UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART FOR LACK OF JURISDICTION: December 12, 2018

CBCA 6306

HOF CONSTRUCTION, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Brian P. Waagner of Husch Blackwell LLP, Washington, DC, counsel for Appellant.

Robert W. Foltman, Office of Regional Counsel, General Services Administration, Chicago, IL; and Michael Converse, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SHERIDAN**, **SULLIVAN**, and **CHADWICK**.

CHADWICK, Board Judge.

We hold that we lack jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7103(g), 7104 (2012), to decide two issues raised on appeal, because the contractor has not shown that the notice it received of its right to appeal a termination for default so misled the contractor and its lawyers that it could file this appeal eleven months after the termination and six months after the agency assessed liquidated damages in closing out the contract. In reaching this result, we articulate for the first time how this Board will approach conflicting precedents of our predecessor boards, and we disavow a predecessor board's decision.

Facts

The respondent, General Services Administration (GSA), terminated a construction contract with the appellant, Hof Construction, Inc. (Hof), on December 14, 2017. The contracting officer's termination letter stated in relevant part:

> Therefore, you are hereby notified that the above referenced contract is being terminated for default under the clause titled "FAR 52.249-10 Default (Fixed Price Construction)[."] The termination is effective immediately upon receipt of this notice. The Government reserves all rights and remedies provided by law and under the contract.
>
> This notice constitutes the final decision of the Contracting Officer. You may have the right to appeal under the Disputes clause. You may invoice for all work completed to date; the invoice is subject to review and approval by GSA. Your invoice must be received no later than December 21, 2017. In addition, GSA will be assessing liquidated damages from November 2, 2017, until the work is complete.

The construction contract incorporated by reference the Default clause cited in GSA's termination letter, as well as Federal Acquisition Regulation (FAR) 52.233-1, Disputes (with Alternate I) (48 CFR 52.233-1 (2017)). On the termination date in 2017, FAR 52.233-1(f) stated: "The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in 41 U.S.C. chapter 71." This statutory citation was and is the CDA.

Daniel F. Hof, president of Hof, states by declaration that the appellant "was not aware of the fact that the term 'final decision' is a term of art in the formal contract disputes process" or "that contract disputes are resolved at the Boards of Contract Appeals or the Court of Federal Claims." Both of those things are stated in the CDA, which was referenced in the Disputes clause in the contract. Moreover, this contractor, perhaps under different management, filed a CDA appeal at a board more than two decades ago. *Hof Construction, Inc. v. General Services Administration*, GSBCA 13317, 96-2 BCA ¶ 28,406.

The parties corresponded about Hof's desire that the termination be converted to one for the convenience of the Government. The final correspondence on this issue was an email from the contracting officer to Hof on January 3, 2018, in which she stated in relevant part: "At this time, we're not willing to give up our rights to the termination for default."

On May 15, 2018, the contracting officer issued a unilateral contract modification assessing liquidated damages of $5307.51 through December 14, 2017, and deobligating funds remaining on the contract. The description on page 2 of the modification stated:

> By letter dated December 14, 2017, GSA notified [Hof] that the subject contract was terminated for default. This unilateral administrative modification establishes the amount due Hof for work performed and accepted, assesses a deduction from amounts due as liquidated damages, and deobligates that portion of the contract price that remains unexpended.

The modification did not contain a statement of appeal rights.

Hof retained a law firm to advise it on the termination sometime between May 15 and the end of May 2018.

On August 13, 2018, ninety days after receiving the May 2018 unilateral modification, Hof submitted a certified claim to the contracting officer. The claim began:

> Pursuant to FAR 52.249-10(c) and FAR 52.233-1 . . . , Hof Construction hereby demands, as a matter of right, the following relief: (1) conversion of the December 14, 2017 termination from a termination for default to a termination for convenience; (2) withdrawal of the May 15, 2018 unilateral modification assessing $5,307.51 in liquidated damages and de-obligating $233,309.88 in funds remaining on the Contract; and (3) correction of the Government's June 21, 2018 [Contractor Performance Assessment Rating System (CPARS)] assessment to remove all references to the default termination [and] the assessment of liquidated damages, and all assertions that Hof Construction failed to perform in accordance with the . . . Contract.

Mr. Hof signed and certified the claim, indicating that he sent a courtesy copy to Hof's current litigation counsel.

GSA did not respond. On November 5, 2018, eighty-four days after submitting the certified claim, Hof appealed to the Board from a deemed denial. The notice of appeal seeks conversion of the termination for default to a termination for convenience, "withdrawal" of the May 2018 unilateral modification, and "correction" of Hof's CPARS report. Recognizing that GSA would likely challenge our jurisdiction, Hof requested in its notice of appeal an expedited ruling on "the jurisdictional questions presented here" in time enough to allow Hof to "file a timely action at the Court of Federal Claims if the Board concludes that it does not have jurisdiction."

