UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION OR,
IN THE ALTERNATIVE, FOR FAILURE TO PROSECUTE:
July 13, 2017

CBCA 5720

M.I.T. INTERNATIONAL COMMERCIAL LENDING, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Patrick J. McEvoy, President of M.I.T. International Commercial Lending, LLC, New York, NY, appearing for Appellant.

John S. Tobey, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **O'ROURKE**, and **RUSSELL**.

LESTER, Board Judge.

On May 4, 2017, the Board issued a show cause order asking the parties to address what the Board, from its review of appellant's notice of appeal, viewed as a possible jurisdictional problem that would preclude the Board from entertaining the appeal. Respondent, the General Services Administration (GSA), argues in response to the show cause order that, in fact, the Board lacks jurisdiction to entertain this appeal. Appellant,

M.I.T. International Commercial Lending, LLC (MIT), has never responded to the show cause order or to any of the Board's repeated inquiries about its failure to respond. For the reasons set forth below, we dismiss this appeal for lack of jurisdiction or, in the alternative, for failure to prosecute.

Background

I. MIT's Breach Allegations

On February 9, 2016, GSA commenced an on-line auction for the sale of real property, sale/lot no. 4-N-WV-0560, called Sugar Grove Station. The property, a 122.85-acre former United States Navy facility located in Sugar Grove, West Virginia, included approximately 105 buildings totaling more than 445,000 gross square feet. According to on-line invitation for bids (IFB) no. PEACH416004001, the Navy used the site from 1955 until the Navy Information Operations Command vacated the facility on September 30, 2015.

Bids for Sugar Grove Station were received and posted on a government website, RealEstateSales.gov. As required by the "Instructions to Bidders" in the IFB, *see* IFB at 12, MIT paid the Government a registration deposit of $100,000 to participate in the auction. For the winning bidder, the deposit would "become Earnest Money to the benefit, custody, accountability and control of the Government." IFB at 7.[1] Further, a clause in the IFB's "General Terms of Sale," titled "Revocation of Bid and Default," provided that, if the winning bidder defaulted on its performance obligations or failed to consummate the transaction, GSA could, at its option, retain the $100,000 earnest money deposit as liquidated damages. The IFB's "General Terms of Sale" also contained a "Condition of Property" provision expressly stating that any sale of the property was "as is," without any warranty or representation by the Government as to its size, quality, or state of repair.

MIT appraised the property as being worth approximately $103 million before placing a bid of $11.2 million to purchase it. MIT planned to develop the property as a senior living facility.

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[1] The IFB defined "Earnest Money" as "the Bidder's deposit of money demonstrating the Purchaser's good faith offer to the Government to fully execute and comply with all terms, conditions, covenants and agreements contained in any contract resulting from the Government's acceptance of the Bidder's offered price." IFB at 7.

GSA accepted MIT's bid on either July 26 or 28, 2016.[2] In accordance with various payment provisions in the IFB's "Instructions to Bidders," which were incorporated into the contract, MIT was required to make an additional deposit of $1,020,000 (beyond the $100,000 deposit that it had previously made) to GSA by August 9, 2016.

MIT alleges that, during a telephone call on August 2, 2016, it requested and GSA denied access to the property for an environmental site assessment (ESA) that would have allowed MIT's consultant to inspect a pipeline. MIT also alleges that GSA and the Navy failed to provide MIT with essential inspection reports that would have provided information about that pipeline. In a letter dated August 9, 2016, MIT informed GSA that, without the ESA, it would not pay the $1,020,000 additional deposit that was otherwise due, and it requested a sixty-day extension of the August 9 deadline to address issues regarding title to the property and to conduct site tests for hazardous substances.

On August 10, 2016, the contracting officer for GSA denied MIT's extension request and issued a cure notice notifying MIT that, to avoid default termination, MIT would have to pay the $1,020,000 deposit no later than 11 a.m. Eastern Standard Time on August 12, 2016. MIT did not pay, and GSA informed MIT by letter dated August 12, 2016, that MIT was in default of its contract and that GSA was retaining MIT's $100,000 registration deposit as liquidated damages (pursuant to the IFB's "Revocation of Bid and Default" clause).

MIT alleges that, three months after the auction closed, it received information from an employee of the Public Service Commission of West Virginia about "unconfirmed reports" of pipeline leaks on the property. It asserts that, unlike the Navy, a private owner like MIT would be subject to federal and state pipeline safety regulations for such leaks, potentially including fines of up to $200,000 per day per violation. It believes that the Government's failure to disclose this information during bidding constitutes a fraudulent breach of contract.

On December 1, 2016, MIT requested that GSA convert its default termination to a termination for convenience. By letter dated January 31, 2017, the GSA disposal contracting officer denied MIT's request, stating that the Government's August 12, 2016, decision to default MIT and retain the $100,000 deposit as liquidated damages remained unchanged.

