Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

MOTIONS FOR SUMMARY RELIEF DENIED:
March 15, 2001

GSBCA 15070, 15189, 15252

HENRY H. NORMAN,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

David L. Shakes and Virginia G. Amend of Hendricks, Hendricks & Shakes, Colorado Springs, CO, counsel for Appellant.

Dalton F. Phillips and Ruth Kowarski, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **NEILL**, **DeGRAFF,** and **GOODMAN**.

NEILL, Board Judge.

These three appeals relate to a single lease entered into by appellant, Henry H. Norman, and the General Services Administration (GSA). Because the appeals share a common core of facts, we have consolidated them for purposes of this litigation.[1] Under its lease with Norman, GSA secured office space for the Internal Revenue Service (IRS) in a building owned by Norman and located in Colorado Springs, Colorado. On the night of April 9, 1999, a fire was set in this building. The space on the ground floor leased to the IRS was severely damaged. As a result of the fire, GSA terminated its lease with Mr. Norman. Mr. Norman contests the propriety of that termination (GSBCA 15070). He argues, in the alternative, that even if the termination was proper, the Government is indebted to him for

[1]When citing to the appeal files submitted by the parties to these proceedings, we make no mention of the particular case or docket number to which they may refer. Rather, because we have consolidated these appeals and because the parties have taken care to number consecutively the appeal file exhibits for all three appeals, we will refer simply to the "Appeal File" without any further reference to a specific docket number.

the cost of tenant improvements made for IRS (GSBCA 15189). In addition, Mr. Norman seeks to recover other damages which he contends resulted from GSA's failure to disclose superior knowledge of studies, requirements, and recommendations known to GSA and/or IRS but which remained undisclosed to him both before and after contract award (GSBCA 15252). GSA has moved for summary relief on all three of Norman's claims. For the reasons set out below, we deny the motions.

Background

1. Prior to GSA's leasing space from Mr. Norman for the IRS offices, it leased space for IRS's offices in Colorado Springs in the Bell Tower office building. On May 3, 1997, these offices were severely damaged by fire (the Bell Tower fire). Appeal File, Exhibits 112-13.

2. The record contains newspaper accounts reporting on the Bell Tower fire. They speak of on-going investigations regarding the cause of the fire, which reportedly started inside the IRS offices. Damage was said to have been estimated at more than one million dollars. Appeal File, Exhibits 114-15.

4. Following the Bell Tower fire, GSA entered into discussions with Mr. Norman regarding the leasing of temporary space for IRS in the Lake Plaza building, a building in Colorado Springs owned by Mr. Norman and his wife. Agreement was reached for the temporary lease of office space on the second floor. Appeal File, Exhibit 109; Affidavit of Henry H. Norman (Norman Affidavit) (Sept. 22, 2000) ¶ 5. Mr. Norman was later invited by GSA to submit an offer for lease of space in his building for the IRS offices on a more permanent basis. He was told that GSA planned to award a lease on the basis of full and open competition. On December 2, 1997, Mr. Norman submitted an initial offer in response to GSA's solicitation for offers (SFO). Norman Affidavit ¶¶ 6-8; Appeal File, Exhibits 16-17, 111.

5. There followed a period in which Mr. Norman negotiated with GSA's contracting officer regarding his offer. During the negotiation period, the contracting officer sent Mr. Norman a letter with various comments regarding his initial offer. Among the items mentioned was the inclusion of GSA Form 3517A, "General Clauses," in the lease. The contracting officer's letter stated: "GSA Form 3517A, 'General Clauses' will be attached and made part of any ensuing lease agreement. A duplicate copy is attached." Appeal File, Exhibit 3 at 2. Mr. Norman responded to the letter with a best and final offer. He raised no objection to the contracting officer calling for the inclusion of GSA Form 3517A in the lease. Id., Exhibit 4.

