UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY JUDGMENT IN CBCA 6493, 6494, 6495, 6496, 6497, 6498, 6500, 6501, 6502, 6503, 6504, 6506, 6507, 6508, 6510, 6511, 6512 DENIED; CBCA 6499, 6505, 6509 GRANTED IN PART:
May 25, 2021

CBCA 6493, 6494, 6495, 6496, 6497, 6498, 6499, 6500, 6501, 6502, 6503, 6504, 6505, 6506, 6507, 6508, 6509, 6510, 6511, 6512

ART PROPERTY ASSOCIATES, LLC,

Appellant in CBCA 6493, 6498, 6509,

and

1101 WILSON OWNER, LLC,

Appellant in CBCA 6494, 6495, 6504, 6512,

and

NASH STREET PROPERTY ASSOCIATES, LLC,

Appellant in CBCA 6496, 6500, 6511,

and

OAK HILLS PROPERTY ASSOCIATES, LLC,

Appellant in CBCA 6497, 6499, 6501, 6503, 6510,

and

BERKLEY PROPERTY ASSOCIATES, LLC,

Appellant in CBCA 6502,

and

1000-1100 WILSON OWNER, LLC,

Appellant in CBCA 6504, 6506, 6507, 6505, 6508,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

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

James 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.

Appellants, Art Property Associates, LLC (Art Property) (CBCA 6493, 6498, and 6509), 1101 Wilson Owner, LLC (1101 Wilson) (CBCA 6494, 6495, and 6512), Nash Street Property Associates, LLC (Nash Street) (CBCA 6496 and 6500), Oak Hills Property Associates, LLC (Oak Hills) (CBCA 6497 and 6499), and 1000-1100 Wilson Owner, LLC (1000-1100 Wilson) (CBCA 6505 and 6508) (collectively "the twelve undecided appeals") move for summary judgment, contending that the General Services Administration (GSA) could not properly recover erroneously paid taxes by setting off rent without issuing a contracting officer's final decision as required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018). Appellants assert that the setoffs must be repaid and the appeals granted because GSA's claims are now barred by the CDA's six-year statute of limitations. *See id.* § 7103(a)(4)(A).

Appellants also move for an award of other than CDA interest from the date of the setoff until the date appellant submitted its CDA claim. Other than CDA interest is also at issue in eight other appeals—filed by Oak Hills (CBCA 6501, 6503, 6510), Berkley Property Associates, LLC (Berkley Property) (CBCA 6502), 1101 Wilson (CBCA 6504), 1000-1100 Wilson (CBCA 6506, 6507), and Nash Street (CBCA 6511)—that were consolidated with the twelve undecided appeals identified above. We previously entered judgment in these eight appeals on the setoff issue but reserved the interest question to decide at a later date.[1] For reasons that follow, we grant some of the appeals in part and deny the motions for summary judgment in others, but we deny appellants' motions for summary judgment and claims for an award of other than CDA interest in all of the appeals (CBCA 6493-6512).

Procedural Background

Appellants filed twenty appeals at the CBCA challenging GSA's claim to reimbursement for the overpayment of taxes. In all of the appeals, appellants contend that the contracting officer failed to assert a government claim for the taxes within the six-year statute of limitations. The parties chose to have us decide this statute of limitations issue in one of the appeals, CBCA 6506, and then use that decision to inform our decision in the other nineteen appeals. *See 1000-1100 Wilson Owner, LLC v. General Services Administration*, CBCA 6506, 20-1 BCA ¶ 37,642. Relying on our decision to grant summary judgment in part in CBCA 6506, we granted summary judgment in favor of the appellant in seven other appeals (CBCA 6501, 6502, 6503, 6504, 6507, 6510, 6511) because GSA could not produce a contracting officer's final decision asserting a claim to withhold the taxes. In all eight appeals, we awarded CDA interest but postponed our decision on appellants' claims for other than CDA interest. In all twenty of the appeals, appellants have withdrawn their other claims for rent that GSA failed to pay appellants as reimbursement for the overpayment of taxes (the "short pay claims").

