

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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DISMISSED FOR LACK OF JURISDICTION: August 13, 2001

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GSBCA 15601

DePONTE INVESTMENTS, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Timothy C. Hutchens of Law Offices of Timothy C. Hutchens, Washington, DC, and Richard J. Conway and Denis W. Kohl of Dickstein, Shapiro Morin & Oshinsky, LLP, Washington, DC counsel for Appellant.

M. Leah Wright, Office of Regional Counsel, General Services Administration, Atlanta, GA, counsel for Respondent.

Before Board Judges **BORWICK**, **NEILL**, and **WILLIAMS**.

**BORWICK**, Board Judge.

On May 25, 2001, appellant, DePonte Investments, Inc. filed an appeal at the Board contesting the General Services Administration's (respondent's or GSA's) default termination of its lease contract. Respondent moves to dismiss the appeal for lack of jurisdiction. Respondent argues that on February 22, 2001, appellant received by Federal Express the Government's notice of default termination, which was dated February 21. Respondent argues that for an appeal to be timely filed at this Board, DePonte was required to file its appeal by May 23, 2001. According to respondent, appellant filed on the ninety-second day following receipt of the default termination notice. Thus, the appeal would not fall within the ninety-day filing limit of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 606 (Supp. V 1999).

Appellant argues that it received the default termination notice on February 26, 2001, not on February 22, 2001. If the appellant had received the default termination notice on February 26, the May 25, 2001, filing with the Board was timely, made on the eighty-eighth day after appellant received the notice. We grant respondent's motion, concluding that the

appeal was not timely filed before the expiration of ninety days from receipt of the notice. Respondent has met its burden of establishing that appellant received the notice on February 22. Appellant filed its appeal on the ninety-second day after receipt of the default termination notice and thus under the CDA untimely filed its appeal at this Board.

### Background

On August 24, 1998, GSA awarded lease no. GS-07B-14651 to appellant for construction and lease of a building to house the Social Security Administration (SSA) in Gallup, New Mexico. On February 21, 2001, GSA wrote a notice to appellant default terminating the lease effective midnight February 22, 2001. This notice did not indicate the method of delivery. As evidence of the notice's February 22, delivery by Federal Express, the GSA submitted a Federal Express internet tracking report, indicating that a priority letter was shipped on February 21 from GSA Region Seven in Fort Worth, Texas, and received by appellant at its offices in Albuquerque, New Mexico, on February 22, 2001, at 9:25 a.m., signed for by one "L. Duran." Respondent's Motion to Dismiss, Exhibit 1. The tracking report did not state the contents of the package. Id. The tracking number on the tracking report was 3185170335.

However, in a supplemental affidavit, GSA's realty specialist, Mr. Jim Plaga, stated that on February 21, he placed the default termination notice in a Federal Express envelope addressed to Mr. Brent DePonte of DePonte Investments. Respondent's Response to Board's order of July 25, 2001, Exhibit 1. (Affidavit of Jim Plaga (Plaga Affidavit) (Aug. 1, 2001) at 2 (¶ 5)). Mr. Plaga sealed the envelope, marked the envelope for overnight delivery, and, at about 4:00 p.m. on February 21, deposited the envelope in the Federal Express site receptacle/drop box at the drop-off location in the lobby of the Federal Building in Fort Worth, Texas. Id.

Mr. Plaga retained the tracking sticker designated with tracking number 3185170335 from the Federal Express label and attached it to the file copy of the default termination notice. Plaga Affidavit at 2 (¶ 5). The file copy of the default termination notice contains the number 3185170335 from the tracking sticker and the following hand-written notation: "send Fed Ex 2-21-01 (318-5170-335)." Plaga Affidavit, Exhibit 2. The tracking number on the file copy of the default termination matches the tracking number of the tracking report indicating a February 22 delivery of the notice to DePonte investments signed by an "L. Duran." Compare Plaga Affidavit, Exhibit 2 with Respondent's Motion to Dismiss, Exhibit 1.

Mr. Plaga also identified "L. Duran" as Ms. Lenna Duran, a person, employed by DePonte Investments, with whom Mr. Plaga had spoken on numerous occasions when she answered the telephone on behalf of DePonte Investments. Plaga Affidavit at 3 (¶ 8). Mr. Plaga stated that Ms. Duran had assisted Mr. Plaga in matters involving the lease that was default terminated. Id. In a supplemental filing, appellant confirms that Ms. Duran was a receptionist/assistant employed by appellant. Appellant's Response to Board's Order of July 25, 2001.

