Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED: February 4, 2002

GSBCA 15584

4J2R1C LIMITED PARTNERSHIP,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Jeffrey J. Michael, General Partner of 4J2R1C Limited Partnership, Bloomington, MN, appearing for Appellant.

Carl E. Smith, Office of Regional Counsel, General Services Administration, Chicago, IL, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **GOODMAN**.

GOODMAN, Board Judge.

This appeal was filed by 4J2R1C Limited Partnership (appellant) from a contracting officer's final decision denying appellant's claim for payment of increased rent consequent to a rise in real estate taxes. The parties have submitted the case for a decision on the written record pursuant to Board Rule 111. As discussed below, we grant the appeal.[1]

Findings of Fact

1. Illinois National Bank of Springfield, Springfield, Illinois, as trustee under trust no. 13-038-47-00 (lessor), and the United States of America (Government) by and through the General Services Administration (GSA), entered into lease number GS-0513-14102 dated November 27, 1985 (lease), for space located at 320 W. Washington Street, Springfield,

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[1] Respondent has also filed a motion for summary relief. As discussed in this opinion, the cases cited by respondent in its motion do not entitle it to judgment as a matter of law. Accordingly, the case is decided on the written record.

Illinois (premises), to be used by the Internal Revenue Service. Appellant was the beneficiary of the trust on the date of the lease. Joint Stipulation ¶ 1.[2] (Sept. 20, 2001).

2. As a result of a refinancing, supplemental lease agreement (SLA) no. 9 dated May 15, 1995, was executed. The purpose of this SLA was to change the named lessor from appellant's trustee to appellant following the refinancing of the premises and termination of the trust. Appellant's Statement of Genuine Issues ¶ 2.

3. The parties have stipulated that, since its inception, the lease has been extended six times, with the most recent extension occurring in December 2000. Joint Stipulation ¶ 3. (Sept. 20, 2001). The original term of the lease was April 1, 1986, through March 31, 1996. Appeal File, Exhibit 1 at 1. The record indicates that the lease was actually extended seven times. By SLA no. 1, dated July 21, 1986, the lease term was extended through July 20, 1996. Id. at 43. By SLA no. 10, dated July 30, 1996, the lease term was extended through August 16, 1996. Id. at 67. By SLA no. 11, dated October 7, 1996, the lease term was extended through October 31, 1996. Id. at 68. By SLA no. 12, dated December 2, 1996, the lease term was extended through February 1, 1997. Id. at 69. By SLA no. 13, dated February 2, 1997, the lease term was extended through December 31, 1999. Id. at 70. By SLA no. 14, dated January 1, 2000, the lease term was extended through December 31, 2000. Id. at 72. By SLA no. 15, dated December 21, 2000, the lease term was extended through December 31, 2002. Id. at 73.

4. The lease provides, in pertinent part, at ¶ 36:

> 36. Tax Adjustment
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> GSA shall pay additional rent for its share of increases in real estate taxes over taxes paid for the calendar year in which its lease commences (base year). Payment shall be in a lump sum and shall become due on the first workday of the month following the month in which paid tax receipts for the base year and the current year are presented, or the anniversary date of the lease, whichever is later. GSA will be responsible for payment only if the receipts are submitted within 60 days of the date the tax payment is due.

Joint Stipulation ¶ 4. (Sept. 20, 2001).

5. Appellant's and GSA's respective records of tax adjustment requests indicate that appellant has previously been late in requesting tax escalation payments for taxes payable in each of the years 1995, 1996, 1997, and 1998, which were subsequently paid by GSA. The records also indicate that GSA made one or more lump sum tax adjustment payments in 1994 for increases in taxes payable in 1991, 1992, and 1993. All taxes have been timely paid by the appellant to the taxing authority since the inception of the lease. Joint Stipulation ¶ 6. (Sept. 20, 2001).

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[2] The Government initially occupied the premises in 1978 under a prior lease. Appellant's Statement of Genuine Issues ¶ 3. The terms of the prior lease are not at issue in this appeal.

6. In December 1997, the Financial and Technical Services team of the Property Acquisition and Realty Services Division sent a letter reminding lessors of their contractual obligation under their leases regarding tax adjustment payments for increases in real estate taxes. GSA sent this letter to appellant at an address in Minneapolis, Minnesota, that was not the current address for notices to be sent to appellant. There is no evidence that appellant received this letter. Joint Stipulation ¶ 7. (Sept. 20, 2001).

