

APPEALS OF STEWARTSVILLE POSTAL PROPERTIES LEASE AGREEMENT

September 7, 2011

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OPINION OF THE BOARD ON RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Respondent moves for partial summary judgment, [FN1] asserting that the Board's dismissal with prejudice of a prior appeal involving the underlying subject matter renders final the contracting officer's decision that Appellant is responsible under the lease for snow removal. Respondent maintains that entitlement therefore is established in its favor based on res judicata, leaving only quantum for the Board to address in these appeals.

We grant Respondent's motion because the statutory period for Appellant to appeal the contracting officer's decision involved in the previously dismissed case has expired. Accordingly, we find that matter, that snow removal was Appellant's obligation under the lease, to be resolved with finality and to be unreviewable. The scope and meaning of that responsibility, as well as quantum issues however, remain for the Board to address in these appeals.

The following findings of fact are determined solely for purposes of resolving this motion.

FINDINGS OF FACT

1. On March 26, 2008, the parties entered into a lease under which Appellant, Stewartsville Postal Properties, LLC, constructed the Stewartsville, New Jersey Main Post Office (Stewartsville MPO), and leased it to Respondent, U.S. Postal Service (Appeal File Tab (AF) 1).

2. General Condition 8, Claims and Disputes, of the lease provides, at subsection (c),

"Claim," as used in this clause, means 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 this contract.

(AF 1 at 7).

3. As reflected in a series of communications between the parties in December 2009, a dispute arose as to whether the provisions of a "Utilities, Service and Equipment Rider" that was listed in the lease under a paragraph entitled "Other Provisions" was actually part of the lease. Appellant contended that two pages that contained the actual language of the Rider were not physically present in the lease that the parties executed and, therefore, were not legally part of the lease. Among the disputed Rider provisions was a paragraph requiring the lessor to provide snow removal services at the Stewartsville MPO. Respondent's personnel took the position that Appellant was obligated under the lease to provide those services. (AF 4-5; compare AF 5 at 83, AF 7 and AF 12 with AF 6 and AF 8; see also Complaint and Answer ¶¶ 12-14).

4. During the winter of 2009-2010, Appellant refused to provide snow removal services at the Stewartsville MPO, and the Stewartsville Postmaster arranged for the services to be provided by a contractor. In a February 18, 2010 letter to Appellant, Respondent's Real Estate Specialist stated his opinion that Appellant was responsible under the lease for snow removal, and that he expected Appellant to reimburse the Postal Service for the funds it had expended. (AF 4-6).

5. In response to the Real Estate Specialist's letter, Appellant sent an undated letter to Respondent setting out its position in detail. In addition to arguing that the Rider was not part of the lease at all, Appellant also identified questions regarding interpreting the Rider's language. Appellant referred to its letter as a claim, and requested a final decision on the matter. (AF 7 at 87).

6. On June 3, 2010, Respondent's contracting officer issued a final decision in which he stated that he was responding to Appellant's claim concerning snow removal responsibility, referenced in Finding 5. The decision analyzed which version of the lease controlled (with or without the Rider that included the snow removal provision). The final decision concluded,

Given the above it is my determination that you, as landlord, have responsibility for snow removal under the terms of the lease ...

(AF 8).

7. While the contracting officer's decision concluded that snow removal was Appellant's responsibility under the lease, it did not respond to Appellant's questions about the scope of that snow removal responsibility or otherwise interpret that provision. The contracting officer's decision included language advising Appellant of its appeal rights. (AF 8; see 39 CFR § 601.109 (g) (7- 8)).

8. On September 1, 2010, Appellant's principal transmitted a letter to the contracting officer denoted as "a formal notice of appeal" of the final decision, and designating "this Notice of Appeal as a Complaint." (AF 9).

9. Respondent's counsel forwarded Appellant's notice of appeal to the Board, and the appeal was docketed as PSBCA No. 6350. On October 29, 2010, Appellant's counsel filed a notice of appearance.

10. In a letter to the Board dated December 10, 2010, Appellant's counsel stated,

In reference to the above captioned matter, as you are aware my office represents the Appellant, Stewartsville Postal Properties, LLC. After consultation with my client please accept this letter as a formal withdrawal of Appellant's appeal under PSBCA No. 6350.

