UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED; MOTION FOR
SUMMARY JUDGMENT GRANTED IN PART: July 6, 2020

CBCA 6506

1000-1100 WILSON OWNER, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Seamus Curley of Stroock & Stroock & Lavan LLP, Washington, DC, counsel for Appellant.

James F. H. Scott and Jessica Gunzel, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **ZISCHKAU**, and **CHADWICK**.

BEARDSLEY, Board Judge.

Appellant, 1000-1100 Wilson Owner, LLC (Wilson), moved to dismiss the General Services Administration's (GSA) complaint and moved for summary judgment. Wilson argues that GSA failed to assert a timely claim for reimbursement of erroneously paid taxes under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018), and breached a lease by setting off the amount in dispute without a contracting officer's decision. We deny the motion to dismiss and grant in part the motion for summary judgment.

Background

In July 2002, GSA entered into lease 11B-01534 (lease I) with Wilson for office space in Arlington, Virginia.[1] Lease I included General Clause No. 9, GSAR 552.270-39, Mutuality of Obligation (AUG 1992), which provided:

> The obligations and covenants of the Lessor, and the Government's obligation to pay rent and other Government obligations and covenants, arising under or related to this Lease, are interdependent. The Government may, upon issuance of and delivery to Lessor of a final decision asserting a claim against Lessor, set off such claim, in whole or in part, as against any payment or payments then or thereafter due the Lessor under this lease. No setoff pursuant to this clause shall constitute a breach by the Government of this lease.

See Lease I at 5. The same language appears in lease 11P-LVA12618 (lease II), which was for essentially the same space and replaced lease I after lease I expired in November 2012.[2] The U.S. Trade and Development Agency occupied the premises under both leases until March 2018.

In 2012, GSA conducted an internal audit of existing leases in the National Capital Region and determined that GSA was improperly reimbursing Wilson for certain taxes assessed by Arlington County. On November 15, 2012, a GSA budget analyst informed Wilson and others by blanket notice that GSA had improperly reimbursed certain taxes under lease I. In December 2012, the contracting officer issued unilateral supplemental lease agreement (SLA) 23 withholding $34,518.55, an amount equal to the contested taxes, from the amount invoiced by Wilson under lease I. The contracting officer's transmittal letter stated, "Enclosed, please find one copy of Supplemental Lease Agreements [sic] No. 23 which provides for real estate tax adjustment for Government-leased space located in the above referenced building. In accordance with the basic lease agreement, the Government has executed the enclosed SLA which reflects a one-time lump sum to be paid with your next monthly rent payment." The contracting officer also stated in the SLA that the credit was "issued to reflect the annual real estate tax adjustment provided for in the basic lease agreement." Wilson objected to GSA's deduction but did not invoice for the taxes at issue for the remainder of lease I or lease II.

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[1] All facts are drawn from the parties' joint stipulation of facts, the lease documents, or the claim exhibits, unless otherwise stated.

[2] Lease II contained General Clause No. 8, GSAR 552.270-28, Mutuality of Obligation (SEP 1999), which contains the same language.

From 2013 to 2016, GSA and Wilson had meetings and repeated communications about the tax issue and GSA's intent to engage in unilateral setoffs. In July 2014, the Assistant Commissioner of GSA's Public Building Service Office of Leasing advised Wilson that GSA was reviewing its policies on some of the taxes at issue. On October 29, 2014, GSA's financial services division demanded payment of $110,874.47 by check to reimburse GSA for overpayment of taxes. The notice informed Wilson that "[o]ffsets will be taken from associated leases, if deemed possible." In March 2016, the financial services division sent four claim letters to collect funds. A Wilson representative responded by asking, "I thought these claims were on hold because GSA itself kicked the matter back to regional for review of its policy on the issues at hand. Has regional reached out to you with a final decision?" GSA's auditor answered that "[i]t has been decided by NCR [National Capital Region] legal and leasing management that the special assessment tax claims in Arlington are valid and the collections will be processed if possible. If the funds cannot be collected from rental payments, the debts will be forwarded to Treasury at the appropriate time." GSA's auditor went on to say,

> You still have the right to formally request a CO's [contracting officer's] decision on all of these, however it is my understanding that the recoveries are going to proceed. I am the facilitator of the claims, but not the decision maker. As you know this has been a very long and drawn out process. If you have questions or concerns regarding the process, you should contact your Contracting Officer. If you have questions or concerns regarding the calculations of the claims, then I am the one to contact.

On July 1, 2016, GSA deducted $104,874.53 from lease II payments to satisfy Wilson's alleged debt for taxes paid under lease I. On June 30, 2016, Wilson received an automated notice that "The GSA Fort Worth Finance Center has processed a payment for your invoice(s) (detailed below) in the amount of $27752.00." Wilson asked GSA's auditor,

> We received notification that the lease below will be paying us $27,752.00 for arrears rent to cover June. Since they usually pay $132,626.53, this amounts to $104,874.53 offset. Might you please confirm that the entire amount is intended as an offset and let me know to which claim the amount was applied?

