party bringing the action must establish jurisdiction by a preponderance of the evidence. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988); *Opportunities for the Aging Housing Corp. v. Department of Housing & Urban Development*, CBCA 1501, 10-1 BCA ¶ 34,311, at 169,488 (2009).

ARI's Claims as Presented

ARI presented two claims to the GSA contracting officer. ARI's first claim is for the interpretation of contract terms. ARI requested that the 2014 lease be interpreted to require the Government to pay the utility provider directly for electrical usage and to specifically exclude electrical utilities from the rental consideration for the premises. ARI's second claim, stated in the alternative, is for payment of a monetary sum. Based on the per-year estimate, and a capitalization rate of 7.5%, ARI requested "payment of a minimum of $268,533 for the diminution of the property's value as a result of the inclusion of the cost of electrical service in the rental consideration." We determine the Board's jurisdiction over each claim separately. *See K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1005 (Fed. Cir. 2015) ("[J]urisdictional standard[s] must be applied to each claim, not an entire case; jurisdiction exists over those claims which satisfy the requirements of an adequate statement of the amount sought and an adequate statement of the basis for the request." (citing *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1281 (Fed. Cir. 1985)).

Whether ARI's Monetary Claim States a Sum Certain

The CDA grants a limited waiver of sovereign immunity by allowing the Federal Government to be sued in its capacity as a contracting party, and, as a waiver of sovereign immunity, must be strictly construed. *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,788 (citing *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982).) Jurisdiction requires "both a valid claim . . . and a contracting officer's final decision on that claim." *See James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996) (citing *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc)); *Corrections Corp. of America v. Department of Homeland Security*, CBCA 2647, 15-1 BCA ¶ 35,971, at 175,741-42 (interpreting 41 U.S.C. § 7103). Because the CDA does not define the term "claim," we apply the definition set forth in Federal Acquisition Regulation (FAR) 2.101, 48 CFR 2.101 (2014). *See, e.g.*, *ASP Denver, LLC v. General Services Administration*, CBCA 2618, 12-1 BCA ¶ 35,007, at 172,041. The FAR defines "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms,

or other relief arising under or relating to a contract." 48 CFR 2.101; *see Construction Group LLC v. Department of Homeland Security*, CBCA 4459, 15-1 BCA ¶ 35,900, at 175,506 (citing *Northrop Grumman Computing Systems, Inc. v. United States*, 709 F.3d 1107, 1112 (Fed. Cir. 2013)).

A contractor must "submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim" to submit a monetary claim in a sum certain. *See Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). A claim for monetary relief is not clear and unequivocal when a contractor's "qualifying language leaves the door open for the request of more money on the same basis." *See Precision Standard, Inc.,* ASBCA 55865, 11-1 BCA ¶ 34,669, at 170,788. In short, the sum certain requirement demands a fixed amount be stated in the claim. *ASP Denver*, 12-1 BCA at 172,041 (citing *Red Gold, Inc. v. Department of Agriculture*, CBCA 2259, 12-1 BCA ¶ 34,921 (2011)); *G & R Service Co. v. General Services Administration*, CBCA 1876, 10-2 BCA ¶ 34,506, at 170,166 (citing *Sandoval Plumbing Repair, Inc.*, ASBCA 54640, 05-2 BCA ¶ 33,072, at 163,933 (holding that the qualifying phrase "no less than" doomed the contractor's claim under the sum certain requirement)); *Rex Systems, Inc*., ASBCA 54436, 07-2 BCA ¶ 33,718, at 166,950-51 (equating "at a minimum" to other unacceptable qualifying phrases in finding that a contractor's claim did not state a sum certain when it sought damages for the release of trade secret information in the amount of, "at a minimum," fifteen percent of the Government's transactions involving the information).

The sum certain requirement is satisfied, or not, at the time the contractor submits its claim to the contracting officer. *See Morgan & Son Earthmoving, Inc*., ASBCA 53524, 02-2 BCA ¶ 31,874, at 157,482 (the contractor's use of "no less than" and "in amounts to be proven at hearing" in its *complaint* did not render its claim uncertain because "the time for determining whether a contractor has submitted a valid CDA claim is when the claim is submitted to the contracting officer, not when the complaint is filed"). Whether or not a contractor will ultimately recover the amount stated in its claim is a matter of quantum to be resolved on the merits, and is distinct from the sum certain jurisdictional requirement. *See ASP Denver*, 12-1 BCA at 172,041.

