UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: January 6, 2021

CBCA 6659

WISE DEVELOPMENTS, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Diana Parks Curran and Hadeel N. Masseoud of Curran Legal Services Group, Inc., Marietta, GA, counsel for Appellant.

Justin S. Hawkins, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Judges **HYATT**, **LESTER**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Appellant, Wise Developments, LLC (Wise), appealed the deemed denial of its claim for damages arising from the default termination of its lease with respondent, the General Services Administration (GSA). GSA filed a motion to dismiss the appeal for lack of jurisdiction on the basis that the contracting officer terminated the lease for default in August 2014, and that the current appeal is an untimely effort to challenge the default termination. Wise argues that its appeal is not untimely because (1) the contracting officer's termination letter lacked any notice of appeal rights, rendering it ineffective, and (2) at least a portion of Wise's claim for monetary damages would still be viable even if Wise could not challenge the default termination. GSA contends that Wise had constructive notice of its appeal rights

and failed to exercise them in a timely manner, divesting the Board of jurisdiction. Because we find that the letter issued by the contracting officer was not a "final decision" that would bar Wise from challenging the merits of the default termination, we deny the motion.

Background

On May 26, 2011, GSA awarded Wise a contract for leased facilities in Hickory, North Carolina (lease number LNC61074). The lease contained a clause titled "Default by Lessor During the Term (Sep 1999)," 48 CFR 552.270-22 (2010), that permitted GSA to terminate the lease based upon, among other things, Wise's failure to maintain the premises in accordance with its terms. It also incorporated, and reprinted in the contract itself, the "Disputes (Jul 2002)" clause at Federal Acquisition Regulation (FAR) 52.233-1 (48 CFR 52.233-1, which, at section (d)(1) of the clause, provided that the contractor, if it believed it warranted, could submit a claim to the contracting officer "within 6 years after accrual of the claim." Although the contract did not expressly state a time frame within which the contractor would have to appeal any contracting officer final decision, the Disputes clause indicated that "[t]his contract is subject to the Contract Disputes Act of 1978, as amended [now located at 41 U.S.C. §§ 7107-7109 (2018) (CDA)]."

By letter dated August 22, 2014, GSA terminated the lease for default, stating that, "[a]fter review of your responses to the deficiency letter . . . and the cure notice . . . the Government has decided to pursue the default language in the lease and seeks to vacate the space as soon as practical." The letter identified the termination for default provision in the lease and quoted the basis for a finding of default as follows:

> [F]ailure to maintain, repair, operate, or service the premises as and when specified in this lease, or failure to perform any other requirement of this lease as and when required provided any such failure shall remain uncured for a period of thirty (30) days next following Lessor's receipt of notice thereof from the Contracting Officer or any authorized representative.

The letter described the harm experienced by the tenant, the Social Security Administration (and the general public when visiting the facility),[1] and concluded with the following statement: "Therefore, due to the repeated persistent disturbances and inability for the Government to enjoy the space as planned, I am hereby terminating the lease under the default clause." The letter was signed by the contracting officer, but did not identify itself as a contracting officer's final decision and did not contain any notice of appeal rights.

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[1] The tenant complained of a persistent chemical odor throughout the facilities that adversely impacted the health and well-being of staff members.

Thirty-nine days after receiving the termination letter, Wise's attorney sent a certified letter and email to the contracting officer and the agency's regional counsel, stating that he and Wise had reviewed the terms of the lease that permitted submittal of a certified claim, but at that time, wished to pursue a less formal dispute resolution process.

> Wise has engaged the services of our firm to assist with the determination of its rights under the lease. . . . I have reviewed recent correspondence from [the contracting officer] which acknowledges the Government's termination of the lease as a result of certain proposed actions of default by Wise. . . . Wise finds the Government's assertion to terminate the Lease to be unfounded and inequitable. Wise firmly contends that it has fully and adequately performed any and all of its obligations under the lease and thereby, no event of default on its behalf has occurred. . . . Wise undoubtedly prefers to resolve this matter in an amicable fashion. Wise and I have reviewed the terms and conditions of the lease which concern the submittal of a certified claim, yet at this time we prefer a less formal dispute resolution procedure.