The auditor replied, "Yes, the entire amount of $104,874.53 is an offset for claim CLA14715. The claim is for recovery of special assessment taxes against [lease I]."

The parties stipulate that "[d]espite multiple discussions with GSA personnel, Wilson Owner did not receive a formal, written communication on the tax reimbursement issue from the C.D. [sic] assigned day-to-day responsibility for Lease I or Lease II. Further, the C.O.

did not issue a C.O.'s Final Decision or any other findings with respect to the taxes. Rather, Government communications largely involved GSA executives, GSA finance personnel, or GSA's outside auditor."

Wilson submitted a certified claim on November 14, 2018, challenging GSA's refusal to pay the taxes at issue, alleging an illegal setoff and alleging breach of both leases. GSA denied Wilson's claim in March 2019, and Wilson filed this appeal in May 2019.[3] By agreement of the parties, GSA filed a complaint limited to requesting that the Board declare as proper GSA's "setting amounts paid under Lease I off on Lease II" and "GSA's withholding requested payments" on lease I. Wilson moves to dismiss the complaint and for summary judgment on the grounds that GSA did not assert its claim within the six-year statute of limitations, rendering the setoffs improper as a matter of law, and that GSA's failure to act in time entitles Wilson to recoup the amounts set off under both leases.

Discussion

Wilson seeks dismissal of GSA's complaint under Board Rule 8(e) (48 CFR 6101.8(e) (2019)) for failure to state a timely claim and moves for summary judgment for monetary relief in the amounts wrongfully set off by GSA. "A motion to dismiss is appropriate if the Board can decide the appeal on the pleadings without the introduction of further evidence." *Akal Security, Inc. v. Department of Homeland Security*, CBCA 3389, 14-1 BCA ¶ 35,532 (citing *Americom Government Services v. General Services Administration*, CBCA 2294, 12-1 BCA ¶ 34,895 (2011)). Here, the Board must consider outside evidence found in the parties' stipulation of facts and claim exhibits, about which GSA had notice and the review of which benefits GSA. *See JRS Management v. Lynch*, 621 F. App'x 978, 981 (Fed. Cir. 2015) ("[I]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56 [and] [a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." (quoting Fed. R. Civ. P. 12(d))). Specifically, GSA's complaint fails to refer to much of the correspondence between the parties related to the setoffs and fails to mention the contracting officer's involvement in the lease I and lease II setoffs. We therefore treat the motion to dismiss as a motion for summary judgment. *See id.* (premising the conversion of a motion to one for summary judgment on the finding that

[3] Related landlords filed nineteen additional appeals on their leases on May 31, 2019. Because the legal and factual issues in all of these appeals are similar, GSA and Wilson's counsel, who also represents the related landlords, identified six appeals that could be tried on the merits to address the vast majority of issues in the various appeals. The parties identified CBCA 6506 as the appeal to adjudicate the statute of limitations issue, an issue common to all of the claims.

matters outside the pleadings had been presented to the court); *e.g., Godwin Anagu v. General Services Administration*, CBCA 5626, 17-1 BCA ¶ 36,812. Summary judgment is appropriate "where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law." *Marine Metal, Inc. v. Department of Transportation*, CBCA 537, 07-1 BCA ¶ 33,554 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). The material facts referenced herein have been stipulated to or are otherwise undisputed.

The Government's right to be reimbursed for alleged overpayments of real estate taxes is a government claim subject to the CDA's six-year statute of limitations. *See JBG/Federal Center, L.L.C. v. General Services Administration*, CBCA 5506, 18-1 BCA ¶ 37,019. "Each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A). It is undisputed that GSA's claim to recoup the overpayment of real estate taxes accrued at the latest on November 15, 2012, when GSA first notified Wilson about the overpayment of taxes. GSA's claim to recoup the overpayment of real estate taxes, therefore, had to be submitted on or before November 15, 2018.

"A claim is submitted by the government when the contracting officer renders a final decision to the contractor." *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1320 (Fed. Cir. 2014). The parties stipulated that the contracting officer did not issue a written, final decision expressly addressing the taxes at issue.

Withholding a contract balance can, however, constitute a decision on a government claim. In *Placeway Construction Corp. v. United States*, 920 F.2d 903 (Fed. Cir. 1990), the Court held that the contracting officer effectively granted the government claim by "declin[ing] to pay Placeway the balance due on the contract," even though the contracting officer's letter declining to pay did not specify the precise amount of damages to be withheld nor did it include language indicating that it represented a final decision. *Id.* at 906. It was enough that the decision to withhold funds resolved issues of liability and of damages administratively, rendering the case ripe for judicial review. *Id.* at 906-07 (citing *Teller Environmental Systems, Inc. v. United States*, 802 F.2d 1385, 1388-89 (Fed. Cir. 1986)).