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[1] *See Oak Hills Property Associates, LLC v. General Services Administration*, CBCA 6501, 20-1 BCA ¶ 37,732; *Berkley Property Associates, LLC v. General Services Administration*, CBCA 6502, 20-1 BCA ¶ 37,733; *Oak Hills Property Associates, LLC v. General Services Administration*, CBCA 6503, 20-1 BCA ¶ 37,734; *1101 Wilson Owner, LLC v. General Services Administration*, CBCA 6504, 20-1 BCA ¶ 37,735; *1000-1100 Wilson Owner, LLC v. General Services Administration*, CBCA 6506, 20-1 BCA ¶ 37,642; *1000-1100 Wilson Owner, LLC v. General Services Administration*, CBCA 6507, 20-1 BCA ¶ 37,736; *Oak Hills Property Associates, LLC v. General Services Administration*, CBCA 6510, 20-1 BCA ¶ 37,737; *Nash Street Property Associates, LLC v. General Services Administration*, CBCA 6511, 20-1 BCA ¶ 37,738.

Factual Background

In 2012, GSA conducted an internal audit of existing leases in the National Capital Region and determined that GSA was improperly reimbursing appellants for certain taxes assessed by Arlington County, Virginia. On November 15, 2012, a GSA budget analyst informed appellants by blanket notice that GSA had improperly reimbursed certain taxes. The parties agree that November 15, 2012, is the latest date of accrual of GSA's claims.

In the twelve undecided appeals (CBCA 6493, 6494, 6495, 6496, 6497, 6498, 6499, 6500, 6505, 6508, 6509, and 6512), GSA has identified unilateral supplemental lease amendments (SLAs) that GSA points to as the contracting officer's final decisions by which GSA deducted the stormwater and transportation taxes it had allegedly wrongly paid to appellants. GSA asserts that it "did not contemporaneously sit on its rights to the tax adjustments about which appellants complain, but, to the contrary, took actions that this Board has identified as being sufficient to assert a claim that the various appellants could, if they so chosen [sic], appeal within the time periods permitted in the Contract Disputes Act." We evaluate whether these SLAs equate to final decisions and comply with the statute of limitations.

Discussion

For each of the twelve undecided appeals, we review and decide whether the SLA or SLAs were "enough that the decision to withhold funds resolved issues of liability and of damages administratively, rendering the case ripe for judicial review." *1000-1100 Wilson Owner, LLC* (citing *Placeway Construction Corp. v. United States*, 920 F.2d 903, 906-07 (Fed. Cir. 1990)).

> 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). . . .
>
> "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). . . .
>
> 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)).

Id. The decision on the government claim was "no less final because it failed to include boilerplate language usually present for the protection of the contractor." *Id*. (citing *Placeway*, 920 F.2d at 907; *Hof Construction, Inc. v. General Services Administration*, CBCA 6306, 19-1 BCA ¶ 37,219).

In several of the appeals, appellants contend that GSA's issuance of a unilaterally executed SLA, related to the setoff but without an accompanying explanatory letter as to GSA's rationale for the setoff, does not equate to a contracting officer's final decision. The finality of the SLAs on the issue of liability and damages for GSA's claim, however, is the determining factor, not the issuance of an explanatory letter. Appellants also contend that the SLAs offer no clarity or finality with respect to GSA's assertion of liability or the amount of its purported damages because there are demonstrable errors, uncertainty, and lack of clarity in GSA's calculations and approach to each of the claims. Errors or uncertainty in the calculations or the amount of taxes owed or withheld, however, do not defeat "the finality of the decision made granting the government a sum certain." *Placeway*, 920 F.2d at 906 (finding that the possibility of adjustments to the claim amount does not affect the finality of the decision made granting the Government's claim.)

Other Than CDA Interest

Appellants seek to recover other than CDA interest running from the dates of the setoffs to the dates of the certified claims that gave rise to these appeals, generally running from as early as 2012 through 2018.[2] Appellants contend that the other than CDA interest is a component of the breach of contract damages required to make appellants whole. Appellants argue that "[t]o be made whole, the Appellants should be compensated for the

[2] Appellants have confirmed that they do not seek interest under the Prompt Payment Act, 31 U.S.C. §§ 3901–3907, which provides for an interest penalty for late payment of undisputed invoices.

deprivation of such monies during that period—and such compensation takes the form of interest."