With the exception of a few communications between counsel regarding a possible government counterclaim, no informal discussions or negotiations took place during the twelve months following the termination. On October 9, 2015, Wise (through counsel) reached out to GSA regarding additional testing conducted after the tenant moved out, noting that "[i]t has been approximately a year since we last communicated on the above-referenced lease." According to Wise, these test results showed that the air quality in the leased building not only met standards, but had improved since the tenant left. Wise concluded that any odor occurring within the building must have come from the tenant or its operations and requested additional discussions with GSA. GSA counsel responded the same day, stating she would review the case file, speak with the contracting officer, and schedule a follow-up call. Nothing in the record shows any further communication between the parties around that time.

Five years after the termination, on August 2, 2019, Wise, through new counsel, submitted by email a request for equitable adjustment (REA) to the contracting officer in the amount of $1,233,423.41. In the REA, Wise stated that the termination was wrongful and, consequently, Wise was entitled to three categories of costs that it incurred under the lease: (1) unpaid rent still due because of the invalid nature of the contracting officer's termination action; (2) costs to identify and remediate odors in the building for which Wise asserts it was not responsible; and (3) REA preparation costs. Wise again invited GSA to participate in informal negotiations as opposed to pursuing formal litigation.

In its email response to the REA submission, counsel for GSA noted that the attachments to the email sent by Wise's counsel appeared to be encrypted, requiring a password, and that GSA could not access them. Subsequently, in response to another email

from Wise's new attorney, counsel for GSA indicated that the REA had been forwarded to the contracting officer for review and that Wise's counsel would be notified when the review was complete. GSA did not otherwise respond to the REA or engage in negotiations before Wise resubmitted the REA as a certified claim on August 29, 2019, and followed up on its previous demands for proof that the alleged odor issue was Wise's fault. On September 19, 2019, Wise's counsel sent another email to GSA about the claim, complaining that there had not yet been any response to the claim submission. The contracting officer responded by email, as follows:

> Thank you for your email and your patience while I review your concerns. I received your August 30 email and I am currently reviewing the records related to this action. I will issue a decision following completion of that review.

The contracting officer's next communication to Wise was by letter dated October 15, 2019, in which he stated:

> My August 22, 2014 notice of termination for default of lease LNC61074 was a contracting officer's final decision. The deadline for appeal of this action has passed and my termination for default stands. I am not considering your August 29th claim on its merits and I am not reconsidering my final decision to terminate the lease. This letter is not a final decision.

Wise replied on October 20, 2019, contesting the propriety of the 2014 termination as "legally incorrect" because it failed to apprise Wise of its appeal rights and did not identify itself as a contracting officer's final decision as required by the CDA. Wise asserted that "[it] was prejudiced by these defects and the time limitations for appealing Wise's wrongful termination were not triggered." In addition to challenging the legal sufficiency of the termination itself, Wise also suggested that GSA's communications since receiving the claim constituted evidence that GSA was considering the claim and thereby reconsidering the termination:

> [W]hile I appreciate the reluctance expressed in your letter to consider Wise's claim, since consideration could undermine your prior final decision, you have likely already done that, by not just receiving Wise's claim, but actually considering it as evidenced by your own email, dated September 19, 2019, as well as those of GSA legal counsel . . . around the same date.

Wise urged GSA to reconsider its position as expressed in its October 15, 2019, letter and to resolve the matter informally. The GSA contracting officer did not issue a new decision, but responded by letter dated November 12, 2019, that he had not reconsidered and

was "not reconsidering the matter." Wise appealed to this Board on November 21, 2019, based on a deemed denial of its August 29, 2019, claim.

In February 2020, GSA filed a motion to dismiss the appeal for lack of jurisdiction, arguing that Wise's appeal was untimely since the contracting officer's August 2014 termination letter was a final decision and appellant's failure to appeal that decision within ninety days of its receipt divested the Board of jurisdiction to entertain a later monetary claim that depended upon invalidation of the unappealed default termination. GSA further argued that the absence of an appeal rights notice in the termination letter did not invalidate the termination or undermine its finality since the lease expressly incorporated the Disputes clause of FAR 52.233-1. GSA maintained that, through that clause, Wise had constructive notice of its appeal rights since it stated that the lease was subject to the CDA and since the CDA clearly articulated the contractor's appeal rights.

GSA also pointed to the letter from Wise's former attorney acknowledging the termination and referring to his review of the terms and conditions of the lease—and specifically, to the submission of a certified claim—but stated that his client preferred to resolve the dispute informally. From the agency's perspective, this letter demonstrated that Wise understood its appeal rights, rendering any flaws in the termination notice moot. "Wise did not miss the appeal deadline as a result of missing boilerplate language," GSA argued, but, "[r]ather, Wise specifically chose not to follow the formalities of the CDA."

