APPEALS OF ZOBE, L.L.C.
LEASE AGREEMENT

December 30, 2009

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OPINION OF THE BOARD ON RESPONDENT'S MOTION TO DISMISS

The parties are engaged in a series of disputes concerning a post office in Smithtown, New York that Respondent, United States Postal Service, leases from Appellant, Zobe, L.L.C. Respondent moves to dismiss two of the three appeals in this consolidated case.

First, Respondent contends that Appellant's appeal docketed as PSBCA No. 6244 from a letter designated by Respondent's contracting officer as a final decision was not filed within the ninety-day appeal period of the Contract Disputes Act (CDA), and therefore the Board lacks jurisdiction.

Second, Respondent contends that Appellant's appeal docketed as PSBCA No. 6245 from the portion of a separate decision by Respondent's contracting officer that denied a claim submitted by Appellant should be barred based on the six-year statute of limitations of the CDA.

As explained below, Respondent's motion is granted regarding PSBCA No. 6244, and denied regarding PSBCA No. 6245. The following findings of fact are determined solely for the purpose of deciding the motion.

FINDINGS OF FACT

1. The lease for the Smithtown, New York Post Office, Hauppauge Branch, was entered in 1985 between Respondent and Appellant's predecessor in interest (Appeal File (AF) 1). Respondent exercised unilateral fixed-price options to renew the lease in 1994, 1998 and 2004, and the current term expires on November 30, 2010 (AF 2-4). Appellant became owner of the post office sometime before 1998, and the notices of Respondent's exercise of renewal options in 1998 and 2004 were transmitted to Appellant (AF 3-4, 45).

2. By letter dated November 16, 2005, Appellant notified Respondent's contracting officer that it believed that a fence at the post office should be moved (AF 5). By letter dated November 30, 2005, Appellant notified the contracting officer that the area within the boundaries of the fence exceeded the lease's allocation of exclusive parking space to Respondent (AF 6).

3. By letter dated December 23, 2005, the contracting officer replied that Respondent believed that the fence was correctly placed (AF 8).

4. By letters dated January 6, 2006, July 21, 2006 and December 1, 2006, Appellant disagreed with the contracting officer's position and notified him that Respondent was using more space within the fenced area than it was entitled to use. Appellant stated that it was entitled to additional compensation but did not identify an amount sought. (AF 9, 10, 12).

5. By letter dated December 12, 2006, Respondent's contracting officer stated:

> It is my position that the placement of the fence enclosing the Postal Facility's exclusive parking area which was originally constructed by the Lessor when the facility was first constructed is correctly placed and should not be moved.

The letter included language describing how Appellant could appeal in accordance with the CDA. (AF 13).

6. By letter dated December 22, 2006, Appellant demanded $112,090.74, for reimbursement of real estate taxes from 1995 to 2007, which Appellant asserted was Respondent's responsibility to pay under the lease (AF 45, p. 93).

7. By letter dated January 16, 2007, the contracting officer notified Appellant that to be considered as a claim, the December 22, 2006 letter must be certified in accordance with the CDA (AF 15). By letter dated January 18, 2007, Appellant transmitted a certification of its real estate taxes claim to the contracting officer (AF 16).

8. By letter dated January 23, 2007, Appellant again complained about Respondent's failure to have reimbursed real estate taxes under the lease, and about Respondent's purported use of excessive parking lot square footage within the fenced area. Appellant suggested that a resolution might involve moving the fence or adjusting the rent. However, a monetary amount was not identified or demanded by Appellant. Again on March 23, 2007, Appellant complained about Respondent's use of more parking space area than provided by the lease. Appellant noted Respondent's previous rejection of the request to move the fence, and suggested a rental adjustment to address the issue, without however, identifying an amount. (AF 17).

9. By letter dated April 25, 2007, Appellant complained that Respondent had not responded to its January 18, 2007 letter. Appellant also stated that Respondent should adjust its parking area within the fenced area, or pay for space use in excess of that leased, but it did not identify or demand a sum certain. The letter suggested the possibility that Appellant may remove the fence with the hope that the parties then could agree upon its proper location or agree upon financial arrangements. (AF 18).