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[2] Letters from GSA to MIT dated August 10 and 12, 2016, state that GSA accepted MIT's $11.2 million offer on July 26, 2016, but other documents from GSA and MIT state that GSA accepted MIT's bid on July 28, 2016.

II. Proceedings Before the Board

On April 28, 2017, an employee of Beecher Stowe Services (BSS), a private feasibility and appraisal firm that MIT had engaged to assist it in the auction, filed an appeal in MIT's name and upon MIT's behalf, using the Board's efile system. Attached to the notice of appeal was a written complaint, signed by MIT's president, Patrick McEvoy, in which MIT stated that it wanted to recover the $100,000 registration deposit that it had paid to GSA and wanted the Board to convert the default termination to a termination for convenience to permit MIT to bid on future government contracts. Although the complaint identified MIT's address as 450 Lexington Avenue, New York, NY, Mr. McEvoy was not electronically copied on the efiling, and the efiling did not identify Mr. McEvoy's email address.

Because the Board's rules require that a corporation be represented either by an attorney or by one of its officers, 48 CFR 6101.5(a)(1) (2016), the Clerk of the Board contacted the BSS employee who had filed the submission to inform her that neither BSS nor one of BSS's employees could represent MIT in the appeal and to obtain more detailed contact information (including an email address) for MIT's president, Mr. McEvoy. Although the BSS employee provided the Clerk with an email address for Mr. McEvoy with a realreits.com suffix, Mr. McEvoy personally submitted a supplement to the notice of appeal on April 30, 2017, using a hotmail.com email address that differed from the address provided by the BSS employee.

On May 1, 2017, the Clerk of the Board electronically issued the notice of docketing for the appeal to Mr. McEvoy and to GSA, with a request that each party confirm receipt. In delivering the notice to Mr. McEvoy, the Board used what it believed was the hotmail.com address that Mr. McEvoy had used in his filing, rather than the realreits.com address that the consultant had identified, but, as the Board only recently discovered, the Board accidentally omitted a letter from that hotmail.com email address, meaning that the notice would not have reached him. Nevertheless, having received no response to the email message, the Clerk twice that week called Mr. McEvoy at the telephone number identified on MIT's complaint to confirm his receipt of the notice of docketing. Both times, the receptionist answering the telephone for MIT stated that Mr. McEvoy was in a meeting, and, both times, the Clerk left a telephone message asking Mr. McEvoy to return his call to confirm receipt. The Clerk did not receive any response.

In reviewing the information in MIT's notice of appeal, the Board questioned whether it possessed jurisdiction to entertain an appeal of the real property sale that appeared to be at issue. Accordingly, on May 4, 2017, the Board issued a show cause order asking MIT to explain to the Board by May 25, 2017, why its appeal should not be dismissed for lack of

jurisdiction. The Board attempted to send that order to Mr. McEvoy's hotmail.com address, with a request that he confirm receipt, but again unintentionally omitted a letter from the email address. For obvious reasons, there was no response.

On May 10, 2017, the BSS employee who had filed MIT's appeal contacted the Clerk of the Board to ask whether the appeal had been docketed. The Clerk responded that he had sent the notice to Mr. McEvoy's hotmail.com address on May 1, 2017 (still unaware that the Board had made a mistake in typing the address), but had received no confirmation of receipt. The BSS employee asked the Clerk to forward the notice to Mr. McEvoy's realreits.com address, which the BSS employee had previously provided. The Clerk immediately forwarded both the notice of docketing and the show cause order to Mr. McEvoy's realreits.com address. The Clerk again called Mr. McEvoy on May 11, 2017, to confirm receipt of the May 10 email message and, after being told that Mr. McEvoy was in a meeting, again left a telephone message asking for a return call.

On May 11, 2017, having received no response from Mr. McEvoy, the Clerk contacted the BSS employee, who informed him that Mr. McEvoy had received the May 10 email message and had forwarded it to her.

MIT did not respond to the show cause order, but GSA filed a response arguing that the Board lacks jurisdiction to entertain this appeal both because the CDA does not encompass contracts for the sale of real estate and because, GSA alleged, MIT had not submitted a proper claim satisfying the requirements of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012).

On May 31, 2017, the Board issued another order directing MIT, no later than June 8, 2017, either to respond to the Board's prior show cause order or to notify the Board that it did not intend to respond. In the order, the Board indicated that "[a] complete failure to respond to this order may result in dismissal of this appeal for failure to prosecute." The Board forwarded the May 31 order, along with a copy of the May 4 order, to Mr. McEvoy, this time using the realreits.com address that the BSS employee had previously provided, and, in the email message, asked Mr. McEvoy to confirm receipt. No confirmation of receipt was ever received.