The presiding judge later ordered Hof to show cause why the Board "should not dismiss Hof's challenges to (1) the default termination and (2) liquidated damages as untimely under 41 U.S.C. §§ 7103(g) and 7104, *Bass Transportation Services, LLC v. Department of Veterans Affairs*, CBCA 4995, 16-1 BCA ¶ 36,464, and *Decker & Co. v. West*, 76 F.3d 1573 (Fed. Cir. 1996)." Hof responded, opposing dismissal, as discussed below. GSA supports dismissal of both enumerated claim issues.

Discussion

As foundation for what follows, we find the December 2017 default termination letter and the May 2018 unilateral modification unambiguous to a reader conversant with government contracts law. Both documents were imperfect. For reasons unknown, the termination letter said that Hof "may have the right to appeal under the Disputes clause," rather than, accurately, that Hof had that right. More significantly, neither the letter nor the modification quantifying the liquidated damages included the statement of appeal rights that FAR 33.211(a)(4)(v) says "shall" accompany a contracting officer's decision on a claim.

The imperfections did not, however, make GSA's communications unclear or misleading. We see plainly *what Hof itself said* in its August 2018 certified claim: the contracting officer terminated the contract for default in December 2017, determined at that time that Hof owed liquidated damages, and quantified the claim for liquidated damages in the May 2018 unilateral modification closing out the contract. By stating in the December 2017 letter that it was her "final decision" and citing the Disputes clause—which, in turn, cited the CDA—the contracting officer asserted the government claim of termination for default. *See Bass*, 16-1 BCA at 177,687, 177,690 n.3 (where the issue was not raised by a party, and where the contract's Disputes clause conveyed the same information about appeal rights as did the Disputes clause here, finding that a termination letter that said it "'constitute[d] a final decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause' . . . adequately advised [the represented appellant] of its appeal rights"). She also plainly announced in the December 2017 letter her intent to assess liquidated damages. Then, in May 2018, on page 2 of the unilateral closeout modification, the contracting officer referred back to her termination letter, which had, in turn, referred Hof to the Disputes clause for information on how to appeal. None of this was mysterious. Hof's own August 2018 claim shows that Hof understood that the contracting officer followed through in May on her previously stated intent to withhold liquidated damages.

Hof filed this appeal eleven months after the termination and six months after it received the unilateral modification. Generally, "[u]pon receiving a contracting officer's decision asserting a government claim, a contractor has ninety days to appeal to the

appropriate board of contract appeals, or twelve months to file suit in the Court of Federal Claims, or else the decision becomes 'final and conclusive and . . . not subject to review by any forum, tribunal, or Government agency.'" *Bass*, 16-1 BCA at 177,688 (quoting 41 U.S.C. § 7103(g)). This timeline is jurisdictional and cannot be lightly set aside. *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982).

There are two situations, analyzed differently by our Board, 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. *See Outback Firefighting, Inc. v. Department of Agriculture*, CBCA 6078, slip op. at 3 (Nov. 21, 2018) (citing *Pathman Construction Co. v. United States*, 817 F.2d 1573, 1578 (Fed. Cir. 1987), and *George Ledford Construction, Inc*., VABCA 6630, et al., 02-1 BCA ¶ 31,662, at 156,442 (2001) (*Ledford*)). *But see State of Florida, Department of Insurance v. United States*, 81 F.3d 1093, 1098 (Fed. Cir. 1996) (holding that "the [total] absence of notification of appeal rights in [a] termination notice was harmless error"); *American Renovation & Construction Co.*, ASBCA 54039, 03-2 BCA ¶ 32,296, at 159,804 (same). The second arises when a notice of appeal rights is provided but is defective. It is with regard to this second situation that we find decisions of our predecessor boards in conflict.

The Court of Appeals for the Federal Circuit held in *Decker* 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." 76 F.3d at 1579-80. The *Decker* Court distinguished *Pathman*, 817 F.2d at 1580, which had held that a deemed denial did not start the clock for an appeal or suit under the CDA. "In *Pathman*," the *Decker* Court observed, "since there was no contracting officer's final decision, the contractor was not informed of its appeal rights to even the most limited extent." *Decker*, 76 F.3d at 1580. The contractor in *Decker*, who received incomplete notice of its appeal rights, thus "had critical information that the contractor in *Pathman* did not have" and was not similarly prejudiced. *Id*.