In opposing the agency's motion, Wise did not address its initial desire to pursue an informal solution. Instead, Wise focused on the lack of any appeal rights notice in the termination letter, describing it as a procedural defect, the impact of which was that it failed to start the time period for an appeal. Wise claimed that, had it been advised both of the finality of the decision and the ninety-day deadline, it would have appealed the decision. Wise contends that it was prejudiced by the contracting officer's omissions and that those omissions served to suspend the ninety-day time limit for appeal at the Board, rendering its November 2019 appeal timely and properly before the Board. Attached to Wise's response brief was an affidavit from Wise's managing member, who averred that, when he received the contracting officer's 2014 termination letter, he "was unaware of the appeal rights of the Lessor;" that the letter neither identified itself as a contracting officer's final decision nor contained any appeal rights information; and that, had the letter identified Wise's appeal rights, Wise would have filed an appeal with the Board within ninety days of receipt.

Wise further argues that even if we find its appeal untimely, the agency's actions and communications since its November filing—especially those by the contracting officer himself—demonstrated that the contracting officer was considering Wise's claim, and thereby reconsidering the termination decision. Wise contends that these actions operated to restore Wise's appeal rights. Wise also advanced two additional bases for denying GSA's

motion: (1) that the motion did not comply with the Board's rules nor with an order dated January 9, 2020, and (2) that, before a contractor can appeal a termination for default, the contractor must first file a claim with the contracting officer challenging it.

Discussion

I. GSA's Motion is Not Untimely

Wise initially urges the Board to reject GSA's motion because it was untimely. By order dated January 9, 2020, the Board granted GSA leave to file a dispositive motion in lieu of an answer and ordered that the motion be filed no later than Friday, February 7, 2020. Although GSA attempted to efile its motion with the Board as a Word document on February 7, the Clerk could not accept that submission because it did not comply with Board Rule 1(b). *See* 48 CFR 6101.1(b) ("attachments must be in .pdf format"). Because the original submission was efiled after the Clerk's Office had closed on February 7, the notice of rejection was not issued until Monday, February 10, 2020, and GSA corrected the defect and resubmitted the motion in a .pdf format that same day. Wise asserts that the motion was untimely filed.

We will not reject GSA's motion in the circumstances here. That the Clerk's Office did not initially accept GSA's timely-submitted motion was for technical reasons that ultimately did not cause Wise any prejudice, and we consider GSA's immediate correction after being notified of the defect as rendering the corrected filing timely filed nunc pro tunc. Even if it were considered technically untimely, the Board issues scheduling orders to facilitate the orderly transaction of its business and, because such orders are primarily for the Board's own benefit, it has the discretion to relax them as it deems appropriate. *See, e.g.*, *American Farm Lines v. Blackball Freight Service*, 397 U.S. 532, 539 (1970). To the extent that GSA is correct that we lack jurisdiction to entertain this appeal, the mere fact that we might strike GSA's motion would not somehow eliminate or waive that jurisdictional defect, *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, or provide us with authority to consider the merits of this case. We will consider and resolve GSA's motion to dismiss for lack of jurisdiction.

II. Wise Need Not Submit a Claim Prior to Appealing a Default Termination

As set forth in FAR 49.402-3(g), a contracting officer's default termination notice is supposed to inform the contractor, among other things, that its right to proceed under the contract at issue is terminated, that the termination notice constitutes a contracting officer's decision that the contractor is in default, and that the contractor has the right to appeal under the contract's Disputes clause. Under the CDA, if a contractor wants to appeal a final decision of a contracting officer to the Board, it must file its notice of appeal no later than

ninety calendar days after the date upon which it receives the decision. 41 U.S.C. § 7104(a). Alternatively, a contractor may file suit challenging the decision with the Court of Federal Claims within twelve months of receipt. *Id.* § 7104(b). Regardless of which forum the contractor selects, meeting the applicable deadline is a jurisdictional prerequisite to the tribunal's ability to consider the appeal. *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1391 (Fed. Cir. 1982); *Mahavir Overseas v. Agency for International Development*, CBCA 6704, 20-1 BCA ¶ 37,619. A contracting officer's decision that is not timely appealed is considered "final and conclusive and is not subject to review by" the Board. 41 U.S.C. § 7103(g).

