UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 25, 2018

CBCA 6158

ELKTON UCCC, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Aaron J. Turner of Levin & Gann, P.A., Towson, MD, counsel for Appellant.

Michael Converse, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SHERIDAN**, **LESTER**, and **CHADWICK**.

CHADWICK, Board Judge.

This appeal resembles *Duke University v. Department of Health & Human Services*, CBCA 5992, 18-1 BCA ¶ 37,023, in that, in both cases, the parties agreed to dismissal without prejudice (but not for lack of jurisdiction) after the Board raised questions about its jurisdiction. As in *Duke*, we take the clearer and cleaner step of dismissing the appeal based on an obvious jurisdictional defect, namely, that the letter that the appellant characterized as its claim to the contracting officer lacked a sum certain. We also find that the contracting officer did not assert a government claim that could form the basis of this appeal.

Background

Elkton UCCC, LCC (Elkton), the appellant, owns a building in Maryland in which it leases space to the General Services Administration (GSA) for a Social Security Administration office. In early 2017, the parties began to dispute whether Elkton was fulfilling its duties as the landlord. In approximately November 2017, GSA began partially withholding rent.

On February 16, 2018, an attorney for Elkton wrote a letter to the GSA contracting officer about the disagreement. Because both parties at least initially advised us that this letter was Elkton's "claim," we quote it in full.

> I have been retained by the landlord of the above referenced property with respect to your unilateral reductions to rent obligations of Social Security Administration.
>
> My clients advised that they agreed to test the property for mold at your cost with the understanding that if no mold was found, there would be no remediation.
>
> I am further advised that the test for mold was negative and no remediation was required. There was never an agreement by the landlord to pay for any of the costs for asbestos. In fact, SSA agreed to pay for the testing cost.
>
> Please deliver a copy of any and all tests you have conducted whether showing a positive or negative finding for mold. Please also advise if you believe this has been delivered previously to the landlord. Please provide copies of the invoices for that test and any remediation you claim was done.
>
> In addition to the above charges, you have taken reductions for rents for other bills such as cleaning, water, etc. that were never raised with the landlord and for which you had no authority to make payment. If you made payment, you did so at your cost and expense. Please provide copies of all invoices, as well as all correspondence with landlord in which you raised the issue that the services were required and evidence of payment.
>
> You are advised that you are not authorized to make any further payments on behalf of landlord without prior written approval.

> Please reimburse landlord for all withheld rent. The landlord's cash flow is very tenuous as a result of your actions and you will be held liable for all costs and expenses incurred.
>
> Your prompt response is appreciated.

The GSA contracting officer responded to Elkton's February 2018 letter by letter dated March 13, 2018. In her letter (which did not refer to Elkton's letter as a "claim"), the contracting officer itemized deficiencies and lease violations that GSA had allegedly encountered at the building since April 2017, and stated that GSA had repeatedly advised the landlord of those issues. The sole mention of a dollar amount in the contracting officer's letter was in a bullet point that stated, "On July 28, 2017, a non-compliance Letter was sent to Avrahom Sauer listing all deficiencies and advising Mr. Sauer that the Government would invoke its right to remedy the issues and deduct rent in the amount of $21,000.00. . . . [N]o response was received." (The July 2017 letter, to which the contracting officer referred, had said "[t]here [wa]s currently" a balance of $21,000 owed for electric services, which GSA intended to pay and deduct from the rent if Elkton did not pay the bill by July 31, 2017.)

The contracting officer concluded, "Based on the above, the action taken to date is considered to be consistent with the remedies provided under the lease. This is the final decision of the Contracting Officer." (Paragraph break omitted.) She advised Elkton of its appeal rights under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012).

Ninety days later, on June 11, 2018, Elkton filed a notice of appeal with the Board. On the appeal form, Elkton stated in part:

> On February 16, 2018, Elkton UCCC submitted correspondence to GSA requesting records to substantiate GSA's claim. GSA failed to provide such records. Instead, it submitted a final decision . . . in which the contracting officer determined all actions taken by GSA were consistent with the remedies in the Lease. A copy of the Final Decision is attached hereto.
>
> Elkton UCCC seeks reimbursement of all rental payments improperly withheld by GSA, including, but not limited to, $21,000 that GSA withheld as a result of Elkton UCCC's alleged defaults.

In an initial procedures order, the Board stated that "[t]he notice of appeal raises facial questions as to the Board's jurisdiction under the [CDA]" and gave the parties two weeks to state, among other things, (1) whether, in each party's view, this appeal involved a contractor

claim or a government claim; (2) the sum certain of the claim, if any; and (3) if the appeal involves a contractor claim, whether the claim was certified.

The parties provided divergent answers. Although, in its notice of appeal, Elkton had described its February 2018 letter to the contracting officer as "requesting records to substantiate GSA's claim," in response to the initial procedures order, Elkton described the February 2018 letter as a CDA claim for "at least $21,000" in withheld rent, which need not be certified under 41 U.S.C. § 7103(b). GSA agreed that Elkton's February 2018 letter was a CDA claim—but GSA called the letter a *nonmonetary* claim. GSA asserted that Elkton's letter "did not request the return of any money that had been withheld to date, let alone a sum certain," but the agency argued that the "letter can be construed, and should be construed, as a contractor claim for an 'interpretation of contract terms'" under Federal Acquisition Regulation (FAR) 2.101 (48 CFR 2.101 (2017) (defining "claim")).