Interest claimed against the Government cannot be recovered unless there is an express waiver of sovereign immunity allowing such recovery—a principle known as the "no interest" rule. *England v. Contel Advanced Systems, Inc.*, 384 F.3d 1372, 1378 (Fed. Cir. 2004) ("The no-interest rule bars the award of interest damages on a claim against the United States.").

> [T]he force of the no-interest rule cannot be avoided simply by devising a new name for an old institution: "[T]he character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it."

Id. at 1379 (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986) (alteration in original)).

> "An allowance of interest on a claim against the United States, absent constitutional requirements, requires an *explicit* waiver of sovereign immunity by Congress. Such express consent to the payment of interest must be found in either a specific statutory or an express contractual provision." *Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1383 (Fed. Cir. 1983)[, *superseded by statute on other grounds*]; *LA Limited, LA Hizmet Isletmeleri*, ASBCA No. 53447, 04-1 BCA ¶ 32,478 at 160,635, 160,637 n.6 (holding that Disputes clause in nonappropriated fund instrumentality contract did not provide for interest recovery).

Whiting-Turner Contracting Co., ASBCA 56319, 10-1 BCA ¶ 34,436; *Copeland*, AGBCA 2003-124-R, 03-1 BCA ¶ 32,172 (finding that a contractor was not entitled to interest on monies withheld by the contracting officer for Davis-Bacon Act violations). We have not found—nor been directed to—any statutory or contractual waiver of sovereign immunity other than the CDA. The CDA, under which we derive jurisdiction, contains the specific statutory consent to the payment of interest. The CDA provides:

> Interest on an amount found due a contractor on a claim shall be paid to the contractor for the period beginning with the date the contracting officer receives the contractor's claim, pursuant to section 7103(a) of this title, until the date of payment of the claim.

41 U.S. C. § 7109 (a)(1); *see Fidelity Construction Co.*, 700 F.2d at 1383. Neither the CDA nor any other statute waives sovereign immunity with regard to interest that runs before a contracting officer receives the claim. *See Copeland* (denying interest on amount withheld when no authority was provided compelling payment). Consequently, appellants are barred from recovering other than CDA interest, and the Board **DENIES** appellants' motions for summary judgment and claims in all of the appeals (CBCA 6493–6512) for an award of other than CDA interest.

Standard of Review

"The standards of review and obligations of each party to prevail on a motion for summary judgment are well established." *Mission Support Alliance, LLC v. Department of Energy*, CBCA 6477, 20-1 BCA ¶ 37,657 (citing *Pernix Serka Joint Venture v. Department of State*, CBCA 5683, 20-1 BCA ¶ 37,589). "[A] party may move for summary judgment on all or part of a claim or defense which we will only grant if the party 'is entitled to judgment as a matter of law based on undisputed material facts.'" *Id.* (citing Rule 8(f) (48 CFR 6101.8(f) (2019)); *CSI Aviation, Inc. v. General Services Administration*, CBCA 6543, 20-1 BCA ¶ 37,580). "We draw inferences in the light most favorable to the party opposing the motion." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). "In cases involving issues of contract interpretation, if we are required to examine the conduct and the intent of the parties in order to resolve the issue, any genuine questions of material fact that arise will jettison the possibility of granting summary judgment to the moving party." *Id.* (citing *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988); *Au' Authum Ki, Inc. v. Department of Energy*, CBCA 2505, 14-1 BCA ¶ 35,727).

CBCA 6493

In its notice of appeal, Art Property identifies SLA 40 as reflecting GSA's setoff for taxes it allegedly wrongly paid to Art Property. In its response to Art Property's motion for summary judgment, however, GSA identifies SLAs 41 (January 24, 2014), 43 (September 2, 2014), and 49 (January 13, 2015), but not 40, as reflecting GSA's setoff. Art Property notes this discrepancy in its amendment to its motion for summary judgment and argues that in the event that GSA points to SLA 40 as the contracting officer's final decision, SLA 40 lacks the finality of a final decision because Art Property did not sign SLA 40, SLA 40 contains errors in the amount set off, and GSA does not sufficiently explain the rationale for the setoff.