10. On May 2, 2007, Respondent's contracting officer transmitted a letter to Ap-

pellant by Certified Mail, return receipt requested, identified as "the final decision of the contracting officer pursuant to the Contract Disputes Act and paragraph 25 of the Lease entitled 'Claims and Disputes."' (AF 35). However, neither paragraph 25 nor any other provision of the lease includes a Claims and Disputes clause, and the lease specifically disclaims its application (AF 1 at 7). The letter was addressed to the address regularly used by Appellant as its return address for correspondence with Respondent (See AF 18).

11. The contracting officer's May 2, 2007 letter did not respond to or assert a monetary claim. It stated that under the lease Respondent is entitled to exclusive use within the fenced area of the post office, and concluded that Appellant is not entitled to additional rent for that area. The letter included language describing how Appellant could appeal in accordance with the CDA. (AF 35).

12. Appellant received the contracting officer's May 2, 2007 letter on May 4, 2007 (AF 35 at 70; see discussion at pp. 8-10, infra). A Track and Confirm print-out from Respondent's commercial website identifies a label/receipt number matching the number typed on the May 2, 2007 letter. The Track and Confirm print-out indicates delivery at 2:24 p.m. on May 4, 2007, in New York, NY 10036, which is Appellant's zip code. (AF 35)

13. On May 11, 2007, the contracting officer issued another letter designated as a final decision. This decision responded to Appellant's $112,090.74 claim for reimbursement of real estate taxes, certified on January 16, 2007. The final decision granted Appellant's claim in the amount of $63,737.02, representing the portion of the claim for the previous six years. However, the contracting officer denied the remaining $48,353.72 of Appellant's claim. The denied portion of the claim represented real estate taxes for the period between January 1995 and November 2000. The basis stated in the final decision for denial of this portion of the claim was that it was barred by the six-year statute of limitations of the CDA (AF 36).

14. By letter dated August 7, 2007, Appellant notified the contracting officer as follows:

> To the extent necessary, please regard this letter as an intent to appeal your "decision" regarding this matter [the real estate taxes claim] as well as that with regards to the Parking Lot.

(AF 37).

15. Respondent received this letter on August 10, 2007 (AF 37), and considered it to be a notice of appeal of the contracting officer's decisions of May 2, 2007, and May 11, 2007 (Findings 10, 13). However, Respondent did not forward these matters to the Board for adjudication until its counsel did so on March 10, 2009, and Appellant did not file anything directly with the Board before then.

16. On December 31, 2008, Appellant filed suit against Respondent in the New York court system for possession of the post office and for damages (AF 28). Following removal to the United States District Court for the Eastern District of New York, the case voluntarily was dismissed without prejudice pursuant to Fed. R. Civ. P. 41 (AF 43; Appellant's Opposition to Motion to Dismiss at § 10).

17. Following receipt of the notice of appeal transmitted to the Board by Respondent's counsel, the Board docketed the appeal of the May 2, 2007 decision (regarding parking area) as PSBCA No. 6244, and the appeal of the May 11, 2007 decision

(regarding real estate taxes) as PSBCA No. 6245. At Appellant's request, the appeals were consolidated, along with its appeal of a third decision by the contracting officer involving Respondent's claim for its costs to replace the fence after Appellant had removed it. The third appeal, docketed as PSBCA No. 6239, is not at issue in this Opinion (March 26, 2009 Order).

DECISION

PSBCA No. 6244.

Respondent argues that the Board lacks jurisdiction over this appeal because Appellant failed to appeal the contracting officer's May 2, 2007 letter within ninety days from its receipt, as required by the CDA. Appellant disputes the date of its actual notice of the May 2, 2007 letter, in arguing that the ninety-day period had not expired when it transmitted its August 7, 2009 notice of appeal to the contracting officer. Appellant also argues that if its notice of appeal was not timely, its appeal nevertheless should be permitted to proceed for equitable reasons.