One of our predecessor boards later ruled categorically that "[d]efects in final decision statements of appeal rights only serve to preclude the ninety-day or one-year periods from commencing if the contractor is able to demonstrate that it suffered some harm as a result of that defect." *Carter Industries, Inc*., DOT BCA 2995, 98-1 BCA ¶ 29,625, at 146,819 (citing *Decker* and *Philadelphia Regent Builders, Inc. v. United States*, 634 F.2d 569 (Ct. Cl. 1980)). The Department of Transportation Board of Contract Appeals also said in *Carter*, contrary to Hof's position here, that the contractor was "conclusively presumed to have had at least constructive knowledge" of federal statutes bearing on its appeal rights. *Id*. at 146,818. The

board dismissed an untimely appeal of a default termination upon finding no evidence that the defective notice of appeal rights was what caused the contractor to appeal to the wrong agency board. *Id*. at 146,819.

The Department of Veterans Affairs Board of Contract Appeals adopted a different approach to *Pathman* and *Decker*. That board held that, where a contracting officer's termination decision cited the CDA and gave details on how to appeal to "the agency board of contract appeals," without identifying the board, the defect was "critical" and rendered the decision "substantially deficient and unable to meet the minimum requirements necessary to trigger the running of" the appeal period. *Ledford*, 02-1 BCA at 156,442; *see also Lawrence Harris Construction, Inc*., VABCA 7219, 05-1 BCA ¶ 32,830, at 162,439 (*Harris*) ("Since the [contracting officer's] failure to provide the information on the 90 day appeal limitation was a critical defect, we need not determine if [the contractor] detrimentally relied on the [omission under *Decker*, although w]ere it necessary, . . . detrimental reliance on the defective final decision is established to our satisfaction."). That board held that, when a notice of appeal rights is sufficiently lacking in information, the situation becomes more like *Pathman* than like *Decker*: "[W]here there is no contracting officer's final decision *or the decision otherwise lacks 'critical' or 'essential' information*, under a reading of *Pathman* and *Decker* a showing of detrimental reliance is not required." *Ledford*, 02-1 BCA at 156,442 (emphasis added).

Hof says it knows of no Board decisions "seeking to reconcile" *Carter*, *Ledford*, and *Harris* and argues that, under the Department of Veterans Affairs Board precedents, we have jurisdiction of its entire appeal in view of the GSA contracting officer's "material departure from the statutory and regulatory requirement to notify [Hof] of its appeal rights."

We do not think *Carter* and *Ledford* are reconcilable. *Carter* says that, under *Decker*, when a defective notice of appeal rights is provided, the appeal period is extended "only" if the contractor can establish detrimental reliance on the defect. Citing *Pathman*, *Ledford* relieves the appellant of that burden in certain cases. That is a genuine conflict, not just a tension in our case law. The Federal Circuit has not addressed the issue since *Ledford* was decided. Moreover, deciding what rule to apply here could in part determine the outcome, since, among other things, the termination letter that Hof received contained less information about appeal rights than did the letter the contractor received in *Ledford*.

Although we follow the decisions of our predecessor boards as precedent, *Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464, 07-1 BCA ¶ 33,486 (full Board), we have not said how we will treat conflicting precedents of predecessor boards. As the Board speaks principally through panels, Board Rule 1(d) (83 Fed. Reg. 41,009, 41,011 (Aug. 17, 2018)), this panel will decide what approach to take. A

search for guidance in decisions of federal appellate courts, which also sit in panels, 28 U.S.C. § 46(b), presents several options. When they encounter an intra-circuit conflict (i.e., panels have ruled differently in a way that intervening Supreme Court precedent does not resolve), many circuit courts, including the Federal Circuit, treat the first decision as precedential "unless and until overturned *in banc*." *Newell Cos. v. Kenney Manufacturing Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988); *accord Walker v. Mortham*, 158 F.3d 1177, 1188 (11th Cir. 1998). In the Eighth Circuit, a panel is "free to choose which line of [conflicting] cases to follow" in its own case, and its decision simply adds one more decision to the unresolved conflict. *See Graham v. Contract Transportation, Inc*., 220 F.3d 910, 914 (8th Cir. 2000). In the Ninth Circuit, a panel that concludes it faces a genuine split in precedent cannot rule on the issue and "must call for *en banc* review." *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) (per curiam). Finally, some circuits have a less formal practice that limits conflicts in precedent by allowing a panel to overrule a prior panel decision if the later panel circulates a draft of its decision among the court and no judge objects. *See United States v. Allen*, 895 F.2d 1577, 1580 n.1 (10th Cir. 1990); *Heirens v. Mizell*, 729 F.2d 449, 449 n.* (7th Cir. 1984). Interestingly, another possible option—treating an intra-court split as the equivalent of no precedent and allowing a panel that faces the conflict to decide the issue afresh—is not the rule in any circuit court.