While SLAs 41, 43, and 49 do mention transportation and stormwater taxes, these SLAs do not specifically identify the taxes for which GSA is claiming reimbursement. Instead, these SLAs state that they were "issued to reflect the annual real estate tax escalation provided for in the basic lease agreement." Appellants provided the affidavit of the property

manager's controller, Ms. Gragard, who has administered the leases for each of the buildings subject to these appeals since 2012. According to Ms. Gragard, these SLAs "reflect amounts billed by Appellant to GSA under protest after GSA had earlier announced, through its budget analyst, its intention not to reimburse certain types of real estate taxes. The lease amendments do not reflect a setoff against revenue taken or to be taken by GSA." These SLAs are not sufficient to establish GSA's claim for liability and damages.

SLA 40, dated December 4, 2012, does administratively establish GSA's claim. GSA set off $134,779.27 in taxes alleged to be incorrectly paid to Art Property from 2003–2011. Art Property originally sought to recoup $134,779.27, but as a result of internal reconciliation efforts described in its amended motion for summary judgment, Art Property reduced its claim from $134,779.27 to $108,073.56. Art Property indicated that $26,705.71 was properly set off by GSA due to a downward adjustment in base real estate taxes. Along with SLA 40, the contracting officer issued an explanatory letter stating, "[W]e have found that GSA has been inadvertently paying non-authorized taxes as part of the annual real estate tax reimbursement. This SLA is to withhold the Special Assessment taxes for Transportation and Business Improvement for the lease referenced above." SLA 40 effectuated the tax withholding, stating that the SLA was "[i]ssued to reflect a correction to the annual real estate tax (RET) for the years noted below to remove the Special Assessment Tax for Transportation and Business Improvement District (BID) as per the terms of the [solicitation for offers] SFO lease agreement."

We find that the contracting officer asserted a government claim for $134,779.27 within the limitations period by withholding payment in December 2012 per SLA 40. The contracting officer's SLA 40 resolved both liability and damages.

We **DENY** Art Property's motion for summary judgment.

CBCA 6494

GSA unilaterally set off monies against its December 3, 2012, rent payment to recoup the allegedly improperly reimbursed BID and transportation taxes. GSA and 1101 Wilson agree that the setoff in the amount of $5317.68 is reflected in GSA-issued SLA 14. The contracting officer stated in the SLA that the credit was "[i]ssued to reflect a correction to the annual real estate tax (RET) for the years [2007–2011] to remove the Special Assessment Tax for Transportation and Business Improvement District (BID) as per the terms of the SFO lease agreement." The SLA stated further that "[t]he Government is entitled to a one-time lump sum refund in the amount of ($5317.68) payable in arrears. This amount shall be reflected with your next rent check."

According to 1101 Wilson, it only received a redacted copy of this SLA in 2014 and an unredacted copy in 2018. Ms. Gragard noted in her affidavit that 1101 Wilson only "challenged $5120.50 of the setoff due to billing adjustments required by the change in the BID billing basis." Ms. Gragard further contended that GSA did not issue an explanatory letter, and there were errors in the amount set off by SLA 14.

We find that the contracting officer asserted a government claim for $5317.68 within the limitations period by withholding payment under the lease. SLA 14 was sufficient to administratively establish GSA's claim for liability and damages. Even if SLA 14 was not provided to 1101 Wilson until 2014 or 2018, 1101 Wilson received SLA 14 within the six-year statute of limitations.

We **DENY** 1101 Wilson's motion for summary judgment.

CBCA 6495

GSA set off $46,953.34 against its September 3, 2013, rent payment to recoup the allegedly improperly reimbursed BID, stormwater, and transportation taxes. GSA asserts that the contracting officer issued SLA 15 dated August 22, 2013, withholding $46,953.34. SLA 15 was "[i]ssued to reflect a correction to the annual real estate tax (RET) for the years noted below to remove the Special Assessment Tax for Stormwater, Transportation and Business Improvement District (BID) as per the terms of the SFO lease agreement." "Removing these assessed Taxes results in GSA being owed a one time lump sum payment for the following years"—2008–2011. The SLA was not accompanied by a separate transmittal letter from the contracting officer. GSA repaid the BID taxes in the amount of $3192.03 per SLA 16 dated August 22, 2013.