ARI's monetary claim is not stated as a sum certain because the dollar amount is preceded by the phrase "of a minimum." ARI argues that the inclusion of that phrase is "merely in recognition of the fact that at a future date there may be an additional reduction of value based on increases in absorbed utility costs occasioned by rate increases, *which cannot be presently calculated*." Appellant's Response to Respondent's Partial Motion to Dismiss in Part at 3 (emphasis added). This is precisely the complication the sum certain requirement curtails. The purpose behind the sum certain requirement "is to facilitate

negotiations and the final and fair resolution of [a] claim by the [contracting officer]." *Precision Standard*, 11-1 BCA at 170,787. If a contractor were permitted to demand a minimum or otherwise indefinite amount, the contracting officer would be precluded from resolving the dispute with any finality because, upon payment of the claim, the contractor could simply claim some greater amount. *See CPS Mechanical Contractors, Inc. v. United States*, 59 Fed. Cl. 760, 765 (2004) (citing *Executive Court Reporters, Inc. v. United States,* 29 Fed. Cl. 769, 775 (1993)); *Metric Construction Co. v. United States,* 14 Cl. Ct. 177, 179 (1988). ARI's use of the phrase "of a minimum" evidences the presently unascertainable nature of its monetary claim, depriving the claim of the certainty required by the CDA. However, even if we were to ignore ARI's qualifying language, we would arrive at the same result: ARI's monetary claim is not stated as a sum certain.

ARI contends, citing to *Gardner Zemke Co. v. Department of the Interior*, CBCA 1308, 09-1 BCA ¶ 34,081, that its monetary claim is nonetheless stated as a sum certain because it may be calculated from the formula provided in its claim. The sum certain requirement is satisfied if a sum is "readily calculable by simple arithmetic" from a formula included in the claim, or in an attachment to the claim. *See McAllen*, 14-1 BCA at 174,975 n.9 (citing *PHI Applied Physical Sciences, Inc.*, ASBCA 56581, et al., 13 BCA ¶ 35,308, at 173,337, *appeal dismissed*, No. 2013-1627 (Fed. Cir. Dec. 11, 2013); *Metric Construction, Inc. v. United States*, 1 Cl. Ct. 383, 391 (1983); *Madison Lawrence, Inc.*, ASBCA 56551, 09-2 BCA ¶ 34,235, at 169,207); *Gardner Zemke*, 09-1 BCA at 168,500.

ARI misunderstands *Gardner Zemke*. In that case, the appellant claimed reimbursement for an additional one-percent tax it paid when the Navajo Nation increased a business activity tax during the performance of the contract. *Gardner Zemke*, 09-1 BCA at 168,498-99. The appellant, in its submission to the contracting officer requesting an equitable adjustment, included a spreadsheet listing the total tax payments it made to the Navajo Nation. *Id.* at 168,499. The Board denied the Government's motion to dismiss because the claimed amount could be easily calculated by multiplying the tax payments listed in the spreadsheet by one percent. *Id.* at 168,500. Similarly, in *ASP Denver*, the Board denied the Government's motion to dismiss the appellant's monetary claim for specific real estate taxes it paid but contended were the Government's responsibility. *ASP Denver*, 12-1 BCA at 172,041. In both instances, the appellants claimed reimbursement for costs that, while disputed, were ascertainable as the amounts had been assessed and paid.

Conversely, ARI's monetary claim requests reimbursement for the diminution of the lease property's value, subject to change based on prospective utility expenses. ARI submitted the following "formula" in its claim:

> "[The yearly electrical utility] cost is likely to be around $20,140 per year, *without taking into account the uncontrollable aspect of utility cost increases*. Based on a cap rate of 7.5%, this reduces the value of the property by approximately $268,533."

ARI's formula depends on utility costs for the term of the 2014 lease, a variable that it admits is not presently ascertainable. Whereas the appellants in *Gardner Zemke* and *ASP Denver* based their claims on definite calculations for costs actually incurred, ARI has based its monetary claim on speculated utility costs in future years of the 2014 lease. A formula that includes an unfixed variable cannot yield a sum certain. Accordingly, ARI's monetary claim is not stated as a sum certain.

Because ARI's monetary claim is not a sum certain, ARI's monetary claim is not a CDA claim; consequently, the Board does not have jurisdiction over ARI's monetary claim. *See Construction Group*, 15-1 BCA at 175,507.[1]

Decision

GSA's motion for partial dismissal for lack of jurisdiction is granted. Appellant's claim is **DISMISSED IN PART FOR LACK OF JURISDICTION**.

JERI KAYLENE SOMERS
Board Judge

[1] The Board's dismissal of ARI's monetary claim does not affect ARI's non-monetary claim before the Board; we retain jurisdiction to hear ARI's appeal to interpret the lease to require the Government to pay for electrical usage and to exclude electrical utilities from the rental consideration as an "adjustment or interpretation of [a] contract term." *See* 48 CFR 2.101; *Partnership for Response & Recovery, LLP v. Department of Homeland Security*, CBCA 3566, 14-1 BCA ¶ 35,629, at 174,489 ("The contractor need not submit a monetary claim to have the dispute over interpretation resolved.").

We concur:

H. CHUCK KULLBERG
Board Judge

RICHARD C. WALTERS
Board Judge