The presiding judge's paralegal then attempted to call Mr. McEvoy three times – on June 1, 2, and 7, 2017 – to confirm receipt. On all three occasions, the receptionist answering the telephone for MIT stated that Mr. McEvoy was in a meeting. The paralegal did not leave a message for Mr. McEvoy on those occasions.

On June 7, 2017, the Board sent hard copies of both the May 4 and May 31 orders to 450 Lexington Avenue, New York City – the only address that the Board has on file for MIT – using United Parcel Service (UPS) package tracking. On June 9, 2017, UPS notified the Board that it had been unable to deliver the package, noting that there was no suite or apartment number listed for an address that, according to Google Maps, is a multi-story office building. The presiding judge's paralegal immediately attempted to call Mr. McEvoy, but the receptionist who answered indicated that Mr. McEvoy was, yet again, in a meeting. In response to the paralegal's inquiry as to whether the Board needed to add a suite or apartment number to the UPS package, the receptionist indicated that there was no such number. The paralegal called Mr. McEvoy again later that day and, after being told that he was in another meeting, left a message on his voicemail asking for a return call. Mr. McEvoy never responded. The paralegal also called the BSS employee who had originally filed the notice of appeal on MIT's behalf, leaving a voicemail message asking her to call to confirm Mr. McEvoy's receipt of the orders, and sent a confirming email message to a general contact email address for BSS. The BSS employee never responded.

Subsequently, on June 12, 2017, the Board received a new delivery notification from UPS indicating that a redelivery attempt had been made and that the package had been accepted at the front desk of the building at 450 Lexington Avenue, signed for by someone named "Lewis." The Board's paralegal called Mr. McEvoy to confirm his receipt of the package and left a message with the receptionist asking for a return call. Mr. McEvoy never responded.

Discussion

I. Jurisdiction

The Board derives its jurisdiction to entertain appeals involving contract disputes from the CDA. In its notice of appeal, MIT cites to two federal statutes – 28 U.S.C. §§ 2017 and 2503 – as the jurisdictional bases of its appeal, but those statutes relate to the jurisdiction of certain federal courts, rather than this Board, and do not provide us with any jurisdictional authority. Instead, we must look to the CDA to determine whether we can entertain an appeal involving a contract dispute. *See Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,209, at 176,676 ("The CDA delineates the bounds of the Board's jurisdiction over contract disputes."). "Jurisdiction is a threshold matter, and where the Board lacks subject matter jurisdiction, [it] may not proceed to decide the merits of the case." *ARI University Heights, LP v. General Services Administration*, CBCA 4660, 15-1 BCA ¶ 36,085, at 176,185.

The CDA covers disputes involving the following types of contracts made by an executive agency of the Federal Government:

> **Executive agency contracts**. – Unless otherwise specifically provided in this chapter, this chapter applies to any express or implied contract . . . made by an executive agency for –
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> (1) the procurement of property, other than real property in being;
> (2) the procurement of services;
> (3) the procurement of construction, alteration, repair, or maintenance of real property; or
> (4) the disposal of personal property.

41 U.S.C. § 7102(a). When the CDA refers to "procurement," it means "an acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the federal government." *Bonneville Associates v. United States*, 43 F.3d 649, 653 (Fed. Cir. 1994); *see Forman v. United States*, 767 F.2d 875, 878 (Fed. Cir. 1985) (the term "procurement" as used in the CDA refers to procurement by the Government). The only part of the CDA that encompasses the Government's disposal, or sale, of property relates to the Government's "disposal of personal property." 41 U.S.C. § 7102(a)(4). The CDA "does not apply to real property sales contracts with the Government." *Ayres v. United States*, 66 Fed. Cl. 551, 558 (2005); *see New London Development Corp.*, ASBCA 54535, 05-2 BCA ¶ 33,018, at 163,637 (sale of real property is not within CDA jurisdiction).

Here, GSA was selling real property through an on-line auction. Although we have repeatedly exercised jurisdiction under the CDA over disputes arising out of government auctions of personal property, *see, e.g.*, *Yasmin Saighi v. General Services Administration*, CBCA 3693, 15-1 BCA ¶ 35,920, at 175,584-87 (involving a government auction of a boat); *Eurasia Partners, LLC v. Department of the Treasury*, CBCA 3229, 14-1 BCA ¶ 35,576, at 174,350-53 (government auction of a painting); *William W. Caswell v. General Services Administration*, CBCA 479, 07-02 BCA ¶ 33,679, at 166,744-47 (government auction of a truck), we cannot extend such jurisdiction to auctions of *real* property. *See Ayres*, 66 Fed. Cl. at 558.