1101 Wilson filed its appeal claiming reimbursement of $43,761.31. 1101 Wilson asserts that the setoff was not reflected in any GSA-issued supplemental agreement but was detailed only in a September 10, 2013, email from a GSA budget analyst. Ms. Gragard testified that "[a]ppellant has no record of receiving the SLA now held out by GSA as a Contracting Officer's Final Decision." She further asserted that "the setoff taken by GSA does not match the amounts referenced in the SLA."

We find that the contracting officer asserted a government claim for $46,953.34 within the limitations period by withholding payment in August 2013 per SLA 15. SLA 15 resolved both liability and damages. The fact that the amount withheld was reduced by SLA 16 does not defeat the finality of the contracting officer's decision to set off the taxes. 1101 Wilson's lack of a record of SLA 15 does not mean that it was not issued, especially

since 1101 Wilson does have a record of SLA 16, the next SLA sequentially. When 1101 Wilson received SLA 16, it should have inquired about the missing SLA 15.

We **DENY** 1101 Wilson's motion for summary judgment.

CBCA 6496

GSA unilaterally set off $18,614.21 against its December 3, 2012, rent payment to recoup the allegedly improperly reimbursed BID, stormwater and transportation taxes. GSA and Nash Street agree that this setoff is reflected in GSA-issued SLA 15. The contracting officer's transmittal letter stated, "This SLA is to withhold the Special Assessment taxes for Transportation and Business Improvement for the lease [GS-11B-01862]. In accordance with the basic lease agreement, the Government has executed the enclosed SLA for which a lump sum adjustment will be reflected in your next monthly rent check." The contracting officer also stated in the SLA that the credit was "[i]ssued to reflect a correction to the annual real estate tax (RET) for the years [2006-2011] to remove the Special Assessment Tax for Transportation and Business Improvement District (BID) as per the terms of the SFO lease agreement."

GSA subsequently repaid BID taxes in the amount of $3353.73 through SLA 17. Nash Street claims reimbursement for $15,260.48 for transportation taxes. In her affidavit, Ms. Gragard stated that SLA 15 "did not fix the alleged liability between the parties" because while the SLA references transportation taxes, it may have also included stormwater taxes.

We find that the contracting officer asserted a government claim for $18,614.21 within the limitations period by withholding payment per SLA 15. The contracting officer's letter and SLA 15 resolved both liability and damages. The fact that SLA 15 incorrectly included BID taxes and may not have included stormwater taxes does not defeat the finality of the witholding and decision.

We **DENY** Nash Street's motion for summary judgment.

CBCA 6497

GSA unilaterally set off $9716.96 against its January 2, 2013, rent payment to recoup the allegedly improperly reimbursed BID, stormwater, and transportation taxes. GSA and Oak Hills agree that this setoff is reflected in SLA 20, issued in December 2012. The contracting officer's transmittal letter stated, "This SLA is to withhold the Special Assessment taxes for Transportation and Business Improvement for the lease [GS-11B-01833]. In accordance with the basic lease agreement, the Government has executed the

enclosed SLA for which a lump sum adjustment will be reflected in your next monthly rent check." The contracting officer also stated in the SLA that the credit was "[i]ssued to reflect a correction to the annual real estate tax (RET) for the years [2006–2011] to remove the Special Assessment Tax for Transportation and Business Improvement District (BID) as per the terms of the SFO lease agreement." GSA subsequently repaid BID taxes in the amount of $1428.47 through SLA 22.

Oak Hills claims reimbursement for $8288.49 for transportation taxes. Ms. Gragard stated in her affidavit that "the amount GSA setoff [sic] (i.e., $9716.96 for BID and Transportation) was more than the amount actually billed to and reimbursed by GSA during the relevant time period (i.e., $8406.40 for BID, Transportation, and storm water)." "GSA's SLA did not explain the basis for Appellant's purported liability."

