

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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MOTION FOR SUMMARY RELIEF DENIED:  
June 7, 2002

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GSBCA 15535

AIRPORT BUILDING ASSOCIATES,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

David R. Nachman of Brown & Nachman, L.L.C., Kansas City, MO, counsel for Appellant.

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

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **HYATT**.

**NEILL**, Board Judge.

Appellant, Airport Building Associates (ABA), a Missouri partnership, is the owner of a building it leases to the United States Government through the General Services Administration (GSA). ABA and GSA disagree over the application of a clause in the lease which provides the lessor with reimbursement for increases in general real estate taxes which occur over the life of the lease. Specifically, the dispute between the parties is over the base year to use for computation of tax increases. ABA contends that the base year should be 1998. GSA states that it is 1999. The Government has submitted a motion for summary relief. For the reasons set out below, we deny the motion.

## Background

1. The lease between ABA, owner and lessor, and the United States Government, dated January 10, 1997 (hereinafter "the lease"), provides for approximately 30,000 rentable square feet of office and related space located at 9741 North Conant Avenue, Kansas City,

Missouri. The lease term begins on April 1, 1997, and runs through August 31, 2007. Appeal File, Exhibit 2.

2. The lease contains Clause 3.3, TAX ADJUSTMENT, GSAR 552.270-24 (AUG 1992). It reads, in material part, as follows:

(A) The Government shall pay additional compensation for its share of increases in General Real Estate taxes over general real estate taxes paid for the calendar year in which its lease commences (base year). Payment will be in a lump sum and become due on the first work day of the month following the month in which tax bills and paid tax receipts for the base year and the current year are presented, or the anniversary date of the lease, whichever is later. . . . 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.

(B) Full assessment is defined as the assessed value of property ready for full occupancy after completion of all construction, renovation or conversion for the intended use of the Government. . . . Partial assessments for newly constructed projects or for projects under construction or partially completed projects, renovations, or conversions will not be used for establishing the Government's base year for tax adjustment payments.

. . . .

(F) In the event of any decrease in general real estate taxes occurring during the term of occupancy under the lease, the rental amount will be reduced accordingly. The amount of any such reductions will be determined in the same manner as for payment of additional compensation provided under paragraph (A) above.

Appeal File, Exhibit 2 at 12-13.

3. Appellant believes that there are three properties under the lease. Appeal File, Exhibit 10 at 2. The largest and most valuable is the land located at 9741 Conant Avenue. Counsel for appellant refers to this parcel as "Lot 9 and the South 120' of Lot 10, Block 7." Id. at 2, 27. For purposes of discussion here, we will call this property "the 9741 Conant Avenue property." The second parcel is adjacent to the 9741 Conant Avenue property. Counsel for appellant refers to this property as "The south 51' of the North 105' of Lot 10, Block 7." Id. at 2, 24. We will call this the "adjacent property." The third parcel is located across the street from the Conant Avenue property and the adjacent property. It serves as a parking lot for the Government employees working at the leased premises. Counsel refers to this property as "Tract B per Certificate of Survey." Id. at 2, 12; Affidavit of Robert Steven Hendrix (Hendrix Affidavit) (Dec. 27, 2001) ¶ 8. We will call this parcel "the parking lot property."

4. There is a dispute between the parties over whether the building housing the space leased by GSA is entirely on the 9741 Conant Avenue property or partly on the adjacent property as well. Mr. Robert Steven Hendrix, a commercial appraiser employed by the Platte County Assessor's Office, explains that the leased premises, with all improvements, is on the 9741 Conant Avenue property and next to it is a "sliver of land, 51 feet by 250 feet, which is adjacent to the 9741 Conant Avenue property and acts as a buffer to it." Hendrix Affidavit ¶ 8. On the other hand, Mr. Myron Haith, an owner and officer of Haith & Company, the property manager for ABA, contends that the building containing the leased office space is located on both parcels of property. Affidavit of Myron Haith (Haith Affidavit) (May 8, 2002) ¶ 3.

5. Prior to the GSA taking possession, the lessor made various improvements to the property in accordance with the terms of the lease. By September 1997, these improvements were substantially completed and GSA took possession. Complaint ¶ 8; Answer ¶ 8.

6. In late August 1997, Mr. Hendrix made an appraisal of the 9741 Conant Avenue property with its improvements. He states that, in accordance with state guidance, he used the "cost approach." He explains:

The state of Missouri asks that appraisers use the cost approach when appraising new construction, but after the first year the taxable property is appraised using the income approach. Statutorily, the county is supposed to perform an equalization of commercial properties, i.e., reappraise all commercial properties located in the county, once every two years on the odd numbered years. Such an equalization was performed for January 1, 1999. However, no similar equalization had been performed in Platte County for January 1, 1995 or January 1, 1997.

Hendrix Affidavit ¶¶ 4-5

7. Haith & Company advised Mr. Hendrix that the total costs for improvements made on its properties on Conant Avenue amounted to \$883,060. Of this amount, \$48,050 was for a finish on the parking lot located across the street from 9741 Conant Avenue. Hendrix Affidavit ¶ 6; Haith Affidavit ¶ 11.

8. Using the cost data provided to him, Mr. Hendrix states that he subtracted from the total cost of \$883,060, the \$48,050 used for improvements of the parking lot property. This left him with a calculated value for the improvements on the 9741 Conant Avenue property of \$835,000. He states that he then added this value to the previous appraised value of the property, \$869,000, to arrive at a new appraised value of \$1,704,000. Hendrix Affidavit ¶¶ 5-6, Exhibit 1.

9. Notwithstanding this new appraised value calculated by Mr. Hendrix for the 9741 Conant Avenue property and noted by him on his office's appraisal record for this property in August 1997, the Platte County tax assessment on that property for January 1, 1998, remained the same as it was as of January 1, 1997, namely, \$869,000. Deposition of Christine McQuitty (McQuitty Deposition) (Aug. 30, 2001) at 14-15.

10. In May 1998, the county assessor advised ABA of a change, as of January 1 of that year, in the appraised and assessed value of two of the three properties ABA owned at or near 9741 Conant Avenue. As of January 1, 1998, the appraised value of the parking lot property rose from a previous value of \$11,360 to \$82,230. The appraised value of the adjacent property rose from a previous appraised value of \$0 to \$12,750. Appeal File, Exhibit 10 at 20, 24. The appraised value of the 9741 Conant Avenue property, however, remained unchanged. McQuitty Deposition at 14-15. For the year 1998, ABA paid a total of \$25,522.30 on these three properties. Appeal File, Exhibit 10 at 17.

11. Mr. Hendrix states that the cost of the improvements made to the 9741 Conant Avenue property by ABA in 1997 was simply not reflected in the tax assessment on that property as of January 1, 1998. He is at a loss to explain why this did not occur and assumes that it was due to human error. Hendrix Affidavit ¶ 7. Mr. Brian Everly, an employee of the Platte County Assessor's Office, who assists Mr. Hendrix with commercial appraisals, also states the value of the improvements made to the 9741 Conant Avenue property "just did not get added on for 1998." He testifies that he believes this was attributable either to oversight or error. Deposition of Brian Everly (Everly Deposition) (Aug. 30, 2001) at 3-4, 31-32, 43. Ms. Christine McQuitty, the Platte County Assessor, has herself testified that the appraised value of the 9741 Conant Avenue property did not increase beginning with January 1, 1998, as a direct result of improvements made to the property in the summer of 1997. She has testified that, from a review of office records, it "looks like . . . [the value of the improvements] didn't get picked up in the system, so it wasn't put into our actual computerized records which were transferred to the collector's office for the initiation of the tax bill." McQuitty Deposition at 4, 9-10, 14-15.

12. As a result of the reappraisal of commercial properties undertaken by the Platte County Assessor's office for the equalization planned for 1999, ABA, in May of 1999, received notice of changes, as of January 1, 1999, in the assessed value of all three of the properties it owned at or near 9741 Conant Avenue. The appraised value of the parking lot property rose from a previous value of \$82,230 to \$135,560. The appraised value of the adjacent property rose from a previous appraised value of \$12,750 to \$19,100. The appraised value of the 9741 Conant Avenue property rose from a previous appraised value of \$869,000 to \$1,454,900. Appeal File, Exhibit 10 at 15-16, 27. For the year 1999, ABA paid a total of \$41,594.49 on these three properties. Id. at 17.

13. In addition to being an owner and officer of Haith & Company, Mr. Myron Haith, since 1978, has held a real estate sales license issued by the state of Missouri. Further, he has personally shared in the responsibility of actually managing ABA's property at 9741 Conant Avenue and claims, therefore, to be familiar with the property's history, condition, market value, and tax appraisals and assessments. Haith Affidavit ¶¶ 1-2.

14. Mr. Haith states that in May 1998, when ABA was notified of changes in the appraised value of two of the three properties located at or near 9741 Conant Avenue, he believed that the Platte County Assessor's Office "had properly appraised and assessed the property for real estate tax purposes, including the improvements which ABA had installed on the property in 1997 pursuant to the Lease with GSA." Mr. Haith further declares that he perceived the increase in the appraised value of the parking lot property from \$11,360 to

\$82,230 and the increase in the appraised value of the adjacent property from zero to \$12,750 as consistent with his understanding of the market value of the property taking into account the improvements made on the property during 1997. In his opinion, the appraised value, as of January 1, 1998, of all three of ABA's properties on Conant Avenue including, therefore, the 9741 Conant Avenue property, was fair and reasonable. Mr. Haith expressly disputes Mr. Hendrix's conclusion that the appraised value of the 9741 Conant Avenue property, after the 1997 improvements, amounted to \$1,704,000. In Mr. Haith's opinion, the actual value of this property was substantially lower. He estimates that the value was somewhere between \$881,750 and \$1,000,000. Haith Affidavit ¶¶ 7, 11.

15. In December 1999, ABA submitted to the contracting officer a tax escalation invoice for \$16,072 -- the difference between \$41,594.49 paid in property tax for 1999 and \$25,522.30 paid in 1998. Appeal File, Exhibit 3. GSA declined to pay the invoice on the ground that Platte County had not fully assessed the property until 1999. According to GSA, therefore, 1999 should be considered the base year for purposes of determining tax escalation. Id., Exhibit 6. By letter dated August 24, 2002, ABA's counsel challenged the contracting officer's conclusion that 1998 was not the base year for calculating tax escalation. Counsel argued that records received from the Platte County Assessor's Office verified that ABA's property was properly appraised and valued as to establish 1998 as the base tax year. Id., Exhibit 7.

16. After some further discussion, counsel for ABA submitted a formal claim for the amount in dispute. Appeal File, Exhibit 10. By letter dated December 21, the contracting officer issued her decision denying the claim. She pointed out that, when the 9741 Conant Avenue property was inspected on August 26, 1997, by an employee of the Platte County Assessor's Office, the construction was not complete. She explained that, because the construction was incomplete, the added value for the improvements was not reflected in the assessment for 1998. When, however, the property was inspected in October 1998 for the 1999 assessment, the added value of the improvements was reflected in the increased assessed value. Accordingly, the contracting officer remained convinced that no full tax assessment on the leased property was completed until 1999 and, therefore, pursuant to the applicable contract provision, 1999 and not 1998 would be the base year for purposes of determining property tax increases. Id., Exhibit 13. ABA has appealed the contracting officer's decision. Id., Exhibit 14.

### 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); Dairyland Power Co-op. v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994); 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). A fact is material if it might significantly affect the outcome of the suit under the governing law. Anderson, 477 U.S. at 248. Any

doubts regarding such factual issues must be resolved in favor of the non-moving party, in whose favor all justifiable inferences are to be drawn. Id. at 255.

The pivotal issue in this case is whether Platte County's property tax assessment of 1998 on property owned by ABA and rented to the Government pursuant to the lease constitutes a "full assessment," as that term is used and defined in the tax adjustment clause of the lease. Given the present state of the record, there are critical and, as yet, unanswered questions of material fact which clearly stand in the way of our resolving this question.

Appellant's monetary claim is based upon the difference between the total property tax paid on all three parcels of property at or near 9741 Conant Avenue for 1998 and the tax paid on the same property for 1999. Whether all those properties are subject to the lease remains an open question. GSA addresses this issue to a limited extent in its motion and cites to us the Board's decision in Prince George Center, Inc. v. General Services Administration, GSBCA 12289, 94-2 BCA ¶ 26,889, in support of its argument that the parking lot property is not subject to the lease. Whether that case can be distinguished significantly from the instant case will undoubtedly require a further inquiry into the relevant facts on which there may or may not be agreement. As to ABA's including in its claim taxes paid on the adjacent property, our decision on that portion of appellant's claim will hinge, even if the Prince George Center precedent is applicable, on whether ABA's building rests in part on that property. As already noted, this factual issue remains in dispute.

GSA argues that there was no "full assessment" for tax year 1998 because the costs of the improvement made to the leased premises during 1997 were not reflected in the appraisal on which the 1998 property tax assessment was based. The Platte County Assessor and two of her staff, focusing on the 9741 Conant Avenue property, confirm that the appraised value of that parcel remained unchanged in 1998 notwithstanding the extensive improvements made on that property during 1997. These individuals acknowledge that, for reasons not readily explained, the information regarding the costs of these improvements was not reflected in the 1998 tax assessment for that property.

Appellant, on the other hand, always convinced that all three parcels of property which ABA owns at on near 9741 Conant Avenue are subject to the lease, does not believe that the costs of the improvements made in 1997 were accidentally overlooked. Counsel for appellant points to documentation in the record which undoubtedly shows that two of the three properties did experience an increase in assessments for 1998 and alleges that the increase was attributable to improvements made to these properties in 1997.

The explanations offered thus far by representatives of the Platte County Assessor's Office pose more questions than they answer. Just what that office actually intended for the 1998 tax assessment with regard to appellant's properties at or near 9741 Conant Avenue remains unclear. The "cost approach," which Mr. Hendrix says the Assessor's Office is accustomed to using for the first year after improvements are made on an owner's property, presents its own factual issues. Mr. Hendrix explains that, in using this approach, it was his intention to increase the appraised value of the 9741 Conant Avenue property by the entire cost of the improvements made to that property. This, however, was not reflected in the January 1, 1998 assessment. By contrast, the appraised value of the parking lot property was

increased for the January 1, 1998 assessments – but not by \$48,050, the stated cost of improvements made on that parcel of property, but by the much greater and, as yet, unexplained figure of \$70,870. Further, the sworn statement of Mr. Haith regarding the fair-market value of the 9741 Conant Avenue property suggests that there may have been, in fact, an explanation other than sheer error or oversight for not increasing the appraised value of that property in the 1998 property assessment.

Finally, in view of the definition of "full assessment" in the tax adjustment clause and the absence of any corrective action by the County Assessor's Office, what was actually done by that office to the assessments on appellant's Conant Avenue properties effective January 1, 1998, may, in the final analysis, be of far greater importance than what was allegedly intended. In any event, given the presence of the various issues of material fact discussed above, we obviously cannot grant respondent's motion for summary relief.

Decision

Respondent's motion for summary relief is **DENIED**.

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EDWIN B. NEILL  
Board Judge

We concur:

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STEPHEN M. DANIELS  
Board Judge.

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CATHERINE B. HYATT  
Board Judge