



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: June 19, 2014

CBCA 3783

BROOKWOOD RESEARCH CENTER, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Lyn Murphy, Vice President of Brookwood Research Center, LLC, Temecula, CA, appearing for Appellant.

Robert W. Schlattman, Office of Regional Counsel, General Services Administration, Lakewood, CO, counsel for Respondent.

GOODMAN, Board Judge.

Appellant, Brookwood Research Center, LLC, appeals a contracting officer's decision denying reimbursement for increased real estate taxes under a lease entered into by appellant and respondent, General Services Administration.

Factual Background

Appellant seeks payment of \$11,958.14¹ from respondent under the Tax Adjustment clause of the lease for real estate tax year 2012. The Tax Adjustment clause reads:

¹ Appellant has elected the small claims procedure pursuant to CBCA Rule 52 (48 CFR 6101.52 (2013)). Accordingly, this decision is final and conclusive and has no value as precedent.

The Lessor shall furnish the Contracting Officer with copies of all notices which may affect the valuation of said land and buildings for real estate taxes thereon, as well as all notices of a tax credit, all tax bills, and all paid tax receipts, or where tax receipts are not given, other similar evidence of payment acceptable to the Contracting Officer (hereinafter, evidence of payment), and a proper invoice (as described in GSA Form 3517, General Clauses, 552.232-75, Prompt Payment) of the tax adjustment including the calculation thereof, for each year that real estate taxes are incurred during the lease term or any extension thereof. All such documents are due within 10 calendar days of receipt except that the proper invoice and evidence of payment shall be submitted within 60 calendar days after the date the tax payment is due from the Lessor to the taxing authority. FAILURE TO SUBMIT THE PROPER INVOICE AND EVIDENCE OF PAYMENT WITHIN SUCH TIME FRAME SHALL CONSTITUTE A WAIVER OF THE LESSOR'S RIGHT TO RECEIVE A TAX ADJUSTMENT PURSUANT TO THIS CLAUSE FOR THE TAX YEAR AFFECTED.

Appeal File, Exhibit 1.

Appellant alleges that a proper invoice and evidence of payment of the taxes was submitted by United States mail on June 20, 2013, before the expiration of the sixty-day period on August 31, 2013. Appellant alleges further that it has always submitted its request for reimbursement by mail, as the lease does not specify the method of submission. Appellant does not have contemporaneous proof of mailing, as it did not send the information by certified mail or by any other method to prove delivery. The mailing was not returned for incorrect address or postage, and appellant therefore assumed it had reached its destination. Appellant also alleges that it had mailed another request to respondent for tax reimbursement with regard to another property, by letter dated June 11, 2013, and had received reimbursement.²

On October 2, 2013, after the expiration of the sixty-day period in the lease, appellant's representative sent an email message to respondent attaching the information that appellant alleges it submitted previously and inquiring why reimbursement had not been received. Respondent searched for the information, could not find it, and concluded that appellant had not previously submitted it and, therefore, had waived the right to payment. On October 24, 2013, the contracting officer responded by letter stating that respondent had

² Both letters were to the same street address. The letter with regard to the instant appeal also included a post office box in the address.

not received the information until appellant's October 2, 2013, email message, which was after the sixty-day period in the lease had expired, and therefore "no payment would be processed."

After additional correspondence between appellant and respondent, the contracting officer issued a decision denying the claim for reimbursement. After the appeal was filed, appellant submitted an affidavit from the person who mailed the required information, affirming the date and location of mailing.

Discussion

Appellant asserts that it timely submitted the required information by depositing it in the United States mail. This assertion is supported by a copy of the letter and information allegedly sent and an affidavit from the person who accomplished the mailing. Respondent asserts that it has no evidence that the required information was received, and appellant cannot prove that its letter with accompanying information was delivered after being deposited in the mail. While respondent has no evidence of receiving the information, this does not sufficiently rebut appellant's assertion that the information was submitted. It is possible that appellant's mailing was lost in transit or after it reached the destination, circumstances which appellant cannot control.

Even though respondent has made a *prima facie* case that the required information was not received,³ appellant's evidence establishes that the information was timely submitted as required by the lease. Whether appellant's mailing was lost before it arrived at its destination or thereafter does not negate appellant's timely submission.

In light of the supporting evidence submitted by appellant, the Board finds that it is more probable than not that the information was timely mailed. *See, eg., Visutron, Inc., Security Electronics*, GSBCA 7139, 84-1 BCA ¶ 17,022.

³ Respondent has cited several Board decisions in support of its position. These cases involve situations in which the appellant clearly did not submit the information until after the sixty-day period expired or could not prove transmission of the information. Under such circumstances, clauses waiving rights for failure to timely submit are enforceable even if the Government suffers no prejudice from the untimely submission. *Cindy Karp v. General Services Administration*, CBCA 1346, 11-1 BCA ¶ 34,716; *Riggs National Bank of Washington, D.C. v. General Services Administration*, GSBCA 14061, 97-1 BCA ¶ 28,920; *Universal Development Corp. v. General Services Administration*, GSBCA 12138 (11520)-REIN, *et al.*, 93-3 BCA ¶ 26,100.

Decision

The appeal is **GRANTED**. Appellant is entitled to payment of \$11,958.14⁴ plus interest pursuant to the Contract Disputes Act, 41 U.S.C. § 611, (2012) from the date respondent received appellant's letter dated October 2, 2013 until paid.

ALLAN H. GOODMAN
Board Judge

⁴ Respondent has not questioned the accuracy of the calculation of the amount due.