The contracting officer's 2014 termination letter at issue here did not contain any notification of appeal rights, and we will discuss later in this decision the effect of that absence on the finality of the decision and Wise's obligation to appeal it within ninety days of its issuance. Wise argues, though, that we need not reach that issue because, even if the termination letter had contained the required appeal notice, Wise could not have appealed the decision unless, and until, it had submitted a separate CDA claim challenging the default termination. Wise's assertion is unfounded. A contracting officer's decision to terminate a contract for default is treated as a government claim. *Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988); *Eagle Peak Rock & Paving, Inc. v. Department of Transportation*, CBCA 5692, et al., 19-1 BCA ¶ 37,337; *Delta Industries, Inc.*, DOT BCA 2602, 94-1 BCA ¶ 26,318 (1993). Like any other decision asserting a government claim, a contractor has ninety days after receiving the default termination decision to appeal it to the Board. *Decker & Co. v. West*, 76 F.3d 1573, 1580 (Fed. Cir. 1996); *Bass Transportation Services, LLC, v. Department of Veterans Affairs*, CBCA 4995, 16-1 BCA ¶ 36,464. There is no need for a contractor to submit a separate claim challenging the termination decision before filing an appeal. *Malone*, 849 F.2d at 1443-44; *TTF, LLC*, ASBCA 59512, 15-1 BCA ¶ 35,884. Wise's argument to the contrary conflicts with the requirements of the CDA and established case law.

Wise refers to a decision by the Armed Services Board of Contract Appeals (ASBCA) in *DCX-CHOL Enterprises, Inc.*, ASBCA 61636, 19-1 BCA ¶ 37,394, as holding that a contractor must file an affirmative claim with the contracting officer before appealing from the contracting officer's final decision terminating the contract. On that basis, Wise argues that, since it submitted a request for equitable adjustment and a certified claim prior to appealing the default termination, its appeal is timely and, therefore, properly before the Board. Wise misreads *DCX-CHOL Enterprises*. The ASBCA found, based upon the rationale of the Court of Appeals for the Federal Circuit's decision in *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010), that it lacked jurisdiction to consider two of the contractor's defenses to a default termination, neither of which had previously been presented to the contracting officer, because the defenses—a delay claim and a constructive change claim—required changes to the terms of the underlying contract,

claims which, according to the ASBCA, first had to be presented to the contracting officer. Nevertheless, the ASBCA accepted jurisdiction of the contractor's appeal challenging the default termination and allowed the appellant to assert common-law affirmative defenses. The *DCX-CHOL Enterprises* decision does not support Wise's position that a contractor must submit a monetary claim before appealing a contracting officer's decision terminating a contract for default.

III. The Board Possesses Jurisdiction To Consider Wise's Monetary Claim

The parties dispute what decision is on appeal here. In its notice of appeal, Wise asserted that it was appealing the GSA contracting officer's "deemed denial" of the monetary claim that Wise submitted on August 29, 2019. As the United States Court of Appeals for the Federal Circuit recognized in *Pathman Construction Co. v. United States*, 817 F.2d 1573 (Fed. Cir. 1987), "the limitations period" set forth in 41 U.S.C. § 7104(a) and (b) "does not begin to run until the contracting officer renders an actual written decision on the contractor's claim." *Id*. at 1574. A contractor may appeal a "deemed denial" of its properly submitted monetary claim once the deadline for the contracting officer to issue a written decision, as defined in 41 U.S.C. § 7103(f)(3), has passed without decision. *SBBI, Inc. v. International Water & Boundry Commission*, CBCA 4994, 17-1 BCA ¶ 36,722 (citing 41 U.S.C. § 7103(f)(5)). Having waited for a contracting officer's decision on its monetary claim until after the statutory deadline for decision had passed, says Wise, this appeal of the contracting officer's "deemed denial" is timely, and we possess jurisdiction to entertain the appeal.

GSA contends that, in reality, the decision that Wise is challenging is the default termination that the contracting officer issued in 2014, which Wise has dressed up as a new money claim. For the Board to rule in Wise's favor on its 2019 monetary claim, GSA argues, the Board would first have to consider and find invalid the 2014 termination decision. As we noted above, like any other final decision, a contractor only has ninety days after receiving a contracting officer's final decision terminating a contract for default to appeal it to the Board. *Decker & Co.*, 76 F.3d at 1580; *Bass Transportation*. Because Wise did not file an appeal of the 2014 termination decision within ninety days after receiving it, argues GSA, Wise's implicit challenge to the default termination decision in the guise of a money claim is untimely, meaning that the Board lacks jurisdiction over this appeal.