We find that the contracting officer asserted a government claim for $9716.96 within the limitations period by withholding payment in 2012 per SLA 20. The contracting officer's letter and SLA 20 resolved both liability and damages. The fact that SLA 20 incorrectly included BID taxes and the amount withheld may have been adjusted later does not defeat the finality of the decision.

We **DENY** Oak Hills' motion for summary judgment.

CBCA 6498

GSA unilaterally set off $3610.53 against its December 2012 rent payment to recoup the allegedly improperly reimbursed BID and transportation taxes. This setoff is reflected in the GSA-issued SLA 16 dated December 5, 2012. The contracting officer's transmittal letter stated, "This SLA is to withhold Special Assessment taxes for Transportation and Business Improvement for the lease [GS-11B-01814]. In accordance with the basic lease agreement, the Government has executed the enclosed SLA for which a lump sum adjustment will be reflected in your next monthly rent check." The contracting officer also stated in the SLA that the credit was "[i]ssued to reflect a correction to the annual real estate tax (RET) for the years [2007–2011] to remove the Special Assessment Tax for Transportation and Business Improvement District (BID) as per the terms of the SFO lease agreement."

In April 2015, the contracting officer issued SLA 24, withholding $1035.71 to recoup the allegedly improperly reimbursed stormwater taxes. The combined setoff in SLAs 16 and 24 is $4646.23, of which Art Property only claims $4000.62. The SLA 24 transmittal letter stated that the SLA "provides for the real estate tax escalation for Government leased space." SLA 24 stated that it was "[i]ssued to reflect the annual real estate tax escalation provided

for in the basic lease agreement." In its notice of appeal, however, Art Property referenced SLAs 16 and 24 as reflecting the amount set off by GSA.

We find that the contracting officer asserted a government claim for $4646.23 within the limitations period by withholding payment per SLAs 16 and 24. The contracting officer's letters and SLAs 16 and 24 resolved both liability and damages.

We **DENY** Art Property's motion for summary judgment.

CBCA 6499

GSA unilaterally set off the amount of $11,229.96 from its lease payments to Oak Hills in June and July 2016 to recoup real estate taxes GSA alleged it had wrongly paid. Oak Hills seeks to recoup this amount set off by GSA plus CDA interest. GSA contends that, per SLAs 19(a) (September 30, 2014), 20 (September 23, 2014), and 21 (February 20, 2015), the contracting officer withheld payment for the claimed transportation and stormwater taxes within the statutory period in which it could take the deductions Oak Hills disputes. On December 15, 2014, however, after the contracting officer unilaterally issued SLAs 19(a) and 20, GSA issued a second notice of its intent to collect the debt of $11,229.96 from Oak Hills. On March 29, 2016, a GSA auditor communicated to Oak Hills by email that $11,200.96 would be set off in its May rent. These SLAs state that they were "[i]ssued to reflect the annual real estate tax escalation provided for in the basic lease agreement." The SLAs deduct monies for transportation and stormwater taxes although the amount does not add up to $11,299.96, and GSA does not explain why. Ms. Gragard testified by affidavit that the SLAs "do not relate to the setoff or shortpay issue in the Appellant's claim." She stated that "the lease amendments do not reflect a setoff against revenue taken by GSA (indeed, there was no lease amendment issued by GSA, unilaterally or otherwise, in connection with the setoff at issue in Appellant's claim and appeal)."

There is no evidence that the contracting officer issued a SLA or final decision reflecting this setoff. Instead, the record indicates that the financial services division set off the lease payments, and GSA's auditor confirmed the set off. SLAs 19(a), 20, and 21 are not related to the setoff of $11,299.96 claimed by Oak Hills. Without a contracting officer's final decision, GSA has failed to submit its claim within the six-year statute of limitations.

We **GRANT** Oak Hills's motion for summary judgment and enter judgment for Oak Hills in the amount of $11,229.96, plus CDA interest to run from November 15, 2018.

