Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED IN PART: May 12, 2003

GSBCA 15973

2160 PARTNERS,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Scott M. McCaleb and Jonathan L. Kang of Wiley Rein & Fielding LLP, Washington, DC, counsel for Appellant.

Telo W. Braswell, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

DANIELS, Board Judge.

In 1977, the General Services Administration (GSA) leased space from 2160 Partners. The contract between the two parties contained a Real Estate Tax Escalator clause. The parties disagree in several regards as to how this clause should be implemented.

The parties have submitted cross-motions for summary relief. This is an appropriate means for presenting the case, for no material facts are in dispute. We agree with 2160 Partners as to most of the issues presented, but hold for GSA as to the issue which involves most of the money involved in the claim.

Background

1. On June 27, 1977, 2160 Partners and GSA entered into a contract for the lease by the former to the latter of a 75,000 square-foot parking area, 1,020 square feet of office space, 4,110 square feet of shop building, and a 720 square foot gasoline service island at 2160 East Van Buren Street in Phoenix, Arizona. Appeal File, Exhibit 6 at 16.

2. The initial term of the lease was ten years (from November 1, 1977, to October 31, 1987) at an annual rent of $85,849. The lease could be renewed at the option of the Government for two additional five-year periods at an annual rent of $77,500. Appeal File, Exhibit 6 at 16, 25. By Supplemental Lease Agreement (SLA) No. 3, the initial lease term was changed to run from December 14, 1977, through December 13, 1987. Id., Exhibit 9.

3. The lease's Real Estate Tax Escalator clause reads, in pertinent part, as follows:

> The resultant lease will provide that at the end of the first 5 years, and at the end of the first 10 years, and at the end of the first 15 years of Government occupancy under the lease, the annual rental rate will be adjusted to provide for increases or decreases in general real estate taxes. The tax adjustment shall be based on the percentage of the building occupied by the Government. Said percentage is to be computed prior to any commitment and will be included in the commitment letter. The tax adjustment amount shall be based on the established percentage and shall be that percent of the increase or decrease of the total taxes to be paid on the property, and the total rental, including any such adjustment, shall not exceed the limitation imposed by Section 322 of the Economy Act of June 30, 1932, as amended (40 U.S.C. 278a).[1] The base from which adjustments will be made will be calculated from the assessment, assessment ratio, and tax rate in effect during the 5th and 10th & 15th year(s) respectively, of occupancy, as compared to the first full assessment, assessment ratio and tax rate in effect after initial occupancy by the Government. . . .
>
> Proof of the amount of tax and evidence of payment will be furnished by the lessor and the rental adjustment by reason of tax increases or decreases shall be accomplished by increasing or decreasing the next monthly rental check and each monthly payment thereafter in the appropriate amount.
>
> The lessor shall furnish the Government copies of all notices which may affect the valuation of said land and building for general real estate taxes thereon . . . within three days from the receipt thereof . . . .
>
> The Government may contest the amount of validity of any valuation for general real estate taxes by appropriate legal proceeding either in the name of the Government or in the name of the lessor or in the names of both. In the event the Government is precluded from such proceeding the lessor, upon reasonable notice and request by the Government, shall contest any such proceeding and in the event of any such request, the Government shall reimburse the lessor for its costs or expenses in connection with any such

[1] In its reference to the Economy Act limitation on total rent, this clause reinforced another in the lease, General Provision 14, which states: "ECONOMY ACT LIMITATION. If the rental specified in this lease exceeds $2,000 per annum, the limitation of Section 322 of the Economy Act of 1932, as amended (40 U.S.C. 278a), shall apply." Appeal File, Exhibit 6 at 65.

> contest or proceeding . . . . If the lessor received any refund of taxes, the lessor shall promptly rebate to the Government the Government's proportionate share thereof. The reimbursement to the lessor, including payment for real estate tax increases must not exceed the rental amount authorized by Section 322 of the Economy Act of June 30, 1932, as amended (40 U.S.C. 278a).

Appeal File, Exhibit 6 at 18-20.

4. The parties agree that the "base year," for the purpose of the Real Estate Tax Escalator clause, was 1979, and the tax on the property for that year was $4,744.83. Appellant's Statement of Undisputed Facts ¶ 5; Appeal File, Exhibit 18. Actually, the "base year" used during the existence of the contract was 1978/1979. The tax on the property for 1978 was $3,879.66; the tax for 1979 was $5,610; and the average of these two figures is $4,744.83. See Appeal File, Exhibit 61.