6. By letter dated February 9, 1998, GSA accepted Mr. Norman's best and final offer. As negotiated and agreed, the annual rental was to be $165,580.48, paid at a rate of $13,798.37 per month in arrears. The term of lease was to be seven years with five years firm. The estimated effective date of the lease was to be May 2, 1998. Appeal File, Exhibit 118.

7. The ensuing lease agreement contains GSA Form 3517A, as agreed. It, like the other pages of the final lease agreement, is initialed by Mr. Norman and the GSA contracting officer. Appeal File, Exhibit 1 at 40.

8. GSA Form 3517A has the following caption:

> GENERAL CLAUSES (Short Form)
> (Simplified Acquisition of Leasehold interests in Real Property for Leases Up to $100,000 Annual Rent.)

Appeal File, Exhibit 1 at 40. Paragraph two on the lease's Form 3517A has the following provision:

> 2. If the building is partially or totally destroyed or damaged by fire or other casualty so that the leased space is untenantable as determined by the Government, the Government may terminate the lease upon 15 calendar days written notice to the Lessor and no further rental will be due.

Id.

9. On April 9, 1999, at approximately 11:00 p.m., a serious fire was observed in progress in the IRS offices at Mr. Norman's Lake Plaza building. Appeal File, Exhibit 7. A Federal Protective Service incident report prepared shortly after the fire stated that an official of the Bureau of Alcohol, Tobacco, and Firearms had determined that arson was involved and that the fire had been started by someone throwing a bag full of newspapers coated in gasoline through a broken window. Id., Exhibit 123. A report prepared by the Colorado Springs Fire Department arrived at a similar conclusion. Id., Exhibit 124.

10. Shortly after the Lake Plaza fire, a GSA official conducted a walk-through of the building to evaluate the damage done. He concluded that the building was unsuitable for GSA's lease purposes and recommended that no Government tenants be assigned to the location without complete replacement of the wood floor system in the burned area. Appeal File, Exhibit 8.

11. By letter dated April 21, 1999, a GSA contracting officer notified Mr. Norman, pursuant to provisions of paragraph two of GSA Form 3517A, that GSA intended to terminate its lease of space in the Lake Plaza building effective May 5, 1999, and that no further rent would be due.

12. The day after the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City, the President directed the Department of Justice to assess the vulnerability of federal office buildings in the United States, particularly to acts of terrorism and other forms of violence. Because of its expertise in court security, the United States Marshals Service coordinated this study. A national review of the kind called for by the President had never before been undertaken. On June 28, 1995, the Department of Justice issued an extensive report entitled: Vulnerability Assessment of Federal Facilities. The report contains recommended minimum security standards for various security levels of

federal facilities. It also contains information regarding a sample survey of existing security conditions and discuses the cost implications of the study. A final section of the vulnerability assessment contains specific conclusions and recommendations for Government-wide application. Appeal File, Exhibit 117.

13. GSA's final investigative report on the fire in the IRS offices of the Bell Tower building on May 3, 1997, was issued several weeks after the fire. It concluded that the fire had been intentionally set. It spoke of the need to lease sprinkler-protected spaces in the future but recognized that IRS was currently housed temporarily in space which was not sprinkler-protected. The report also pointed out that sprinkler protection cannot prevent arson but can greatly reduce the damage from fire within acceptable limits. It concludes that, in the wake of the recent fire, IRS and GSA were both sensitive to fire protection mechanisms and would in the future insist upon state-of-the-art security and fire protection systems. Appeal File, Exhibit 112.

14. Shortly after the Bell Tower fire, an IRS official wrote to the offices of the Federal Protective Service in Denver, Colorado, asking that the new permanent space being leased for the IRS in Colorado Springs be subject to a security evaluation. The IRS official asked that the offices be given a high classification (Level IV). He stated:

> As you know, our previous location in Colorado Springs was destroyed by arson. This area of Colorado is statistically proven to be a center of Tax Protestor groups and is obviously a target for anti-government action.

Appeal File, Exhibit 137.