7. By letter dated January 4, 2001, appellant's representative requested as follows:

> The terms of the . . . lease provide for the government to reimburse its share of any increase in real estate taxes annually.
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> Enclosed are copies of the tax statements for 1999 taxes payable in 2000 and negotiated checks as proof of payment (we do not receive tax payment receipts from the State of Illinois.)
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> Please calculate the lump sum amount payable by the government and send a notice to my attention.

Appeal File, Exhibit 6.

8. Attached to the letter dated January 4, 2001, were copies of checks dated June 30, 2000, and August 25, 2000, payable to the County Collector. Each check was in the amount of $178,191.27. Id.

9. By letter dated February 1, 2001, GSA refused to pay appellant any increased rent resulting from the increased real estate taxes as requested in appellant's letter dated January 4, 2001. GSA stated that it did not have the authority to process tax adjustments unless paid tax receipts are received within sixty days of the date the tax payments are due. GSA referenced paragraph 36 of the lease and noted that appellant's tax adjustment request was received by GSA in January 2001, which is more than sixty days after September 1, 2000, the due date for the second half installment of taxes payable to the taxing authority, Sangamon County, Illinois. Appeal File, Exhibit 7.

10. By letter dated February 19, 2001, to the contracting officer, appellant stated that its tax adjustment request was untimely due to an administrative oversight. Appellant's letter noted that GSA had adjusted rent consequent to the changes in real estate taxes during the lease term on numerous occasions in the past when the requests for reimbursement had not been made within sixty days of the date the taxes were due. Appellant requested a determination from the contracting officer. Appeal File, Exhibit 8.

11. The contracting officer treated appellant's letter dated February 19, 2001, as a claim pursuant to the Contract Disputes Act of 1978.[3] By letter postmarked March 7, 2001,

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[3] While appellant's letter did not request reimbursement of a specific amount, the parties have stipulated that the dollar amount of the appellant's claim to which the contracting officer

the contracting officer issued a final decision denying appellant's request for reimbursement and advising claimant of its right to appeal the decision. Appeal File, Exhibit 9.

12. Appellant appealed the contracting officer's decision to this Board. The appeal was docketed as GSBCA 15584.

13. In the instant case, GSA has suffered no measurable prejudice as a result of appellant's late application for payment of additional rent due to escalation of real estate taxes. Joint Stipulation ¶ 8 (Sept. 20, 2001).

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responded by issuing the final decision at issue would be calculated by a method set forth in the lease and would equal $40,005.38. The parties have stipulated further that the contracting officer treated appellant's letter of February 19, 2001, as a claim in that amount. Joint Stipulation ¶ 3 (Jan. 11, 2002).

Discussion

In the instant case, GSA has refused to pay appellant additional rent for its share of the escalation of real estate taxes paid in the year 2000 over the base amount. Pursuant to the lease, appellant must submit paid tax receipts within a specific time frame. Finding 4. Respondent asserts that it is not liable to pay the increased rent if the lessor failed to submit required tax documentation within the time period required by the lease, and appellant failed to do so in this instance. Findings 4, 9, 10.

Appellant asserts that GSA should pay the additional rent as requested. The parties have stipulated that GSA paid increased rent pursuant to the tax adjustment clause numerous times in the past, during the original lease term and after the lease had been extended, when appellant submitted its tax documentation within the same time frame as the request at issue. Findings 3, 5.

GSA did send a letter in 1997 reminding its lessors of their obligation to timely request tax adjusted payments. There is no evidence that appellant received this letter. The letter was sent to an address that was not the designated address for appellant to receive notice under the lease. Finding 7.

Respondent relies upon our recent decision of Roger Parris dba Manchester Realty v. General Services Administration, GSBCA 15512, 01-2 BCA ¶ 31,629, and cases cited therein. In the Parris case, the lessor failed to submit required tax documentation within the time period required by the lease. The language of the relevant lease provision was substantially the same as the provision in the instant case, which states that GSA will be responsible for payment only if the receipts are submitted within sixty days of the date the tax payment is due. In one previous instance, when appellant had not timely submitted the tax receipts to GSA, GSA had paid the tax escalation. Appellant argued that this one instance of the Government's payment of an untimely submitted request for payment was a waiver. The lease also contained the following provision, which the Board characterized as a "no-waiver" provision:

> No failure by either party to insist upon the strict performance of any provision of this lease or to exercise any right or remedy consequent upon a breach thereof, and no acceptance of full or partial rent or other performance by either party during the continuance of any such breach shall constitute a waiver of any such breach of such provision.