5. During the entire lease period, the parties agreed that the percentage of the building occupied by the Government was one hundred percent. See, e.g., Appeal File, Exhibits 18, 31 at 125, 32, 43 at 157, 50 at 168, 54 at 180.

6. Section 322 of the Economy Act of June 30, 1932, as amended, which is referenced in the Real Estate Tax Escalator clause, read as follows on the date of the lease:

> On and after June 30, 1932, no appropriation shall be obligated or expended for the rent of any building or part of a building to be occupied for Government purposes at a rental in excess of the per annum rate of 15 per centum of the fair market value of the rented premises at date of the lease under which the premises are to be occupied by the Government . . . .

40 U.S.C. § 278a (1976).

7. The only evidence in the record as to the fair market value of the rented premises, as of the date of the lease, is contained in a statement from a GSA appraiser dated June 17, 1977. The statement is that the fair market value of the property was $543,000. Appeal File, Exhibit 4 at 13.

8. In 1982, the fifth year of Government occupancy under the lease, as required by the Tax Escalator clause, GSA calculated the tax escalations due for the succeeding five-year period by comparing the base year amount of tax ($4,744.83) to the average of the tax bills for 1981 and 1982 ($5,740.77). This calculation resulted in an amount due of $995.94[2]

[2]The Tax Escalator clause calls for the resulting increase or decrease in taxes to be multiplied by the percentage of the property occupied by the Government. The rent is to be changed by an amount commensurate with that percentage. Because the Government occupied all of the property at all times during the lease, neither in 1982 nor at any other time was performing this part of the calculation necessary.

for each year from 1982 to 1986.[3] The parties agree that this calculation properly applied the clause and that the amounts for 1982 to 1986 are not in dispute. Complaint ¶ 8; Answer ¶ 8; Appellant's Statement of Undisputed Facts ¶¶ 6, 7. The parties effectuated the change in the rent through SLA No. 4, which included the following three provisions: (a) The lease is amended "to provide for a tax increase in the amount of $995.94 for Calendar Year 1982"; (b) "The Government shall pay the Lessor annual rent of $86,844.94"; and (c) "Payment [of escalated taxes] shall be in a lump sum or payment of the adjusted rental (whichever is appropriate)." Appeal File, Exhibit 17.

9. On July 15, 1987, GSA exercised its option to renew the lease for five years, from December 1987 to December 1992. Appeal File, Exhibit 26. For the second five-year period specified in the Real Estate Tax Escalator clause, GSA calculated the amount owed to 2160 Partners in the same way that it calculated the amount owed for the first five-year period. It subtracted the base year amount ($4,744.83) from the average of the tax bills for 1986 and 1987 ($10,812.22), which yielded the escalation amount of $6,067.39. Appellant's Statement of Undisputed Facts ¶ 10; see Appeal File, Exhibits 30-33.

10. SLA No. 7, which was executed by both parties, provides for the first five-year renewal of the lease at the rent specified in the original contract ($77,500 per year). SLA No. 7 also states, "[T]he Lessor will be paid a lump sum payment in the amount of $6,067.39 that represents full settlement of the tax escalation for Calendar Year 1987." The Agreement additionally includes the sentence, "All other terms and conditions of the lease shall remain in force and effect." Appeal File, Exhibit 34.

11. In 1991, 2160 Partners asked GSA for permission to hire a professional tax consultant to challenge the tax assessment on the property. GSA responded, "If the consultation results in a tax savings for the Government, we agree to reimburse the consultant's fee in accordance to [sic] our percentage of building occupancy." Appeal File, Exhibit 35; Answer ¶ 26. 2160 Partners did hire such a consultant. The consultant charged a fee of $653.49, and his work resulted in a reduction of tax on the property of $2,613.96 for 1991. Appeal File, Exhibit 36. GSA reimbursed 2160 Partners for the tax consultant's fee. Id., Exhibit 38. 2160 Partners paid, for 1991, the tax due based on the reduced assessment. Id., Exhibits 36 at 135-36, 60 at 213.