GSA finds support for its argument that Wise is not really appealing a "deemed denial" of a monetary claim here, but instead is implicitly attempting to appeal (in an untimely manner) the contracting officer's 2014 termination decision, in the Board's decision in *Bass Transportation*. In that case, the Board, essentially adopting the rationale of a decision of the Armed Services Board of Contract Appeals (ASBCA) in *Military Aircraft Parts*, ASBCA 60139, 16-1 BCA ¶ 36,390, held that, where "the appellant's [monetary] claim is not independent of the unappealed termination decision, but arises from it," the

Board lacks jurisdiction to entertain the appeal arising from the monetary claim because it is an "implicit challenge" to the termination decision itself. *Bass Transportation*; *see JRS Management v. Department of Justice*, CBCA 3053, 13 BCA ¶ 35,235 (finding lack of jurisdiction to entertain appeal on a second claim that mirrored a prior claim, the decision on which the contractor had not appealed).

Even assuming that the GSA contracting officer's termination letter is truly an enforceable final decision under the CDA, the rationale of *Bass Transportation* does not apply here. We recognize that a large portion of Wise's 2019 monetary claim is wholly dependent upon challenging the default termination, given that the bulk of the claim seeks recovery of rent that GSA did not pay because, allegedly, it had improperly terminated Wise's contract. If Wise failed to appeal the default termination decision in a timely manner (an issue that we will address below), we would be barred from considering it, particularly since that claim depends upon the Board's invalidation of the termination. 41 U.S.C. § 7103(g). Yet, in addition to lost rental payments, Wise's claim also seeks an equitable adjustment for Wise's efforts to identify and remediate an odor for which it was allegedly not responsible under the lease, as well as REA preparation costs. The mere fact that a contract was terminated for default does not automatically negate a contractor's right to compensation for damages arising out of actions that the Government had no right to take during contract performance. *See, e.g.*, *Roxco, Ltd. v. United States*, 60 Fed. Cl. 39, 45-46 (2004); *Pyrotechnic Specialties, Inc.*, ASBCA 53469, et al., 02-1 BCA ¶ 31,668 (2001); *Wholesale Tire & Supply Co.*, ASBCA 42502, et al., 92-2 BCA ¶ 24,960; *Systems & Industry Optical*, ASBCA 21635, 79-2 BCA ¶ 13,966; *Harent, Inc.*, ASBCA 16206, 73-2 BCA ¶ 10,074; *see also Wyodak Enterprise, Inc.*, VABCA 3808, et al., 95-1 BCA ¶ 27,493 (termination for default did not preclude consideration of contractor's post-termination claim).

Further, just because certain arguments may serve as defenses to a termination for default does not necessarily mean that they may not "also stand alone as claims against the Government." *Roxco*, 60 Fed. Cl. at 44. Importantly, rules regarding *res judicata* do not apply to contracting officers' unappealed final decisions in the same way that they apply to adjudicated Board or federal court decisions. *Id.* at 45-46. Although, if we assume that the termination decision is unappealable at this point in time, Wise might not be able to challenge the fact of termination or seek to convert the default into a convenience termination, Wise is not necessarily "barred from relying upon contentions rejected by the [contracting officer] in the unappealed default termination" to support a monetary claim. *Id.* at 45.

In the circumstances here, we cannot say that Wise's claim is merely a challenge to the default termination and does not, as alleged, present any monetary request that, despite the termination, could provide a basis for some type of equitable adjustment arising from

alleged unauthorized government actions during contract performance. By statute, the CBCA possesses "jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority) relative to a contract made by that agency." 41 U.S.C. § 7105(e)(1)(B). The statutory limitation on that jurisdiction is that the contractor must file its appeal with the Board no later than "90 days from the date of receipt of [the] contracting officer's decision under section 7103 of this title." *Id.* § 7104(a). The contracting officer here did not issue a decision on Wise's claim within the statutory deadline, and the claim encompasses at least some monetary requests that, on their face, might not be completely barred by the unappealed default termination decision.[2] Accordingly, the contractor is entitled to appeal the contracting officer's "deemed denial" of that claim, and we possess jurisdiction to entertain that appeal. *See Pathman Construction*, 817 F.2d at 1574.