To support the February 26 delivery date of the default termination notice, appellant offers as evidence the sworn affidavit of Mr. Brent DePonte, President of DePonte

Investments, Inc. Affidavit of Mr. Brent DePonte (DePonte Affidavit) (July 10, 2001) ¶ 1. In that affidavit, Mr. DePonte stated that he received the default termination notice on February 26, 2001, and he immediately notified his counsel of its receipt. DePonte Affidavit ¶ 5. He believed that if the notice had arrived on February 22, it would have quickly come to his attention and he would have immediately notified counsel on that day. DePonte Affidavit ¶ 6. Mr. DePonte stated appellant had searched its files for any evidence that the default termination notice was actually delivered on February 22, and it found no such evidence. DePonte Affidavit ¶ 7. Further, DePonte indicated that appellant had occasionally received letters from GSA in the past, often by overnight courier, as appellant has a number of projects with GSA. Id.<sup>1</sup> In its supplemental filing, appellant's counsel argues that a letter dated February 22, from Mr. Plaga transmitting drawings for a build-out of an additional 912 square feet of space on another project, was in the package delivered on February 22. Appellant's Response to Board's order of July 25, 2001, Exhibit 1.

### Discussion

Under the CDA, 41 U.S.C. § 606, a contractor's appeal to the Board must be filed "within ninety days from the date of receipt of a contracting officer's decision." This Board lacks jurisdiction over the appeal if the appeal is not filed within the statutory ninety-day period. 41 U.S.C. § 606; Cosmic Construction Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982); CWI Consultants & Services v. General Services Administration, GSBCA 11889, 98-2 BCA ¶ 29,343 (1997), recon. denied, 98-1 BCA ¶ 19,476. Thus, in this matter, the date the ninety-day period ended hinges on the date the default termination notice was received.

The Federal Acquisition Regulation (FAR) section 33.211(b) provides that "The contracting officer shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt." 48 CFR 33.211(b) (2000). Therefore, the Government bears the burden of establishing the date the default termination notice was received by the appellant. Public Service Cellular, Inc., ASBCA 52489, 00-1 BCA ¶ 30,832; Mid-Eastern Industries, Inc., ASBCA 51287, 98-2 BCA ¶ 29,907.<sup>2</sup> The GSA has met its burden and has provided sufficient proof that appellant received the notice on February 22.

As evidence of receipt on February 22, GSA offers an internet tracking report from Federal Express and an affidavit from GSA's realty specialist which explains contemporaneous evidence attached to the affidavit. The tracking report indicates that a priority letter was delivered to appellant on February 22, 2001, and signed for by one "L. Duran." Appellant does not dispute that it received a communication from GSA Region Seven by Federal Express on February 22.

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<sup>1</sup> Respondent's motion to dismiss as originally filed relied only upon the Federal Express tracking report. Mr. DePonte's affidavit, which attempts to refute the tracking report, was submitted before the Plaga affidavit and does not address the substance of the Plaga affidavit.

<sup>2</sup> Appellant's burden is to establish--by affidavit or other evidence--that the appeal was timely filed. Mid-Eastern Industries, Inc.

The Federal Express tracking report number which shows a February 22 delivery, however, matches the tracking number on GSA's file copy of the default termination notice. It also matches the hand-written notation on the file copy that on February 21 the default termination notice placed in a Federal Express drop-off box for overnight delivery on February 21.

Appellant offers the affidavit of Mr. DePonte who states that the default termination notice was received on February 26, 2001, on which day he immediately notified counsel. Mr. DePonte stated that appellant had previously received letters from GSA, often by overnight mail, in regard to other projects appellant had with GSA. Additionally, Mr. DePonte stated that appellant had searched its records and found no evidence that the default termination notice was in fact received on February 22. Appellant speculates that the delivered letter was a letter dated February 22 transmitting drawings for a build-out of space on another project.

Respondent's affidavit and the contemporaneous evidence -- the Federal Express tracking report with the number 3185170335, the file copy of the default termination notice with that same number referenced, and the hand written notation about the delivery date on the file copy of the default termination notice -- trumps appellant's self-serving and conclusory affidavit. Program and Construction Management Group, Inc. v. General Services Administration, GSBCA 14149, 99-2 BCA ¶ 30,579, at 151,009, recon. denied, 00-1 BCA ¶ 30,771; SKR Construction Corp., ASBCA 51980, 99-2 BCA ¶ 30,477, at 150,566; cf. Grumman Aerospace Corp., ASBCA 48006, 95-2 BCA ¶ 27,891, at 139,143.

Appellant's suggestion that the Federal Express delivery contained the February 22 letter transmitting drawings for a build-out on another project is not convincing or even plausible. Appellant can not explain how GSA could have sent the letter and drawings on February 21, a day before the letter was prepared on February 22. Of course GSA could have prepared the letter on February 21, post-dated it and sent it by Federal Express on February 21 for receipt by appellant on February 22, but appellant has not explained why GSA would go to that trouble. Appellant's theory does not refute the Government's evidence of delivery of the default termination notice on February 22.

Respondent has established that it delivered the default termination notice to appellant on February 22 and that an employee of appellant signed for it on February 22. Appellant filed the appeal at the Board on the ninety-second day after receipt of the default termination notice.

### Decision

Respondent's motion to dismiss for lack of jurisdiction is granted. The appeal is **DISMISSED**.

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ANTHONY S. BORWICK  
Board Judge

We concur:

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EDWIN B. NEILL  
Board Judge

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MARY ELLEN COSTER WILLIAMS  
Board Judge