15. The SFO for a permanent lease of space for IRS had specifically called for all ground floor windows to be covered with a transparent, projectile-inhibitive, vinyl coating at least six millimeters thick. Appeal File, Exhibit 1 at 23. In his initial proposal, Mr. Norman wrote that he was not offering to provide this coating, and if the coating were still required, he would charge for it as a tenant improvement. Id., Exhibit 17 at 2. GSA states that it waived this requirement. Respondent's Reply to Appellant's Response to the Motion for Summary Relief at 4.

16. The IRS itself arranged for an outside contractor to do a vulnerability assessment of the agency's offices on the first floor of Mr. Norman's Lake Plaza building. The final report, dated July 1998, recommended that these first-floor offices be equipped with break-resistant glass. The assessment also identified various other vulnerabilities such as no lighting in the parking lot or in the immediate vicinity of the building, the unevenness of the terrain, and numerous small trees and vegetation next to the building walls providing hiding places for potential criminals, vandals and persons intent on attempting to break into the building. Appeal File, Exhibit 138.

17. Sometime in January or early February 1999, there was a bomb threat to IRS's Colorado Springs offices. Appeal File, Exhibit 136.

Discussion

It is well established that resolving a dispute on a motion for summary relief is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000); Olympus Corp. v. United States , 98 F.3d 1314, 1316 (Fed. Cir. 1996); Copeland Enterprises, Inc. v. CNV, Inc., 945 F.2d 1563, 1565-66 (Fed. Cir. 1991); Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); Armco, Inc. v. Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986).

GSA contends that the principal issue regarding the termination of appellant's lease is whether the lease could be terminated pursuant to the provision in Form 3517A regarding partial or total destruction of the premises. This, according to GSA, is a matter of contract interpretation. Respondent's Memorandum in Support of Motion for Summary Relief (Respondent's Memorandum) at 5.

We agree that the application of the provision in Form 3517A is central to GSBCA 15070. We likewise agree that, if there were no factual issues regarding inclusion of this provision in the contract, the issue would be one simply of contract interpretation. Unfortunately there are a number of basic factual issues regarding the inclusion of this Form 3517A and/or its longer version, Form 3517, in the contract. Given the record currently before us, we are not even certain there was a meeting of the minds regarding the inclusion or application of either of these forms. There is obviously a need to develop the record further on these issues. For this reason, we deny GSA's motion for summary relief on GSBCA 15070.

So far as Norman's claim for the cost of tenant improvements is concerned (GSBCA 15189), we deny GSA's motion for summary relief on this case as well. GSA's position is that it is relieved of responsibility for these costs under the same provision of Form 3517A which allegedly justified termination of the lease. The provision states that no further rent is due once the contract is terminated. Because the costs of tenant improvements were included in the rent to be paid under the lease, GSA contends that it is not liable for these costs.

As already noted, there are unresolved material issues of fact relating to Form 3517A. To the extent that GSA's motion is based upon a provision contained in that form, we obviously must deny the Government's motion for relief in GSBCA 15189 as well.

The claim raised by Norman in its third appeal, GSBCA 15252, is that the GSA is responsible for the damages resulting from the fire set in his building because the Government had knowledge that there was a very real risk of arson and failed to share this information with him either before or after award of the lease.

GSA's motion for summary relief on this claim is based upon its understanding of the well-established doctrine of superior knowledge. In its Memorandum in Support of a Motion for Summary Relief, Government counsel succinctly summarizes this doctrine as follows:

> Under that doctrine, where the Government possesses special knowledge, not shared by the contractor, which is vital to the performance of the contract, the

> Government has an affirmative duty to disclose such knowledge. Helene Curtis Industries, Inc. v. United States, 160 Ct. Cl. 437, 444, 412 F.2d 774, 778 (1963). ("Although it is not a fiduciary toward its contractors, the Government -- where the balance of knowledge is so clearly on its side -- can no more betray a contractor into a ruinous course of action by silence than by the written or spoken word.") If the Government fails this duty, it breaches the contract. Pia v. United States, 7 Ct. Cl. 208, 211, aff'd, 818 F.2d [876] (Fed. Cir. 1978) [(table)].