We recognize that, in some circumstances, there is a dual purpose underlying a contract (only one of which involves the Government's sale of real property) and that the Board can sometimes exercise jurisdiction over an appeal arising under such a dual-purpose contract if one of the contract's purposes is covered by section 7102(a). For example, in *Bonneville Associates*, 43 F.3d at 655, the portion of a contract that conveyed real property to the Government – a type of conveyance not encompassed within the CDA's jurisdictional

grant – was part of a larger agreement requiring the contractor to repair and alter a building for the Government, and the Court of Appeals for the Federal Circuit found CDA jurisdiction over the entire appeal pursuant to the CDA's application to contract disputes related to the procurement of services for the alteration and repair of real property. Similarly, in *Forman*, 767 F.2d at 879, the Federal Circuit found CDA jurisdiction where, even though the Government contended that the CDA did not cover the type of lease agreement at issue there, that lease was part of a larger contract that included the Government's acquisition of construction services that the CDA clearly covered. *See, e.g.*, *Korman Corp.*, HUD BCA 81-563-C5, 82-2 BCA ¶ 16,044, at 79,491 (finding CDA jurisdiction where "the instant contract is not exclusively for the sale of real property and Appellant's claims do not in any way involve the sale aspects of the contract").

Our independent review of the parties' agreement makes clear that its only purpose was the sale of real property to MIT. Unlike the contracts in *Bonneville Associates*, *Forman*, and *Korman*, there is nothing in this contract that even suggests a purpose other than a direct sale of real property. Further, MIT's intended development of the site as a senior living facility was for its own purposes, not for the Government's, and the Government would have retained no control over the use of the property once it was sold at auction. Because we can find no purpose for this sales contract covered by the CDA, the Board lacks jurisdiction to decide this appeal.[3]

II. Failure to Prosecute

To the extent that we possess jurisdiction to entertain this appeal, we dismiss it for failure to prosecute. As established in Board Rule 33(c)(6), 48 CFR 6101.33(c)(6) (2016), we may dismiss an appeal for failure to prosecute "when an appellant is unresponsive to an order requiring action by the appellant." *Persaud Cos. v. General Services Administration*, CBCA 3179, 14-1 BCA ¶ 35,547, at 174,202; *see JDM, LLC v. Department of Veterans Affairs*, CBCA 5522, 17-1 BCA ¶ 36,729, at 178,892-93; *CCJN & Co. v. General Services Administration*, CBCA 821, et al., 10-1 BCA ¶ 34,420, at 169,909.

[3] In its response to the Board's show cause order, GSA argued that MIT did not submit a proper claim to the contracting officer, as required by the CDA, 41 U.S.C. § 7103, and that this defect also precludes us from exercising jurisdiction. Because there is no copy of the "claim" letter in the record, we cannot verify whether that letter satisfies the CDA requirements. Because there are other grounds upon which to dismiss this appeal for lack of jurisdiction, we need not address GSA's argument.

MIT has failed to respond to either the Board's show cause order or its subsequent order providing MIT with an additional opportunity to respond. In its order of May 31, 2017, the Board expressly warned MIT that a failure to respond could result in dismissal for failure to prosecute. MIT was amply warned of the consequences of its failure to respond.

Although the first two email messages that the Board sent to Mr. McEvoy were unintentionally misaddressed, the Board has undertaken significant efforts since sending those two messages to ensure that MIT actually received the two orders that the Board issued. It made a multitude of telephone calls to MIT's president and MIT's consultant, left numerous messages through MIT's receptionist and on voicemail, sent several email messages to Mr. McEvoy through his realreits.com account, and sent hard paper copies to MIT through UPS. MIT's absolute silence is baffling. To the extent that, despite the Board's efforts, the orders somehow did not reach MIT's president (contrary to the May 11 representation of MIT's consultant, BSS, that they had), that is MIT's fault and responsibility, given that the Board has forwarded those orders to both the realreits.com email address and street address that were provided to the Board.

Dismissal for failure to prosecute acts as an adjudication on the merits. *Summit Commerce Pointe, LLC v. General Services Administration*, CBCA 2652-R, et al., 14-1 BCA ¶ 35,581, at 174,360. Because we do not decide the merits of a case if we know that we lack subject matter jurisdiction over it, *ARI University Heights*, 15-1 BCA at 176,185, and because the jurisdictional defect here is obvious, we have elected to resolve this appeal by dismissing it for lack of jurisdiction. Nevertheless, to the extent that it were determined that we possess jurisdiction here, we alternatively dismiss it for failure to prosecute.

Decision

For the foregoing reasons, this appeal is **DISMISSED FOR LACK OF JURISDICTION OR**, in the alternative, **FOR FAILURE TO PROSECUTE**.

HAROLD D. LESTER, JR.
Board Judge

We concur:

KATHLEEN J. O'ROURKE
Board Judge

BEVERLY M. RUSSELL
Board Judge