That does not mean that Wise is necessarily entitled to seek damages without regard to the fact that it did not appeal what GSA alleges is a now-final default termination decision. In such circumstances, we would have to consider the relationship of the costs now being claimed and the default termination itself. Where a "motion to dismiss for lack of jurisdiction challenges [appellant's] case on the merits, . . . the [tribunal] should 'treat [respondent's] . . . motion to dismiss for lack of subject matter jurisdiction as a . . . motion to dismiss for failure to state a claim upon which relief can be granted.'" *Gregory v. United States*, 37 Fed. Cl. 388, 392 (1997), *aff'd*, 108 F.3d 1391 (Fed. Cir. 1997) (table) (quoting *Hare v. United States*, 35 Fed. Cl. 353, 354 (1996)). Below, we evaluate GSA's arguments about the finality of the default termination, and its effect on Wise's claim, as arguments about the merits of Wise's claim in light of a binding default termination.

IV. The Contracting Officer's Default Termination Letter Was Not a Final Decision

GSA's argument that Wise's claim is entirely barred on its merits is based upon Wise's failure timely to appeal the contracting officer's 2014 default termination decision

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[2] In deciding this jurisdictional question, we must avoid allowing the evaluation to become "an indirect attack on the merits of the plaintiff's claim." *Peckmann v. Thompson*, 966 F.2d 295, 297 (7th Cir. 1992). The Board "must assume jurisdiction to decide whether the allegations state a cause of action on which the [Board] can grant relief as well as to determine issues of fact arising in the controversy. Jurisdiction, therefore, is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. . . ." *Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 639-40 (Fed. Cir. 1989) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

within ninety days of its receipt. As the Board has previously recognized, however, "[t]here are two situations . . . in which a contractor's receipt of a contracting officer's decision on a CDA claim does not start the time for appeal. The first such situation is when the decision wholly fails to advise the contractor of its appeal rights. The second arises when a notice of appeal rights is provided but is defective." *Hof Construction, Inc. v. General Services Administration*, CBCA 6306, 19-1 BCA, ¶ 37,219 (citations omitted).

In *Hof Construction*, the Board resolved conflicting precedents among its predecessor Boards for the latter situation: where a final decision contains a defective notice of appeal rights. In such circumstances, the Board held, a termination decision containing a defective notice of appeal rights does not automatically invalidate the decision. Instead, quoting from the Federal Circuit's decision in *Decker & Co. v. West,* 76 F.3d 1573 (Fed. Cir. 1996), it held that, "'[w]hen the contractor's determination regarding [where or when to] appeal is unaffected by the defect' in a notice of appeal rights, 'the notice does not fail in its protective purpose,' and the contractor 'must demonstrate that the [defect] actually prejudiced its ability to prosecute its timely appeal before the limitation period will be held not to have begun.'" *Hof Construction* (quoting *Decker*, 76 F.3d at 1579-80). Accordingly, "a contracting officer's decision can be final for purposes of appeal without using all of the language required by regulation, provided the contractor was not prejudiced by the omissions." *Id.*

The *Hof Construction* decision did not address the situation that we have here, where the purported final decision did not identify itself as a "final decision" and wholly failed to provide the contractor with *any* appeal rights notice. Wise argues that, where *no* appeal rights notice is included in a final decision, the decision is *per se* defective and automatically precludes the start of the time for appeal. We reject Wise's argument. Past precedent from the Federal Circuit establishes that the same rule requiring detrimental reliance on a defective appeal rights notice applies to a decision containing *no* appeal rights notice. In *State of Florida, Department of Insurance v. United States*, 81 F.3d 1093 (Fed. Cir. 1996), the Federal Circuit found that the complete absence of a notice of CDA appeal rights in a termination decision was "a procedural defect [that did] not justify overturning an otherwise valid termination" where the contractor surety plaintiff had *actual* notice of its appeal rights through a separate termination notice to the original construction contractor (of which the surety was aware) and through language in the original bonded contract. *Id.* at 1098-99. The *State of Florida* Court cited to an earlier decision of the Court of Claims that recognized that "[t]o nullify [a] termination for default solely on the ground of . . . harmless technical defects would grant [a contractor] an entirely unwarranted windfall." *Id.* at 1098, (citing *Philadelphia Regent Builders v. United States*, 634 F.2d 569, 573 (Ct. Cl. 1980)); *see Sea-Land Service, Inc. v. United States*, 735 F. Supp. 1059, 1063 (CIT 1990), *aff'd and adopted*, 923 F.2d 838 (Fed. Cir. 1991) (even though the Customs Service failed to include 180-day statutory appeal right in notice of denial of protest, "[p]laintiff was well aware of its right to bring suit as evidenced by its prior timely actions contesting earlier notices of denial,"