Respondent's Memorandum at 14.

GSA then proceeds to list the requirements of a four-pronged test often mentioned by the courts when discussing the superior knowledge doctrine, namely:

> (1) A contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration.
>
> (2) The Government was aware the contractor had no knowledge of and had no reason to obtain such information.
>
> (3) Any contract specification supplied misled the contractor, or did not put it on notice to inquire.
>
> (4) And the Government failed to provide the relevant information.

Respondent's Memorandum at 14.

GSA applies this four-pronged test to the information Norman contends should have been disclosed, namely, that arson was the cause of the Bell Tower fire, that a final report on that fire recommended the installation of sprinklers, and that a vulnerability report recommended more vigilant and more extensive security. The conclusion reached by GSA is that none of this information has any bearing on the contractor's cost of performing the contract or on the contract's duration. Rather, the information is characterized instead by GSA as involving nothing more than speculation about damages from a crime by a non-party to the contract and information about how to minimize damage which might result from the crime of arson. Respondent's Memorandum at 15.

While we have no quarrel with GSA's summary statement of the superior knowledge doctrine, we nonetheless find its application of the four-pronged test premature. There are some related factual issues which we deem material to the issues raised in GSBCA 15252 which are still subject to some troubling uncertainty. Among them is the issue of just how public was the information regarding the cause of the Bell Tower fire. The contracting officer appears certain that it was publicly known that the fire was the result of arson. Mr. Norman, however, in a sworn affidavit, declares that the contracting officer flatly refused to share any details of the federal investigation of that fire and left him with the impression that the fire was a rare occurrence unlikely to occur again.

Another issue of concern to us is the degree to which Government officials were aware that the IRS offices in Colorado Springs were a target for terrorism and tax-payer protests. We are also interested in exploring the factual issue of whether Government representatives, either by their silence or through positive representations to Mr. Norman, attempted to counteract the impact of publicly known information regarding IRS's problems in the Colorado Springs area.

As GSA itself recognizes, Mr. Norman's claim in GSBCA 15252 states that the failure to disclose the alleged facts constituted false representation and breach of the implied duty of good faith and fair dealing. Id. at 10. This is undoubtedly the duty to which the Court refers in Helene Curtis Industries when it speaks of the duty to disclose critical information necessary to prevent a contractor from unknowingly pursuing "a ruinous course of action." Given this basic duty, we deem it best to permit appellant the opportunity to present evidence on related factual issues before proceeding to the four-pronged test. GSA would have us apply the test now without further delay. We note, however, that mention of this test in judicial decisions is frequently prefaced with the statement that the superior knowledge doctrine is "generally applied" to situations where the four enumerated requirements are met. E.g., Giesler v. United States, 232 F.3d at 876; Hercules Inc. v. United States, 24 F.3d 188, 196 (Fed. Cir. 1994); Lopez v. United States, 858 F.2d 712, 717 (Fed. Cir. 1988) American Ship Building Co. v. United States, 654 F.2d 75, 79 (Ct. Cl. 1981). We read this language as containing an implied caution regarding the application of the well-known four-pronged test. We believe it our duty in applying this test to take a particularly close look at all underlying facts which may be material and, at the same time, to bear in mind the fundamental duty affirmed in Helene Curtis Industries and its progeny. Accordingly, respondent's motion for summary relief in GSBCA 15252 is also denied.

Decision

Respondent's motions for summary relief in GSBCA 15070, 15189, and 15252 are **DENIED**. Counsel are directed to confer among themselves and provide the Board within fifteen days from the date of this decision a revised schedule for the resumption and completion of discovery.

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EDWIN B. NEILL
Board Judge

We concur:

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MARTHA H. DeGRAFF
Board Judge

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ALLAN H. GOODMAN
Board Judge