The Board denied the appellant's claim, citing previous decisions in cases with similar factual circumstances. The Board stated:

> In Riggs [National Bank of Washington, D.C. v. General Services Administration, GSBCA 14061, 97-1 BCA ¶ 28,290], we concluded that GSA's tax adjustment clause represented an exception to the general rule enunciated in Hoel-Steffen[Construction Co. v. United States, 456 F.2d 760 (Ct. Cl. 1972)] and its progeny, that notice provisions in contract-adjustment clauses are not to be applied too technically and illiberally where the Government is well aware of the operative facts. We found the tax adjustment

> clause different from others in one very significant aspect. Unlike other typical clauses imposing time limitations upon the contractor, this clause not only imposed the limit but also addressed the consequences of failing to comply with that limit. It was our conclusion in Riggs that clauses such as this should be applied as written because, unlike other similar provisions, they clearly informed or warned the contractor of the consequences of any failure to meet the prescribed time limit.
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> The position we took in Riggs did not represent any change in Board precedent. We came to a similar conclusion in Universal Development Corp. v. General Services Administration, GSBCA 12138(11520)-REIN, et al., 93-3 BCA ¶ 26,100. In that decision we enforced the provision of a real estate tax and operating cost escalation provision which expressly warned the lessor that it would waive the right to contract price adjustment for tax increases for the year involved if it failed to submit copies of paid tax receipts within sixty days from when taxes were due or payable. In both cases, the Board has striven to do nothing more than strike a reasonable balance between the teaching of Hoel-Steffen and decisions following it with the general rule that "agreed-upon contract terms must be enforced" and " [c]ontracting parties must be held to their agreements." Madigan v. Hobin Lumber Co., 986 F.2d 1401, 1403-04 (Fed. Cir. 1993) (citing numerous decisions).

01-2 BCA at 156,260.

In response to appellant's argument that the Government's prior failure to enforce the clause by making reimbursement after receipt of an untimely request for reimbursement amounted to a waiver, the Board stated:

> The no-waiver provision in the lease provides that no failure by either party to insist upon the strict performance of any provision shall constitute a waiver. . . . We recognize that the general view is that "a party to a written contract can waive a provision of that contract by conduct expressly or surrounding performance, despite the existence of a so-called anti-waiver or 'failure to enforce' clause in the contract." 13 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 39:36 (4th ed. 2000). Nevertheless, in a case such as this, where the Government's reasons for paying the claim are unclear and where there is no persuasive evidence of an express intent on the Government's part to waive the sixty-day time requirement, we conclude that the no-waiver provision effectively protects the Government from appellant's claim of waiver. At a minimum, this provision should have put the claimant on notice that a single exception, such as that which occurred, could not reasonably be relied upon for future transactions.

01-2 BCA at 156,261.

The Board also held that the Government's single prior payment to appellant after an untimely request for increased rent did not constitute a prior course of dealing that

demonstrated that the lease provision requiring timely submission had been waived. Accordingly, the Board denied the appeal.

The facts in the instant case are significantly different from those in the Board's previous decisions relied upon by respondent and present a combination of circumstances not addressed by any of these decisions. The Board's decisions in Riggs and Universal dealt solely with the effect of the lease provision which stated that no payment would be made for submission of untimely reimbursement requests. Those cases contained no allegations of prior course of dealing between the appellant and the agency. The Parris decision focused on the additional effect of a "no-waiver" provision in the lease. While the appellant in the Parris case alleged a prior course of dealing with the agency, the Board found that one single incident of the Government's failing to enforce the lease provision did not amount to a prior course of dealing.

The lease in the instant case does not contain a "no-waiver" provision as did the lease in Parris. The lease in the instant case has been in existence since 1985 and has been extended seven times. Finding 4. Appellant in the instant case argues that there had been a prior course of dealing amounting to a waiver of the lease provision which contains a time requirement for submission of reimbursement requests. Unlike the Parris case, where the appellant alleged only one single incident of the Government's failure to enforce the timeliness provision for submission of reimbursement requests, the appellant in the instant case has submitted many such requests which respondent has paid. Accordingly, the issue in the instant case is whether appellant has established a prior course of dealing which amounts to a waiver of the time requirement in the lease for submission of requests for payment of increased rent pursuant to the tax adjustment clause.