meaning that it could not show prejudice as a result of the defect); *see also Parsons Government Services, Inc.*, ASBCA 62113, 20-1 BCA ¶ 37,586 ("The failure to include a notice of appeal rights does not prevent the start of the appeal period unless the contractor demonstrates that it was actually prejudiced by the lack of notice."). In light of the Federal Circuit's guidance, we apply to the default termination decision here, which lacked *any* appeal rights notification, the same rule that *Hof Construction* applied to termination decisions with a *defective* notice: the contractor must show prejudice from, or detrimental reliance upon, the absence of a proper appeal rights notice.[3]

The question before us, then, becomes whether Wise has shown that it was prejudiced by or detrimentally relied on the absence of any appeal rights notification in the termination notice that it received. GSA argues that there can be no prejudice because the contractor represented soon after receiving the 2014 termination letter that, although it had reviewed the contract and was aware that it could submit a claim to GSA, it preferred to try to resolve the parties' dispute informally, but then sat on its rights for extended periods of time before, five years later, it finally submitted a claim. GSA suggests that, by referencing language printed in the contract from the FAR's Disputes clause that indicated Wise's right to submit a claim, Wise must also have known of the time limits for appealing a government claim under the CDA. Yet, although the Disputes clause mentions the contractor's right to submit a claim, neither that clause nor any other language in Wise's contract mentions the ninety-day deadline for appealing to the Board or, for that matter, even the right to appeal. As the ASBCA recognized in *Access Personnel Services, Inc.*, an agency cannot rely on the Disputes clause as a basis for automatically inferring knowledge of appeal rights to the contractor:

> The government further contends that the Disputes clause in the contract, FAR 52.233-1 (JUL 2002), advises appellant of its appeal rights. This is not entirely correct. While subsection (f) of the clause refers generally to an "appeal" under the [CDA], it does not state with whom that appeal had to be filed, and the date by which that appeal had to be filed. A contractor would need to ascertain this information in some other way.

Access Personnel Services, ASBCA 59900, 16-1 BCA ¶ 36,407.

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[3] Although the Board in *Outback Firefighting, Inc. v. Department of Agriculture*, CBCA 6078, 19-1 BCA ¶ 37,20 (2018), indicated that "[a] contracting officer's final decision that does not give the contractor adequate notice of its appeal rights is defective and therefore does not trigger the running of the limitations period," the Board was quoting *Pathman Construction*, 817 F.2d at 1578, which dealt with a deemed denial and did not involve a lack of prejudice due to the absence of an appeal rights notification.

GSA also argues that, even if appeal rights are not defined in the Disputes clause or contract language itself, the contractor can identify those rights by looking at the CDA. Undoubtedly, this is true. Yet, were we to find that the Government can escape a finding of prejudice every time it fails to include a notification of appeal rights in a final decision, simply because the CDA identifies the contractor's right, it would essentially eradicate the contracting officer's obligation under FAR 33.211(a)(4)(v) ever to provide such notice. The requirement to notify a contractor of its appeal rights in the contracting officer's decision is for the contractor's benefit. *Crothall Food Services*, ASBCA 30674, 85-3 BCA ¶ 18,308. "[N]either *Decker* nor the CDA imposes an affirmative obligation on a contractor to ascertain its appeal rights" on its own. *Access Personnel Services*. Instead, "[t]he CDA places the obligation of notification squarely on the shoulders of the government." *Id.* Even in situations in which, unlike here, a final decision actually mentions that the contractor has a right to appeal in accordance with the contract's Disputes clause, but fails to provide any further guidance, "*Decker* does not permit the contracting officer to shift to the contractor responsibility to determine all of its appeal rights . . . [simply because] the final decision mentions that the contractor can appeal. If that was the case, then FAR 33.211(a)(4)(v)'s requirement for extensive explanation about the time and place for appeal or suit would be reduced to 'you may appeal this decision.'" *Mansoor International Development Services*, ASBCA 58423, 14-1 BCA ¶ 35,742. We cannot adopt a standard of constructive notice that completely absolves the contracting officer from *ever* having to meet his or her notice obligations under FAR 33.211.