CBCA 6500

GSA set off the amount of $48,360.36 from its December 2012 lease payment to Nash Street to recoup taxes GSA alleged it had wrongly paid. Nash Street seeks to recoup this setoff amount plus CDA interest. As noted in Nash Street's notice of appeal, the contracting officer withheld $48,360.36 for transportation taxes in SLA 18 (December 4, 2012). The contracting officer's transmittal letter stated, "This SLA is to withhold Special Assessment taxes for Transportation and Business Improvement for the lease [GS-11B-01727]. In accordance with the basic lease agreement, the Government has executed the enclosed SLA for which a lump sum adjustment will be reflected in your next monthly rent check." The contracting officer also stated in the SLA that the credit was "[i]ssued to reflect a correction to the annual real estate tax (RET) for the years [2005–2011] to remove the Special Assessment Tax for Transportation and Business Improvement District (BID) as per the terms of the SFO lease agreement." Ms. Gragard asserted that SLA 18 "does not explain the basis for GSA's calculation."

We find that the contracting officer asserted a government claim for $48,360.36 within the limitations period by withholding payment in December 2012. The contracting officer's letter and SLA 18 resolved both liability and damages.

We **DENY** Nash Street's motion for summary judgment.

CBCA 6505

1000-1100 Wilson contends that GSA has only threatened to set off from its rent payments for taxes reimbursed by GSA between 2006 and 2012 under this lease. 1000-1100 Wilson further contends that in May 2015, GSA's financial services division issued its final notice of "intent to collect" a debt from 1000-1100 Wilson in the amount of $540,556.92. The GSA debt account number was CLA 14983.

GSA asserts that SLAs 33 (April 22, 2014) and 35 (May 12, 2015) withheld the claimed transportation and stormwater taxes. These SLAs, however, were issued before the final notice was issued for CLA 14983. The SLAs mention nothing about withholding special assessment taxes for transportation or stormwater taxes or that they reflect a correction to RET for the years 2006–2012. Instead, the SLAs simply state that they were "[i]ssued to reflect the revised annual real estate tax escalation provided for in the basic lease agreement." Ms. Gragard contended, via an affidavit, that the SLAs do not reflect an actual or threatened setoff by GSA for the taxes previously reimbursed by GSA between 2006 and 2012.

We find that SLAs 33 and 35 are not related to the threatened setoff for taxes previously reimbursed by GSA between 2006 and 2012. As a result, there is no evidence that the contracting officer issued a SLA or final decision reflecting the threatened setoff amount. Without a contracting officer's final decision, GSA has failed to assert its right to set off these taxes within the six-year statute of limitations.

We **GRANT** 1000-1100 Wilson's motion for summary judgment, barring GSA from asserting a claim for taxes it allegedly wrongly paid to 1000-1100 Wilson between 2006 and 2012.

CBCA 6508

On May 20, 2015,[3] GSA's financial services division issued its final notice to 1000-1100 Wilson of GSA's "intent to collect" a debt in the amount of $49,295.27 plus interest and fees under debt account CLA 14984. 1000-1100 Wilson contends that GSA has not issued a contracting officer's final decision but has only threatened to set off from its rent payments for taxes reimbursed by GSA between 2006 and 2012 under this lease.

GSA points to the bilateral SLA 28, dated September 3, 2015, as evidence of GSA's withholding for the 2006–2012 taxes within the statutory period. SLA 28 states, in paragraph 6:

> For the purposes of full and final settlement of amounts due and owing to the Lessor, the Lessor is entitled to a one-time lump sum payment of $11,629.50 for outstanding real estate taxes. With the payment of this settlement, the Lessor agrees that no further real estate tax claims will be made against the Government.

Ms. Gragard contended in her affidavit that this amount of $11,629.50 relates to 2015 base real estate taxes and not to GSA's threatened setoff of the stormwater and transportation taxes paid by GSA from 2006 to 2012. We are unable to determine from the record whether SLA 28 relates to the threatened setoff claimed by 1000-1100 Wilson. As a result, material facts remain in dispute, and 1000-1100 Wilson's motion for summary judgment is denied.

We **DENY** 1000-1100 Wilson's motion for summary judgment.