The Board's statutory authority to review contracting officer decisions depends on appeals having been filed within ninety days from the contractor's receipt of the decision. 41 U.S.C. § 606; see also 41 U.S.C. § 607(c) (applying the CDA to contract disputes before the Postal Service Board of Contract Appeals in the same manner as they apply to contract disputes before the Civilian Board of Contract Appeals). This ninety-day deadline may not be waived by the Board. Accordingly, failure to file an appeal within the CDA's ninety-day deadline divests the Board of jurisdiction to consider the case on its merits. SeeCosmic Construction Co. v. United States, 697 F.2d 1389, 1390-91 (Fed. Cir. 1982); Ellis Coleman, PSBCA No. 5355, 07-1 BCA ¶ 33,461; Pixl Inc. v. Department of Agriculture, CBCA No. 1203, 09-2 BCA ¶ 34,187. Even a filing one day after expiration of the statutory period renders an appeal untimely and requires dismissal. See Birkhart Globistics AG, ASBCA No. 53784, et al., 06-1 BCA ¶ 33,138.

There is no dispute that Appellant transmitted a notice of appeal to the contracting officer no earlier than August 7, 2007 (Finding 14). Thus, if Appellant received the contracting officer's letter ninety days earlier, on May 10, 2007, or thereafter, its notice of appeal would have been timely. Respondent argues that Appellant received the letter on May 4, 2007. As support for that assertion, [FN1] Respondent relies on a Track and Confirm print-out from its commercial website indicating delivery at 2:24 p.m. on May 4, 2007, in New York, NY 10036, which is Appellant's zip code (Finding 12).

Our analysis must focus on the date of receipt by the contractor or its agent, not on the date of its actual notice. See Borough of Alpine v. United States, 923 F.2d 170, 172 (Fed. Cir. 1991); J. Leonard Spodek, Nationwide Postal Management, PSBCA No. 4464, 00-1 BCA ¶ 30,849. Such an analysis, mandated by the language of the CDA, eliminates disputes about the date of actual notice by the contractor, or the contractor's internal arrangements for processing of received mail. Id. Respondent bears the burden to demonstrate the date of receipt of the contracting officer's decision, and it must do so by "objective indicia." See Riley & Ephriam Construction Co. v. United States, 408 F.3d 1369, 1372 (Fed. Cir. 2005); Borough of Alpine, 923 F.2d at 172. Therefore, if Respondent proves by objective indicia [FN2] that a contracting officer's decision was received at the location designated by Appellant for receipt of correspondence, the ninety-day appeal period effectively commences. See Kamp Systems Inc., ASBCA No. 55317, 07-1 BCA ¶ 33,460, recon. granted on other

grounds, 08-1 BCA ¶ 33,748.

Respondent relies on the Track and Confirm print-out from its commercial web site for its objective indicia of receipt of the May 2, 2007 letter. The Track and Confirm print-out identifies the Certified Mail tracking number that appears on the letter itself, identifies a delivery date that would be expected if the letter were mailed on May 2, 2007 as it indicated, and identifies Appellant's zip code. While not as compelling proof as a Certified Mail return receipt, which includes a signature of the person that received the mail, and the date and precise address of receipt, we find the Track and Confirm print-out, the authenticity or accuracy of which was not challenged by Appellant, [FN3] to be sufficient in these circumstances to establish the date of receipt of the contracting officer's May 2, 2007 letter (Finding 12).

Appellant does not deny that the May 2, 2007 letter was received at the correct address on May 4, 2007. However, it explains that May 4, 2007 was a Friday, that the office which Appellant uses solely for the receipt of its mail, closes prior to mid-afternoon on Fridays due to religious observance, and that Appellant's manager only appears periodically at that location to pick up its mail (Declaration of A. Rubin). Appellant suggests that the letter may have been signed for on May 4, 2007 at a security desk in the building, possibly delaying Appellant's actual notice of the letter "for several days." (Appellant's Opposition to Motion to Dismiss, at fn. 3). However, Appellant does not identify the date on which it asserts it received the letter, and it has not submitted evidence to contradict receipt on May 4, 2007, at the address it designated for that purpose. [FN4]

Respondent's unrebutted objective indicia of receipt of the letter by Appellant on May 4, 2007, is sufficient to satisfy the standard established by the CDA. Therefore, because Appellant's August 7, 2007 notice of appeal was transmitted more than ninety days thereafter, the appeal was not filed within the time required by the CDA.