We addressed the issue of prior course of dealing in the Parris decision. The Board stated:

> It is, of course, true that evidence of a prior course of dealing may demonstrate that a contract requirement has effectively been waived. "A contract requirement for the benefit of a party becomes dead if that party knowingly fails to exact its performance, over such an extended period, that the other side reasonably believes the requirement to be dead." Gresham & Co., 470 F.2d at 554; accord Products Engineering Corp. v General Services Administration, GSBCA 12503, et al., 98-2 BCA ¶ 29,851, at 147,760; General Security Services Corp. v. General Services Administration, GSBCA 11381, 92-2 BCA ¶ 24,897, at 124,169-70. . . .
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> Traditionally, the term "course of dealing" has been described as "[a] sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Restatement (Second) of Contracts § 223 at 157-58 (1981).

01-2 BCA at 156,261.

As we mentioned, in the Parris case we found that the Government's single prior payment to appellant after an untimely request for increased rent did not constitute a prior course of dealing that demonstrated that the lease provision requiring timely submission had been waived. In order to prove justifiable reliance on a course of conduct which is a prior course of dealing, appellant must prove that such conduct involved the same contracting agency, the same contractor, and essentially the same contract provisions. See L. W. Foster Sportswear Co. v. United States, 405 F.2d 1285, (Ct. Cl. 1969); Miller Elevator Co. v. United States, 30 Fed. Cl. 662, 689-90 (1994). All those elements are present in the instant appeal, as the course of conduct has occurred during extensions of a lease entered into by appellant and respondent. Finding 3.

The circumstances in the instance case are similar to those in Unlimited Supply Co. v. General Services Administration, GSBCA 12371, 94-3 ¶ 27,170. In that case, the Government terminated for default a contract for the supply of stainless steel mixing bowls on the ground that the bowls did not meet the specification for capacity. In overturning the default termination, the Board found that a prior course of dealing had been shown under which the Government had, under nineteen prior purchase orders subject to the same provisions as the one that had been terminated, accepted the same bowls, made with the same molds. The record contained no evidence that the Government had ever previously advised the appellant of its discovery that the bowls did not conform to specifications, although apparently some testing performed after acceptance on earlier contracts had alerted the Government to this fact. Because appellant relied on the prior unqualified acceptances in pricing the terminated orders, the Government would not be permitted, without notice, to exact strict conformance with the specifications. Thus we held that GSA's knowing failure to enforce the contract provision at issue is a prerequisite to the application of the prior course of dealing.

In the instant case, the lease requirement for timely submission of tax documentation to support the request for increased rent as the result of increased real estate taxes was clearly a provision for the benefit of the Government. The Government knowingly failed to enforce the performance of this requirement on payments for seven tax years which spanned the original lease term and five extensions of the lease. Findings 3, 5. This is evidenced by its letters to lessors advising that the provision would be enforced in the future. Finding 6. The fact that the Government sent the letters to lessors is an indication that the Government itself believed that its own conduct may have created a reasonable expectation in some of its lessors that the provision would not be enforced. The parties have stipulated that there is no evidence that appellant received this letter. Id. We find that, in the instant case, based upon the seven prior reimbursements of increased rent as the result of increased real estate taxes after untimely requests, spanning five extensions of the lease, and lack of adequate notice of future enforcement of the timeliness requirement, it was reasonable for appellant to believe, as it did in this case, that the requirement was "dead." The requirement would remain dead until appellant receives actual notice from respondent that GSA intends to enforce the provision in the future.

Accordingly, we find that such payment of untimely requests for increased rent as occurred in this case is a prior course of dealing, i.e., a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct, which resulted in a waiver

of the requirement in the lease for timely submission of requests for increased rent as the result of increased real estate taxes. Appellant is entitled to payment of its claim.

Decision

The appeal is **GRANTED.**

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ALLAN H. GOODMAN
Board Judge

We concur:

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STEPHEN M. DANIELS
Board Judge

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ANTHONY S. BORWICK
Board Judge