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[3] This final notice has a print date of June 12, 2018, but a last notice date of May 20, 2015.

CBCA 6509

On December 3, 2014, GSA's financial services division demanded payment from Art Property in the amount of $87,044.91 to recoup taxes allegedly overpaid by GSA from 2006–2011. On March 29, 2016, GSA's auditor indicated that GSA's claim for $87,044.91 was scheduled to be set off from March rent. On April 1, 2016, GSA withheld $87,044.90 from its rent payment to set off the taxes it believed it had improperly reimbursed Art Property. GSA points to SLAs 26 (March 28, 2013), 27 (November 19, 2013), 30 (November 20, 2014), and 33 (December 22, 2015), and argues they collectively must be construed as the contracting officer's decision to withhold payment for the claimed transportation and stormwater taxes. However, each SLA was only "[i]ssued to reflect the annual real estate tax escalation provided for in the basic lease agreement." Per Ms. Gragard's affidavit, the SLAs are irrelevant to Art Property's claim and the appeal as "they merely reflect amounts billed by appellant to GSA under protest after GSA had earlier announced, through its budget analyst, its intention not to reimburse certain types of real estate taxes." The SLAs "do not reflect a setoff against revenue taken by GSA."

The record is devoid of evidence that the contracting officer issued a determination concerning the $87,044.90 withheld under the lease. The record indicates that the financial services division set off the rent payments in 2016, years after GSA issued the SLAs it relies on as the contracting officer's final decision.

We **GRANT** Art Property's motion for summary judgment and award Art Property $87,044.90 plus CDA interest running from November 15, 2018.

CBCA 6512

GSA set off $23,244.74 against its December 3, 2012, rent payment to recoup the allegedly improperly reimbursed BID and transportation taxes. GSA and 1101 Wilson agree that the setoff is reflected in GSA-issued SLA 17. The contracting officer stated in the SLA that the credit was "[i]ssued to reflect a correction to the annual real estate tax (RET) for the years [2007–2011] to remove the Special Assessment Tax for Transportation and Business Improvement District (BID) as per the terms of the SFO lease agreement." 1101 Wilson only challenges $21,067.84 of the setoff because some of the setoff was owed to GSA due to an overpayment of base real estate taxes.

In her affidavit, Ms. Gragard stated that SLA 17 "does relate to the GSA setoff at issue in the claim." The contracting officer, however, has "never reconciled" the amount that was alleged to be due in SLA 17 "with the amount claimed to be due by GSA's financial services division."

We find that the contracting officer asserted a government claim for $23,244.74 within the limitations period by withholding payment in 2012 under the lease. SLA 17 resolved both liability and damages.

We **DENY** 1101 Wilson's motion for summary judgment.

Decision

For the reasons set forth above, we **DENY** appellants' motions for summary judgment in CBCA 6493, 6494, 6495, 6496, 6497, 6498, 6500, 6508, and 6512.[4] In CBCA 6499, we **GRANT IN PART** Oak Hills' motion for summary judgment and award Oak Hills $11,229.96 plus CDA interest running from November 15, 2018. In CBCA 6505, we **GRANT IN PART** 1000-1100 Wilson's motion for summary judgment barring GSA from asserting a claim for taxes it allegedly wrongly paid to 1000-1100 Wilson between 2006 and 2012. In CBCA 6509, we **GRANT IN PART** Art Property's motion for summary judgment and award Art Property $87,044.90 plus CDA interest running from November 15, 2018.

In all of the appeals (CBCA 6493–6512), we **DENY** appellants' motions for summary judgment and claims for an award of other than CDA interest. In all of the appeals (CBCA 6493–6512), the "short pay claims" were withdrawn.

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

We concur:

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge

[4] For the nine undecided appeals in which we deny summary judgment, material facts remain in dispute in one (CBCA 6508), and the question of whether we have jurisdiction to decide the setoff claims remains unresolved in eight (CBCA 6493, 6494, 6495, 6496, 6497, 6498, 6500, 6512). Those eight appeals in which jurisdiction is at issue were filed more than ninety days from the issuance of the final decision, and consequently, the issue to be briefed and decided is whether these appeals were timely filed.