Appellant argues that if the Board decides that its notice of appeal was not filed within ninety days, equitable considerations should allow its case to proceed. We construe Appellant's argument to seek application of the doctrine of equitable tolling. The Federal Circuit has not definitively resolved whether equitable tolling may extend the ninety-day appeal period of the CDA. See Bonneville Associates, LP v. Barram, 165 F.3d 1360, 1365 (Fed Cir. 1999), 528 U.S. 809 (1999) (expressly-leaving the question open). However, we need not resolve whether the doctrine can apply because Appellant has not submitted evidence to support its position.

Appellant offers two reasons to apply equitable tolling. First, it suggests that Appellant's principal is "an upstanding American citizen" rendering services to the government, and it therefore would be inequitable for Appellant to be precluded from having its case heard (Appellant's Opposition to Motion to Dismiss at § 8). Good character is not a basis for equitable tolling.

Second, Appellant argues that its voluntary dismissal without prejudice of related state court litigation, that had been removed to federal district court, was based on its expectation that the Board would adjudicate the merits of this dispute (Appellant's Opposition to Motion to Dismiss at § 10). However, Appellant does not allege that any conduct by Respondent resulted in such an expectation, and the legal effect of a voluntary dismissal without prejudice pursuant to Fed. R. Civ. P. 41renders the dismissed proceedings as a nullity, leaving the parties in the same position as if the suit had never been brought. See Bonneville Associates, 165 F.3d

at 1360. Appellant's arguments do not excuse a late filing under the doctrine of equitable tolling, even if the doctrine legally is applicable. See Glenna Romero, PSBCA No. 5137, 04-2 BCA ¶ 32,790.

Accordingly, because Appellant did not transmit its notice of appeal within ninety days from receipt of the contracting officer's May 2, 2007 letter, we lack jurisdiction to review the merits of its appeal. [FN5]

PSBCA No. 6245.

In the other decision at issue, the contracting officer denied a portion of Appellant's claim seeking payment for real estate taxes that had accrued during the period between January 1995 and November 2000 (Finding 13). Respondent moves to dismiss the resulting appeal because that part of the claim accrued longer than six years before it was asserted by Appellant. Respondent contends that the claim therefore is barred by the six-year statute of limitations in the CDA.

Appellant argues that its accounting methodology results in the inapplicability of the statute of limitations, and further argues that any violation of the statute of limitations should be excused for equitable reasons. [FN6]

As acknowledged by Respondent, the six-year statute of limitations applicable to CDA claims, 41 U.S.C. § 605(a), does not apply to claims relative to a contract awarded prior to October 1, 1995, the effective date of an amendment to the CDA creating the statute of limitations. See 39 CFR § 601.109(c); Motorola, Inc. v. West, 125 F.3d 1470, 1473-74 (Fed. Cir. 1997) [FN7]; National Construction Co., PSBCA Nos. 3902, 3929, 1999 WL 538171 (July 23,1999).

Although the lease on which Appellant's claim is based was awarded prior to October 1, 1995, Respondent, relying on state law authority, [FN8] argues that its exercise of options to renew the lease after that date (Finding 1), created a new lease subject to the statute of limitations. However, ample precedent to the contrary demonstrates that federal law governs this appeal, [FN9] and that Respondent's exercise of renewal options does not create a new contract. See Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1275-76 (Fed. Cir. 1999); VHC, Inc. v. Peters, 179 F.3d 1363, 1366 (Fed. Cir. 1999); Jackson v.United States PostalService, 799 F.2d 1018, 1022 (5th Cir. 1986); Spodek v. United States, 26 F.Supp.2d 750, 757 (E.D. Pa. 1998).

Because the lease was entered before October 1, 1995, the statute of limitations bar does not apply to this claim. Accordingly, Respondent's motion to dismiss the appeal of the contracting officer's May 11, 2007 final decision, docketed as PSBCA No. 6245, is denied.