11. On December 20, 2010, the Board issued an Order in PSBCA No. 6350, as follows,

Appellant's counsel has filed a letter withdrawing this appeal. Appellant is advised that such a withdrawal will result in dismissal of the appeal with prejudice. If Appellant has any objection to such a result, it must notify the Board in writing no later than January 7, 2011. (Emphasis in original).

Appellant's counsel received the Order on December 28, 2010.

12. The Board did not receive a response to the Order referenced in Finding 11.

13. On January 19, 2011, the Board dismissed PSBCA No. 6350 with prejudice. The Dismissal provided,

Appellant submitted a letter dated December 10, 2010, withdrawing this appeal. On December 20, 2010, the Board issued an Order advising Appellant that such a withdrawal would result in dismissal of the appeal with prejudice. That Order allowed Appellant until January 7, 2011, to object to such a dismissal. No objection having been received, this appeal is dismissed with prejudice.

(AF 10).

14. On February 17, 2011, Respondent's contracting officer issued a decision assessing Appellant \$3,196.20 for snow removal costs that Respondent incurred at the Stewartsville MPO. The contracting officer indicated that Respondent intended to deduct that amount from the March rent otherwise due Appellant. Regarding responsibility for snow removal, the contracting officer's decision stated,

On June 3, 2010[,] I issued a final decision letter to you regarding snow removal at the Stewartsville, NJ Post Office. In that letter I stated that under the terms of your Lease with the Postal Service you have responsibility for snow removal at the facility. A copy of that letter is attached. You did not fully pursue an appeal to challenge my decision that you are liable for snow removal under the Lease and the time to do so has expired. As such, my final decision on liability is now binding.

(AF 14).

15. Appellant timely appealed the contracting officer's decision (AF 15). The appeal was docketed as PSBCA No. 6377.

16. On March 31, 2011, Respondent's contracting officer issued another decision, assessing Appellant \$1,548.75 for additional snow removal costs, to be deducted from the April rent. The contracting officer's decision included the same paragraph recited in Finding 14. (AF 17).

17. Appellant timely appealed this decision. The appeal was docketed as PSBCA No. 6382, and the appeals were consolidated (May 13, 2011 Order).

18. On June 16, 2011, Respondent's contracting officer issued another decision, assessing Appellant \$1,638.75 for additional snow removal costs, to be deducted from the June rent. The contracting officer's decision included the same paragraph recited in Finding 14.

19. Appellant timely appealed this decision. The appeal was docketed as PSBCA No. 6394, and the appeals were consolidated (June 30, 2011 Order).

20. Respondent's Answer raised res judicata as an affirmative defense (Answer at 4), and a briefing schedule was established to address the issue (Order and Memorandum of Telephone Conference, April 28, 2011). Respondent's motion, captioned Re-

spondent's Legal Brief On the Res Judicata Effect of June 3, 2010 CO Final Decision Letter, was received by the Board on May 11, 2011, and construed to apply to the consolidated appeals (May 13, 2011 Order; June 30, 2011 Order). Appellant did not respond to the motion (June 17, 2011 Order).

DECISION

Respondent argues that the Board's dismissal with prejudice of PSBCA No. 6350 requires that we rule that the question there at issue which was addressed by the contracting officer has been resolved in its favor. Respondent argues that Appellant therefore is precluded from contesting entitlement in the present appeals due to res judicata. It concludes that as a result, the Board need only determine in these appeals whether the costs incurred by Respondent were reasonable.

Appellant did not respond to the motion (Finding 20). [FN2] In the absence of explanation by Appellant, we consider, and ultimately accept an argument presented in Respondent's motion, that the denied claim appealed in PSBCA No. 6350 was cognizable as a claim under the Contract Disputes Act (CDA). [FN3] The CDA itself does not define a claim. However, Federal Circuit precedent obliges us to consider the term "claim" broadly. See *Todd Construction, L.P. v. United States*, ___ F.3d ___, 2011 WL 3796259 (Fed. Cir., August 29, 2011). We examine applicable regulations implementing the CDA, the language of the contract, and the facts of the case to decide whether an appeal of a cognizable claim was at issue in PSBCA No. 6350. See *Garrett v. General Electric, Co.*, 987 F.2d 747, 749 (Fed. Cir. 1993).