We are an administrative body and need not adopt any of these discretionary court practices. Indeed, we find none of them ideally suited to our mission "to promote the just, informal, expeditious, and inexpensive resolution of [each CDA] case." Rule 1(a). We will instead combine aspects of the second and fourth options described above. If, as here, deciding a case requires resolving a genuine conflict between decisions of two or more predecessor boards (which intervening Federal Circuit precedent does not resolve), the panel will apply what it deems our better precedent *and* the panel decision will be the Board's precedent on the issue. *See* Rule 1(d) ("[P]anel and full Board decisions are precedential."). This will resolve conflicts expeditiously and definitively. We reject the other approaches used by the circuit courts because there is no principled reason to follow the decision of a predecessor board that happened to be issued first, and all of our judges can see a panel decision when it is published online, after which the full Board may vote to consider an issue either on its own initiative or at a party's request. Rules 25(a), 28(a), (b).

Under this approach, we adopt the categorical rule for defective notices of appeal rights stated in *Carter*, and we overturn *Ledford* and its progeny *Harris*. Six years before it decided *Decker*, the Federal Circuit held in a defective notice case that "the [contracting officer] made a final decision on [a] government claim alleging damages because of . . . delay in contract performance. *The decision is no less final because it failed to include boilerplate language usually present for the protection of the contractor*. Moreover, the . . . decision was adverse to [the contractor, which] could properly appeal to the Claims Court."

Placeway Construction Corp. v. United States, 920 F.2d 903, 907 (Fed. Cir. 1990) (emphasis added). We read *Decker* as a natural elaboration of *Placeway*. Both hold that 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. *Decker* clarifies that the contractor must show material prejudice from a defective notice, while the Government need not show lack of prejudice. The board in *Ledford* mistakenly read *Decker* as holding only that the notice of appeal rights in *Decker* was adequate because it contained certain "critical information" about how to appeal. *Ledford*, 02-1 BCA at 156,442. Instead, the "critical information" that the *Decker* Court said the contractor had in that case (and that the contractor in *Pathman* lacked) was that the contracting officer had issued a decision appealable somewhere under the CDA. *Decker*, 76 F.3d at 1580. Armed with that partial information, the contractor was obliged to show that a defect in the notice resulted in its untimeliness. *See id*. *Carter* got it right. "Defects in final decision statements of appeal rights only serve to preclude the [appeal period] from commencing if the contractor is able to demonstrate that it suffered some harm as a result." *Carter*, 98-1 BCA at 146,819.

Turning back to this case, Hof received defective notice of its right to appeal the termination for default in December 2017, but Hof cannot show that it reasonably relied on that notice to its detriment. In August 2018, ninety days after receiving the May 2018 unilateral modification, and almost that long after it retained counsel, Hof submitted a certified claim stating, *in so many words*, that the contracting officer had terminated the contract for default in December 2017 and had assessed liquidated damages in a sum certain in May 2018. Moreover, as a contract action expressly relating back to a prior final decision and perfecting a previously articulated government claim for money, the May 2018 modification was "no less final because it failed to include [appeal rights] language . . . for the protection of the contractor," *Placeway*, 920 F.2d at 907, absent evidence that the contracting officer's failure to repeat in the modification the reference to the Disputes clause she had already made in her termination letter "actually prejudiced [Hof in] its ability to prosecute [a] timely appeal." *Decker*, 76 F.3d at 1580; *see also DynPort Vaccine Co*., ASBCA 59298, 15-1 BCA ¶ 35,860 (deeming a unilateral modification with no notice of appeal rights a government claim). Hof knew by August 2018 that both government claims were pending and does not assert that its lawyers did not know where or how to appeal. Hof chose to submit a claim to challenge GSA's claims, which is not how to proceed under the CDA. *Bass*, 16-1 BCA at 177,687-88. When Hof filed this appeal in November 2018, Hof had known enough to appeal both government claims for more than ninety days, and the appeal periods for both claims had expired.

Decision

Because GSA asserted the two government claims at issue more than ninety days before Hof appealed, and Hof has not shown reasonable, detrimental reliance on a defect in the notice of appeal rights that could extend the appeal period by enough to make the appeal timely as to either claim, Hof's challenges to the default termination and to the unilateral modification are **DISMISSED FOR LACK OF JURISDICTION**. This decision does not address the aspect of the appeal concerning Hof's CPARS rating.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge