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

DENIED: September 25, 2001

GSBCA 15512

ROGER PARRIS dba
MANCHESTER REALTY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Roger N. Parris, dba Manchester Realty, Evanston, IL, appearing for Appellant.

Gerald L. Schrader, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

NEILL, Board Judge.

Appellant in this case, Roger Parris, doing business as Manchester Realty (Manchester), is the owner of property leased to the General Services Administration (GSA). Mr. Parris contends that, pursuant to the lease agreement, GSA is obliged to reimburse him for an increase in real estate taxes paid on the leased premises for the calendar years 1997 and 1998. GSA denies liability for the claimed reimbursement.

In accordance with Board Rule 109, the parties have advised the Board in writing that they wish to submit this case on the record for a decision without hearing pursuant to Board Rule 111. For the reasons discussed below, we deny the appeal.

Findings of Fact

1. On January 28, 1994, GSA entered into a lease of 5175 square feet of net usable space located on the first floor of 2124 Green Bay Road, Evanston, Illinois. The leased premises, although apparently owned by Mr. Parris at the time, were then held in trust by

Bank One, Chicago. The lessor named in the lease, therefore, is "Bank One, Chicago NA Trust 3343," with Roger Parris as the named beneficiary of this trust.[1]

2. The lease contains a provision dealing with tax adjustment (Tax Adjustment, GSAR 552.270-24 (AUG 1992)). Paragraph "a" of the provision reads as follows:

> (a) The Government shall make annual lump sum payments to cover its share of increases in real estate taxes over taxes paid for the calendar year in which its lease commences (base year). The amount of payment shall be based upon the submission of [a] proper invoice, including paid tax receipts/statements/bills, from the Lessor to the Contracting Officer. The due date for making payment shall be the 30th day after receipt of the invoice by the Contracting Officer or the 30th day after the anniversary date of the lease, whichever is later. If the invoice submitted does not meet the requirements of a proper invoice, it will be returned to the Lessor within 7 days of receipt. The Government will be responsible for payment only if the receipts are submitted within 60 calendar days of the date the tax payment is due. If no full tax assessment is made during the calendar year in which the Government lease commences, the base year will be the first year of a full assessment.

Appeal File, Exhibit 1 at 12.

3. Among the general clauses set out in GSA Form 3517, which is incorporated into the lease, is one regarding waiver. It reads:

> 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.

Appeal File, Exhibit 1 at 57.

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[1] Mr. Parris contends that he has standing to pursue the claim which is the subject of this dispute because the leased premises have since been taken out of Trust 3343 and, even while part of the trust, the property was nonetheless still legally owned by him. Conference Memorandum (June 6, 2001). Counsel for the Government has submitted for the Board's review documentation which does, in fact, confirm that on March 13, 1995, the property identified in appellant's claim (permanent real estate index numbers 10-12-423-011, 10-12-423-012, and 10-13-204-027) was deeded to appellant by the trustees of Trust 3343. Government counsel, after discussing this and related issues with appellant, is now satisfied that Mr. Parris is the real party in interest in this case. By letter dated August 28, 2001, counsel advised the Board that, based upon his review of documents provided by Mr. Parris, he does not believe that the trustee and Mr. Parris were obliged to obtain GSA's consent to a change in ownership because it appears that Mr. Parris always owned the property in question.

4. Appellant contends that in April 1997, he submitted an invoice and requested a reimbursement for taxes paid for half of 1994 through 1996 and that GSA honored the request notwithstanding the fact that it was made beyond sixty calendar days of the date the tax payments were due. Complaint ¶¶ 7-8. GSA in its answer to appellant's complaint admits these allegations of material fact. Answer at 2.

5. By memorandum dated August 26, 1997, an official of GSA's Public Buildings Service (PBS) formally issued a clarification of existing policy regarding payment of tax adjustment claims under the terms of GSA real property leases. The memorandum was addressed to all real property leasing activities in the field. It advised the activities of a decision issued by this Board on April 17, 1997, Riggs National Bank of Washington, D.C. v. General Services Administration, GSBCA 14061, 97-1 BCA ¶ 28,920. The memorandum explained that, in this decision, the Board had ruled that GSA is not liable for tax adjustment claims under a GSA real property lease where (1) the lessor failed to submit required tax documentation within the time period required by the lease, and (2) the lease provisions clearly conveyed that the consequences of this failure would be that the Government would not be liable for payment of the tax adjustment. All activities were directed to stop paying tax adjustment requests that are not submitted in accordance with the time limits specified in the tax adjustment clause, where the lease provisions meet the conditions specified in the Board's decision. Appeal File, Exhibit 2.

6. In response to this clarification notice sent by PBS to all real property leasing activities in the field, the Chief of Financial and Technical Services of GSA's Great Lakes Region sent a letter to lessors in the region reminding them of their contractual obligation to submit requests for real estate tax adjustments in accordance with the terms and conditions of the tax adjustment clause in their leases. In particular, lessors were reminded that the clause states in pertinent part:

> The Government will be responsible for payment **only** if the receipts are submitted within 60 calendar days of the date the tax payment is due.

Appeal File, Exhibit 5 at 1. This letter to lessors concludes:

> GSA will not process your requests for tax adjustments unless paid tax receipts are received within 60 days of the date the tax payment is due.

Id.

7. The record does not contain a copy of such an advisory letter actually sent to the lessor in this case. Instead, we have been provided with what is referred to as an "example of l[et]t[e]r sent to lessors." This sample letter is dated December 22, 1997, and is addressed to another lessor in the region. Attached to this letter is a second sheet with the names and addresses of other lessors in the region. Handwritten at the top of this second sheet is the

phrase: "mail mes[sa]ge - all addresses listed." The name of "BANK ONE TRUST NO 3334" and the bank's address appears on this list of lessors.[2] Appeal File, Exhibit 5.

[2] We note that the trust number 3334 is incorrect. It should be 3343. A similar error was made in the text of the lease itself. The number in the lease, however, was corrected to 3343 and initialed by the contracting officer and the bank's trust officer. Appeal File, Exhibit 1 at 1-2. The record is silent on whether Mr. Parris ever received a letter advising lessors of GSA's plan to enforce without exception the sixty-day time requirement in the tax adjustment clause. If he did not receive any such letter, it is uncertain whether this was attributable to the incorrect trust number or to the fact that the property leased to GSA had already been released from Trust 3343 prior to dispatch of the letter. It would not appear that GSA was even aware that the leased property had been released from Trust 3343 in 1995 until the question of Mr. Parris' status as a real party in interest arose in this case. See supra note 1.

8. By letter dated November 17, 2000, Manchester submitted to GSA a claim for increases in taxes on the leased premises for the period 1996 to 1999. Appeal File, Exhibit 6. Relying upon the Riggs decision and agency guidance issued as a result of that decision, GSA questioned the contractor's right to payment since Manchester's submission was not timely. Id., Exhibits 3-4. As of January 30, 2001, the claim remained unpaid. By letter of that date, Manchester again wrote GSA requesting payment. The letter noted that, under the lease, GSA had previously paid similar claims which were not submitted within the sixty-day period stated in the tax adjustment clause. This, in the opinion of Manchester, constituted a waiver of the contract requirement. In addition, Manchester argued that the claim for increases in 1999 taxes had, in fact, been submitted within the sixty-day period. Id., Exhibit 9 (Exhibit C).

9. With a brief, handwritten memorandum faxed to Manchester on February 1, 2001, the contracting officer replied to Manchester's letter of January 30. She provided payment history showing that payment for increases in the 1996 tax had already been made by electronic fund transfer on March 3, 1998. She denied the claim for increases in the 1997 and 1998 taxes because these claims had not been filed within the sixty-day period set out in the tax adjustment clause. As to increases in the 1999 taxes, she advised Manchester that this part of the request was timely filed and would, therefore, be paid. Appeal File, Exhibit 7. By letter dated February 7, 2001, the contracting officer issued a formal decision confirming her denial of appellant's claim for increases in taxes for 1997 and 1998. Id., Exhibit 9.

10. Appellant has filed a timely appeal of that decision. Appeal File, Exhibit 9.

Discussion

Each party is of the opinion that the Board's Riggs decision supports its position. In 1997, after the Board's decision was issued, the agency advised its real property leasing activities that they should not pay tax adjustment requests not submitted in accordance with the time limits specified in the tax adjustment clause. Finding 5. GSA's current refusal to honor appellant's claim for reimbursement of increased taxes for 1997 and 1998 is obviously based upon this clarification of policy.

Appellant, on the other hand, contends that, under Riggs, limitations imposed by contract provisions should be applied liberally and not enforced unless the Government can successfully demonstrate that it has been prejudiced by the contractor's failure to comply with the provision in question.

Appellant misconstrues Riggs. It is indeed correct that in Riggs we wrote:

> Generally, limitations imposed by contract provisions should be applied liberally; if the contractor fails to meet such a limitation, the provision should be enforced only where the Government demonstrates that it has been prejudiced by the failure.

Riggs National Bank, 97-1 BCA at 144,179. The seminal decision in support of this proposition, as we noted in Riggs, is Hoel-Steffen Construction Co. v. United States, 456 F.2d 760 (Ct. Cl. 1972). Immediately following this summary of the Hoel-Steffen principle, however, we also wrote:

> Where a contract clearly states that the contractor will lose rights if it does not make a submission within a prescribed period of time, however, the limitation should be strictly enforced.

Riggs National Bank, 97-1 BCA at 144,179.

It is this final sentence that sets off our decision in Riggs from other decisions which discuss enforcement of notice provisons in contract-adjustment clauses. In Riggs, we concluded that GSA's tax adjustment clause represented an exception to the general rule enunciated in Hoel-Steffen 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.

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).

Appellant notes that his claim for reimbursement of additional real property taxes covering the last half of 1994 through 1996 was not submitted to GSA within the sixty-day period mentioned in the tax adjustment clause. Nevertheless, GSA paid the claim. Finding 4. This, according to appellant, constituted a waiver of the Government's right to enforce the time requirement. Indeed, in his notice of appeal, Mr. Parris contends that, prior to this payment in 1998, an official of Manchester discussed the clause's sixty-day time requirement with a GSA representative and was assured at that time that the requirement would not then or in the future be used against the lessor.

In the record before us, we find no evidence of any express waiver or waiver through conduct. It is true that in March 1998, several months after GSA had advised field activities to enforce the sixty-day time provision in the tax adjustment clause and after lessors were

advised by the Great Lakes region of its intention to do so, GSA paid appellant's untimely claim. Findings 4-6, 9. It is not clear, however, why GSA elected to do so. It may have done so simply because appellant's claim was submitted in April 1997, the month in which the Board issued its Riggs decision – well before the agency issued its clarification and notice of intent to enforce consistently the time provision in the tax adjustment clause. If exceptions had been made in the past, then GSA may have been of the opinion that it would be best to apply the new no-exception policy prospectively.

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. Finding 3. 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.

As noted, appellant alleges in his notice of appeal that, prior to this single payment in March 1998, GSA assured a representative of Manchester that the sixty-day time limitation in the clause would not be enforced either in the present or in the future. The allegation, however, remains unproven. No particulars have been provided by appellant regarding precisely when the statement was made or by whom it was made. This last point is particularly important since it is well established that:

> [t]he waiver of a contract provision requires a decision by a responsible officer assigned the function of overseeing the essentials of contract performance, not just any Federal employee or officer whose work happens to be connected with the contract.

Gresham & Co. v. United States, 470 F.2d 542, 555 (Ct. Cl. 1972) (citing Deloro Smelting & Refining Co. v. United States, 317 F.2d 382 (Ct. Cl. 1963)).

The likelihood that such an assurance was given at all or, if given, by one possessing the actual authority to make an express waiver is significantly diminished by evidence in the record which demonstrates that during this same general period in which the assurance was allegedly given (sometime prior to payment), GSA was taking specific steps to advise its field personnel and contractors that the sixty-day requirement in the tax adjustment clause would, for the future, be strictly enforced. See Findings 5-6. We cannot, therefore, find in this unsubstantiated allegation evidence of any express waiver of the clause's time requirement.

What, however, of GSA's actual conduct? 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.

Unfortunately for appellant, the evidence provided in this case is hardly probative of a prior course of dealing established over an extended period of time. While appellant's claim for additional taxes covered a two-and-a-half-year period, it was a single claim presented in April 1997 and paid in March 1998. We cannot view a single event such as this as sufficient to constitute a "course of dealing." 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).

In short, given the facts in this case, we do not find the one, single incident in which the Government failed to insist on strict compliance with the sixty-day time requirement in the lease's tax adjustment clause sufficient to constitute an express or implied waiver of that provision. For the reasons already stated in the aforementioned decisions of this Board, this provision of the clause may be enforced, as written, with regard to appellant's claim for reimbursement of increased personal property taxes paid for 1997 and 1998. We, therefore, conclude that the contracting officer properly denied the claim.

Decision

The appeal is **DENIED**.

EDWIN B. NEILL
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

MARTHA H. DeGRAFF
Board Judge