Regulations implementing the CDA for Postal Service contracts [FN4] do not address the definition of a claim. See 39 CFR § 601.109. However, the lease's Claims and Disputes clause implementing the CDA (Finding 2) provides the definition. Utilizing that definition, we determine that Appellant's letter, which Appellant itself designated as a claim, which expressly requested a contracting officer's decision (Finding 5), and which sought interpretation of the lease (Finding 2) constituted a CDA claim. [FN5] See *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1267 (Fed. Cir. 1999).

The contracting officer's response, that Appellant "as landlord, [has] responsibility for snow removal under the terms of the lease," (Finding 6), was unequivocal in interpreting the lease responsibilities. This falls within the ambit of a cognizable claim and contracting officer decision appealable under the CDA. See *Alliant Techsystems*, 178 F.3d at 1265 (contracting officer determination rejecting contractors' position concerning validity of government exercise of an option); see also *Kaman Precision Products, Inc.*, ASBCA No. 56305, 10-2 BCA ¶ 34,529 (nonmonetary contract interpretation question whether contractor obliged to perform at all is within Board's CDA jurisdiction); *N.J. Hastetter*, PSBCA No. 3064, 92-3 BCA ¶ 25,189 (nonmonetary claim to determine lease obligations of the parties within Board's jurisdiction); *Greater Eastern Holding Co.*, PSBCA No. 1128, 83-2 BCA ¶ 16,784 (nonmonetary claim to determine continuing responsibility for roof repairs under a lease within Board's jurisdiction).

Accordingly, the contracting officer's June 3, 2010 decision must be appealed within 90 days for the Board to possess jurisdiction to address its merits, or within 12 months to vest jurisdiction with the United States Court of Federal Claims. 41 USC § 7104. Failure to appeal or file suit within those time frames results in the contracting officer's decision becoming final, conclusive and not subject to review in any forum. 41 USC § 7103(g). Under the facts of this case, once the appeal of that final decision in PSBCA No. 6350 was dismissed, for purposes of timeliness, it was as if the appeal never were brought. See *Charles G. Williams Construction, Inc.*, ASBCA Nos. 51329, 51637, 99-2 BCA ¶ 30,409. As recognized in the contracting officer's monetary decisions (Finding 14), the time for challenging before the Board that now-final and unappealable CDA decision is past. We find the matter addressed in the contracting officer's June 3, 2010 decision resolved. [FN6]

Accordingly, snow removal is Appellant's obligation under the lease. Proceedings concerning the remaining aspects of these appeals, involving the scope of that responsibility and damages issues, will be addressed by separate Order.

CONCLUSION

Respondent's motion for partial summary judgment is granted.

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. Because Respondent's motion addresses the merits of these appeals, we construe it as one for partial summary judgment. See *J. Leonard Spodek, Nationwide Postal Management*, PSBCA No. 4351, 00-1 BCA ¶ 30,681, at 151,519 n.1.

FN2. Nor did Appellant respond to the Board's December 20, 2010 warning that withdrawal of PSBCA No. 6350 would result in dismissal with prejudice (Findings 11-13). At the time of Appellant's withdrawal request and the Board's warning, the 90-day appeal period had expired.

FN3. Had we concluded to the contrary - that the denied claim was not cognizable as a CDA claim, the statutory appeal period would not have begun, and so, could not be expired. Similarly, there could not have been a viable appeal before the Board when PSBCA No. 6350 was dismissed, and the dismissal could not have resulted in any preclusive effect. See *Do-Well Machine Shop, Inc.*, 870 F.2d 637, 639-40 (Fed. Cir. 1989).

FN4. The Federal Acquisition Regulations, which include a definition of a claim for CDA purposes, see *Garrett*, 987 F.2d at 749, do not apply to the Postal Service. See *Zobe, LLC*, PSBCA Nos. 6239, 6244, 6245, 10-1 BCA ¶ 34,342.

FN5. We express no opinion as to whether the contracting officer's decision would have been viable under the CDA in the absence of Appellant's claim requesting it be decided.

FN6. Accordingly, we need not address Respondent's *res judicata* argument.