Here, the contracting officer asserted a government claim for $34,518.55 within the limitations period by withholding payment in December 2012 under lease I. The contracting officer's letter and SLA 23 resolved both liability and damages. This decision on the government claim was "no less final because it failed to include boilerplate language usually present for the protection of the contractor." *Placeway*, 920 F.2d at 907; *see also Hof Construction, Inc. v. General Services Administration*, CBCA 6306, 19-1 BCA ¶ 37,219 (discussing *Placeway* and *Decker & Co. v. West*, 76 F.3d 1573 (Fed. Cir. 1996)); *Sprint*

Communications Co. v. General Services Administration, GSBCA 13182, 96-1 BCA ¶ 28,068 (1995) (finding that a letter from the contracting officer detailing deficiencies and deductions constituted a decision on a government claim).

The record is devoid of evidence, however, that the contracting officer issued a similar determination concerning the $104,874.53 withheld under lease II. The record indicates that the financial services division set off the lease II payments, and GSA's auditor confirmed the reason for the setoff. Since the contracting officer did not determine the basis or amount of liability, he issued no decision on GSA's claim for the $104,874.53. *See* 41 U.S.C. § 7103(a)(4)(A); *Placeway*, 920 F.2d at 906.

It is not enough that the setoff was the result of "some sort of decision" by "someone," as GSA argues. The CDA requires that every claim "be submitted to the contracting officer for a decision." 41 U.S.C. § 7103(a)(1). Accordingly, one of our predecessor boards dismissed appeals from deductions on a janitorial services contract for lack of a contracting officer's decision because the letters advising the contractor of the deductions were from the field office manager, not the contracting officer. *Iowa-Illinois Cleaning Co. v. General Services Administration*, GSBCA 12595, 95-2 BCA ¶ 27,628; *see also Volmar Construction, Inc. v. United States*, 32 Fed. Cl. 746, 753 (1995).

GSA further argues that the deductions of $34,518.55 from lease I payments and $104,874.53 from lease II payments constituted nonpayment of an invoice and not a government claim. GSA says it refused to pay amounts due during performance of the lease, rendering Wilson as "the only aggrieved party with anything left to claim." We disagree. GSA's deductions for an alleged debt are distinct from simple nonpayment for failure to perform. "[I]t is by now well established that such a withholding or deduction to a fixed-price contract qualifies as a Government claim." *Sprint Communications Co. v. General Services Administration*, GSBCA 14263, 97-2 BCA ¶ 29,249 (citing *Placeway*, 920 F.2d at 906); *accord JBG/Federal Center*, 18-1 BCA ¶ 37,019.

GSA also argues that it could choose to exercise its common law right of setoff instead of complying with the CDA, thus eliminating the need for a contracting officer's decision. GSA is mistaken. The common law right of setoff and the CDA are not mutually exclusive. The CDA is implicated when the Government's claim "relates to a contract." *See Applied Cos. v. United States*, 144 F.3d 1470, 1472-73 (Fed. Cir. 1998) (finding that erroneous payments due to a computer error did not create a claim relating to a contract under the CDA). GSA's claim for overpaid taxes relates to the terms of lease I and required a contracting officer's decision to proceed. *See Cecile Industries, Inc. v. Cheney*, 995 F.2d 1052, 1054-55 (Fed. Cir. 1993).

Wilson asserts that GSA breached the mutuality of obligation clauses in the leases by taking the setoffs without a contracting officer's decision. Because we find that GSA issued a contracting officer's decision before withholding $34,518.55 under lease I but that GSA's claim for $104,874.53 under lease II is barred by the statute of limitations, we need not reach Wilson's mutuality argument.

Decision

For the foregoing reasons, the Board **DENIES** Wilson's motion to dismiss GSA's complaint. Wilson's motion for summary judgment is **GRANTED IN PART**. Because GSA is out of time to claim the amount withheld under lease II, we award Wilson $104,874.53, plus CDA interest from November 14, 2018.[4] Wilson's appeal seeking the $34,518.55 withheld under lease I, and any government defenses to repayment, survive the motion to dismiss and for summary judgment.[5]

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

We concur:

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Kyle Chadwick
KYLE E. CHADWICK
Board Judge

[4] Wilson claims entitlement to "other applicable interest." Since the parties have not fully briefed this claim, the Board declines to decide it and leaves this claim for further development in the appeal.

[5] The question of whether the Board has jurisdiction to decide the remaining setoff claim in Wilson's appeal remains unresolved. As set forth above, the contracting officer issued his final decision for the $34,518.55 in December 2012. This appeal was filed on May 29, 2019, more than ninety days from the issuance of the final decision. Consequently, the issue to be briefed and decided is whether Wilson timely filed its appeal.