CONCLUSION

Respondent's motion to dismiss PSBCA No. 6244 is granted. Respondent's motion to dismiss PSBCA No. 6245 is denied. Further proceedings will be handled in accordance with an Order to be issued separately.

Gary E. Shapiro

Administrative Judge

Board Member

I Concur:

William A. Campbell

Administrative Judge

Chairman

I Concur:

David I. Brochstein

Administrative Judge

Vice Chairman

FN1. Where the predicate jurisdictional facts are in dispute, it is proper for us to consider extrinsic evidence to find the facts necessary to determine our jurisdiction. See Hunn Corp. v. National Gallery of Art, GSBCA No. 12888-NGA, 94-3 BCA ¶ 27,148; General Dynamics Corp., ASBCA No. 36985, 89-3 BCA ¶ 22,009.

FN2. Respondent's regulations require contracting officers to furnish such decisions by Certified Mail, return receipt requested, or by any other method that provides evidence of receipt. 39 CFR § 601.109(g)(4). Although the contracting officersent the letter by Certified Mail, return receipt requested (Finding 10), Respondent has been unable to locate the return receipt form. (Respondent's Notice in Response to Order, September 21, 2009). A Certified Mail return receipt form ordinarily would demonstrate such receipt. See Quillen v. United States, 89 Fed. Cl. 148, 2009 WL 3232745 (October 1, 2009), at 3.

FN3. See Nuskey v. Hochberg, --- F.Supp.2d ----, 2009 WL 3069722 (D.D.C. September 25, 2009) (sworn declaration attesting to date of receipt later than that indicated in Track and Confirm print-out defeats summary judgment motion on timeliness grounds where return receipt form that would have proved date of receipt was not produced). The parties have not submitted supplemental briefing concerning the legal significance of the Track and Confirm print-out despite an opportunity to do so.

FN4. Appellant's sole explanation for a delay of its actual notice -- that personnel at a security desk at its address may have signed for the letter and provided it to Appellant a "few days later" -- likely would not account for the six days that would be needed for Appellant's appeal to be timely. Additionally, even if it had submitted evidence of receipt of the letter by personnel at a security desk, Appellant has not denied that such personnel were its agents for receipt of mail.

FN5. The resulting dismissal raises the question of whether expiration of the appeal period has preclusive effect on any possible future monetary claim, or related claim or appeal, given the uncertain legal status of the May 2, 2007 letter as a contracting officer's final decision pursuant to the CDA. See Asset #20024 L.L.C. c/o Nationwide Postal Management, PSBCA No. 6249, 2009 WL 3324241 (October 16, 2009); Midwest Transport, Inc., PSBCA No. 6132, 08-1 BCA ¶ 33,823. Because we find that the appeal of the contracting officer's May 2, 2007 letter was untimely, we

express no opinion as to whether the letter constitutes a cognizable final decision or whether it is entitled to preclusive effect. Similarly, we express no opinion concerning the contracting officer's similar earlier letter, dated December 12, 2006, also styled a final decision (Finding 5), the legal significance of the contracting officer having issued a second decision on the same matter, or the legal significance of Respondent's failure to have forwarded Appellant's notice of appeal for nineteen months (Finding 15), issues not addressed by the parties.

FN6. See Arctic Slope Native Assn. v. Sebelius, 583 F.3d 785 (Fed. Cir. 2009).

FN7. The Federal Circuit concluded in Motorola that the CDA's six-year statute of limitations may not be applied retroactively by virtue of the Office of Federal Procurement Policy's issuance of a FAR governing the effective date of the six-year bar. While the FAR does not apply to the Postal Service, the applicable postal regulation, 39 CFR § 601.109(c), is identical to the FAR interpreted in Motorola.

FN8. Respondent also relies on Ramah Navajo School Board, Inc. v. United States, 83 Fed. Cl. 786 (2008). In Ramah Navajo School Board, however, "[n]either party alleges that this contract is not subject to revised § 605(a), and plaintiff consistently argues that the six-year period is applicable to its [] claim." Id., 83 Fed. Cl. at 798, n. 5.

FN9. See Forman v. United States, 767 F.2d 875, 879-80 (Fed. Cir. 1985).