In the end, we have to look to the specific circumstances of the contractor involved in the dispute to determine whether it detrimentally relied on and was prejudiced by the absence of an appeal rights notice. "When the government fails to adequately provide this notice, the *Decker* test is one of detrimental reliance, i.e, whether the [contracting officer's] decision, by words of commission or omission, actually misled the contractor to its prejudice regarding its appellate rights." *Access Personnel Services*; *see Uniglobe General Trading & Contracting Co. v. United States*, 115 Fed. Cl. 494, 515-16 (2014) (finding that contractor was prejudiced by lack of any appeal rights notice in "decision" of contracting officer, such that appeal time never began). "Prejudice requires 'injury or damage,'" with at least "a showing of . . . some reasonable possibility that the outcome would have been different had it received notice." *Old Republic Insurance Co. v. Underwriters Safety & Claims, Inc.*, 306 F. App'x 250, 255 (6th Cir. 2009) (quoting *Merriam Webster's Collegiate Dictionary* 919 (10th ed. 1997)). We will not presume "prejudice or [detrimental] reliance by virtue of the late filing alone." *Shafi Nasimi Construction & Logistics Co.*, ASBCA 59916, 16-1 BCA ¶ 36,215. Nevertheless, we similarly cannot assume that no prejudice will *ever* result from the absence of any appeal rights notification simply because a contractor can look to the CDA to find its appeal rights. If a contractor can establish that it "did not understand its appeal rights, or know of the time limits for appealing to the Board," when it received the decision containing a defective or absent appeal rights notification and that, had it been

correctly advised, it "would have filed an appeal within 90 days," it has established that it was prejudiced by the defective appeal rights notice. *Mansoor International*; *see United States v. Taranowski*, 467 F.2d 1027, 1030 (7th Cir. 1972) (in a case involving a board decision on a Military Selective Service Act failure to work citation, the court has to find "record support for the conclusion that [the individual] knew of [its] right," and in fact its obligation, "to appeal"); *Access Personnel Services* (holding that lack of proper CDA appeal rights notice prejudiced a contractor who "was unfamiliar with the contract dispute process in general and the [boards of contract appeals] in particular"). An unknowledgeable contractor is not required to "promptly search[] the internet, hire[] counsel or take[] other pro-active steps to determine its appeal rights" in response to a defective appeal rights notification or "be held responsible for [a] late appeal" if it fails to do so. *Access Personnel Services.* "Where [the contractor] lacked the knowledge itself, the government's failure to provide it" can prejudice the contractor. *Mansoor International*.

Wise has presented sufficient evidence showing that it was prejudiced by the lack of any appeal rights notice, as well as by the failure of the contracting officer to title his termination notice a "final decision," to vitiate the finality of the 2014 default termination "decision." Wise is a small company that was leasing a property to the Government. There is no evidence that Wise typically engaged in government contracting or was well-versed in the procedures for dealing with government contracts disputes. Although Wise had hired counsel to assist it in its dealings with GSA after receiving the termination notice, the counsel that it originally hired to assist it did not specialize in government contracts and, based upon language in the Disputes clause, appears to have believed that Wise had six years within which to submit a claim challenging the default termination, a belief that is supported by Wise's delay in challenging the termination until after it submitted a monetary claim five years later. Wise has also presented an affidavit from its managing member in which the member avers that he was unaware of how the disputes appeal process worked back in 2014 and that, had the contracting officer notified Wise in the termination notice that Wise only had ninety days to appeal the termination decision, Wise would have done so. We find that, in these circumstances, Wise has established that it detrimentally relied on and was prejudiced by the absence of any appeal rights notice in the 2014 termination notice.

In light of that holding, we need not address Wise's argument that, under *Guardian Angels Medical Service Dogs, Inc. v. United States*, 809 F.3d 1244 (Fed. Cir. 2016), its communications with agency attorneys and the contracting officer when it submitted its REA five years after the termination waived any finality of the contracting officer's 2014 termination decision.

Decision

For the foregoing reasons, we **DENY** GSA's motion to dismiss for lack of jurisdiction and, further, find that the default termination letter that the GSA contracting officer issued in 2014 is not a "final decision" that bars Wise from challenging the merits of GSA's default determination.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge

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