After reviewing these filings, the Board provided the parties with a preliminary jurisdictional analysis (substantially as set forth below) and ordered them to show cause, by July 11, 2018, "why this analysis is incorrect and the appeal should not be dismissed for lack of jurisdiction." The day before that deadline, Elkton filed a motion, unopposed by GSA, noting that "[t]he Board has expressed concern over whether Appellant's February 2018 letter to [GSA] constitutes a 'claim'" and asking us to "dismiss this matter without prejudice and grant such other and further relief as appropriate."

Discussion

There can be no CDA litigation without a preceding CDA claim. *See* 41 U.S.C. § 7103(a); *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996); *Bass Transportation Services, LLC v. Department of Veterans Affairs*, CBCA 4995, 16-1 BCA ¶ 36,464, at 177,687 ("The Board gains jurisdiction under the CDA only after a claim is presented to the contracting officer and is either decided or deemed denied, and the contractor files a timely appeal."). This is true even when, as here, the contracting officer has issued a document styled as a "decision." *E.g.*, *Greenbrier Valley Economic Development Corp. v. Department of Veterans Affairs*, CBCA 5897 (June 7, 2018). The FAR defines a "claim" as a writing "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 the contract." 48 CFR 2.101. We use "a common sense analysis to determine whether the contractor communicated [a] desire for a contracting officer's decision" on a claim. *Moss Card Consulting, Inc. v. General Services Administration*, CBCA 5193, 16-1 BCA ¶ 36,291, at 176,988.

Elkton's February 2018 letter was not a monetary claim under the CDA because it did not demand a sum certain. *E.g.*, *Foxy Construction, LLC v. Department of Agriculture*, CBCA 5632, 17-1 BCA ¶ 36,687, at 178,628. We are puzzled by GSA's assertion, in response to the initial procedures order, that Elkton's letter "did not request the return of any money that had been withheld to date," as the letter explicitly said, "Please reimburse landlord for all withheld rent." Nonetheless, it is true the letter did not quantify a dollar amount then in dispute. Only in the contracting officer's "decision" letter was the figure of $21,000 mentioned (and Elkton's notice of appeal, for that matter, suggests that some larger, unidentified dollar amount is at issue). Nor did Elkton's February 2018 letter refer with specificity to any records or correspondence from which one could tally a sum certain. Overall, Elkton's letter had the tenor of early dispute correspondence (which is consistent with Elkton's description of the letter in its notice of appeal), rather than of a claim triggering the requirement of a contracting officer's decision. *Cf. Moss Card Consulting,* 16-1 BCA at 176,988 (finding that a written request to modify a contract was not a claim).

A similar analysis leads us to reject GSA's suggestion, in its response to the initial procedures order, that we read Elkton's February 2018 letter as a nonmonetary claim seeking an "interpretation" of the lease. For one thing, Elkton's letter did not specify any provisions of the lease for GSA to interpret. More fundamentally, it is clear from Elkton's February 2018 letter that GSA had already "taken [some] reductions" against the rent; Elkton used that phrase in the past tense. Under such circumstances, a claim by Elkton for an "interpretation" of the lease in its favor "would— if granted—yield only one significant consequence," namely, to entitle Elkton to recover money that GSA had withheld. *Securiforce International America, LLC v. United States*, 879 F.3d 1354, 1360-61 (Fed. Cir. 2018), *quoted in Duke,* 18-1 BCA at 180,290. A claim in that posture "is in essence a monetary one," not a nonmonetary one, and must satisfy the requirements of a monetary claim. *Id*. at 1362. Again, Elkton's letter did not qualify because it lacked a sum certain.

There is another possibility, not advanced by either party. Should we construe the contracting officer's March 2018 "decision" letter as asserting either a monetary or nonmonetary *government* claim, which Elkton timely appealed? *See, e.g.*, *Partnership for Response & Recovery, LLP v. Department of Homeland Security*, CBCA 3566, 14-1 BCA ¶ 35,629, at 174,489 ("[B]y issuing the decision which recognized a dispute with the contractor's interpretation of the contract, the contracting officer perfected the agency's interpretation of the contract. This written assertion of the agency's interpretation constitutes a Government claim under the contract. The contractor need not submit a monetary claim to have the dispute over interpretation resolved[.]"). We do not see a government claim here. Although the contracting officer referred in her March 2018 letter to a letter from the prior year in which GSA had threatened to withhold $21,000 in rent, the March 2018 letter did not state that GSA had gone ahead and withheld the $21,000 (or any other sum certain). The

March 2018 "decision" thus lacks the specificity required to assert a monetary claim. As a potential *nonmonetary* claim by GSA, the decision is likewise too vague. We cannot read the contracting officer's general assertion that "the action taken to date is . . . consistent with . . . the lease" as a meaningful enough interpretation of any particular lease provision to constitute an appealable CDA claim against Elkton under the lease. *Cf. K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1005 (Fed. Cir. 2015) (defining a "claim" as a "clear and unequivocal statement that [provides] adequate notice" of the dispute (quoting *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987))); *Partnership for Response & Recovery*, 14-1 BCA at 174,489 (the contracting officer had construed the contract's payment clause).

As in *Duke*, we are dismissing this appeal for lack of jurisdiction even though neither party asked us to. *See Duke*, 18 BCA at 180,291 ("[The parties] asked that the Board, without addressing the jurisdictional issue, dismiss this appeal without prejudice[.]"). Leaving the jurisdictional status of this appeal ambiguous could lead to controversy over the timeliness or venue of a future CDA appeal or lawsuit relating to the lease. *See id*. & n.1. For clarity, we rule that, absent a CDA claim, this appeal was never properly before us.

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

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