12. Again in 1992, 2160 Partners hired a professional tax consultant to challenge the tax assessment on the property. The consultant charged a fee of $1,084, and his work resulted in a reduction of tax on the property of $4,335. Appeal File, Exhibit 50. GSA

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[3]GSA's practice throughout the lease was to make tax escalation adjustments to the rental rate as if the first year of any five-year period was the calendar year in which the period began. Thus, even though the second five-year period of the lease actually ran from December 1982 to December 1987, the parties treated 1982 as the first year of that period for tax escalation purposes. The years of the period were consequently 1982, 1983, 1984, 1985, and 1986. While this practice does not strictly conform to the requirements of the Tax Escalator clause, it was considered unobjectionable not only during the lease, but also in the parties' briefs on their cross-motions for summary relief.

reimbursed 2160 Partners for the tax consultant's fee. Id., Exhibit 52. 2160 Partners paid, for 1992, the tax due based on the reduced assessment. Id., Exhibits 50 at 174-75, 60 at 211.

13. In 1993, 2160 Partners once more hired a professional tax consultant to challenge the tax assessment on the property. This time, the fee charged (and paid by GSA) was $757.52, and the reduction in tax resulting from the work was $3,060. Appeal File, Exhibits 54, 55. 2160 Partners paid, for 1993, the tax due based on the reduced assessment. Id., Exhibits 54 at 180, 187; 60 at 209.

14. In June 1992, according to notes prepared by a GSA employee, 2160 Partners general partner Paul T. Davis asked GSA to provide tax escalation payments for the years since the previous escalation calculation for which payment had not been made. The notes state that the agency would not comply with the request. Appeal File, Exhibit 43. Nine years later, Mr. Davis was still complaining to GSA that "[t]he government's delinquency to reimburse Real Property Taxes to 2160 Partners has persisted since 1988. Our office has made multiple attempts to resolve the problem but have [sic] been shifted from employee to employee in the GSA." Id., Exhibit 71; see also id., Exhibit 69.

15. GSA exercised its option to renew the lease for five additional years, from December 1992 to December 1997, at the rent specified in the original contract ($77,500 per year). SLA No. 9 (dated December 4, 1992), which was executed by both parties, provides for this lease extension. It also includes the sentence, "All other terms and conditions of the lease shall remain in force and effect." Appeal File, Exhibit 48; see also id., Exhibits 41, 44.

16. GSA admits that it was liable for reimbursements under the Real Estate Tax Escalator clause for each of the years from 1992 through 1996. Complaint ¶ 25; Answer ¶ 25. The contracting officer calculated the amount due in the following manner: He subtracted the base year amount ($4,744.83) from the average of the tax bills for 1991 and 1992 ($17,531.26), which yielded the escalation amount of $12,786.43. Appellant's Statement of Undisputed Facts ¶ 15; Answer ¶ 25. Payments were not made during the relevant years, however; they were made later, in the amounts described in paragraphs 23-25 below.

17. In September 1997, Elizabeth Holland of GSA asked 2160 Partners' Paul Davis to quote a price for a two-year renewal of the contract. Mr. Davis proposed an annual rental of $114,719. Declaration of Paul T. Davis (March 2003) (attachment to Appellant's Statement of Undisputed Facts) (Davis Declaration) ¶ 4; Appeal File, Exhibit 56. GSA objected that the rate was excessive, and Mr. Davis reduced the offer to $100,000 per year. Davis Declaration ¶ 5; Appeal File, Exhibit 58. During these discussions, according to Mr. Davis, "I informed [Ms. Holland] that I would continue to expect tax escalation amounts for the Lease extension periods under negotiation. At no time during our discussions did Ms. Holland even suggest, let alone expressly state, that the new rental rate, which more closely approximated the value of the leased property [than did the previous rate of $77,500 per year], would need to encompass all tax escalations." Davis Declaration ¶ 7. GSA considers Mr. Davis's declaration, which contains these statements, to be "nothing more than a self-serving document prepared to buttress the legal position taken in this appeal." The agency says that the matters described in the statements are in dispute. Respondent's Response to

Appellant's Motion for Summary Relief at 7. GSA has not presented any evidence contrary to Mr. Davis's statements, however.

18. On December 12, 1997, the parties agreed to extend the lease for two years, "one (1) year firm, and one (1) year non-firm." The "firm" year was December 14, 1997, through December 13, 1998, and the "non-firm" year was December 14, 1998, through December 13, 1999. The annual rent was agreed to be $100,000. SLA No. 13, which contained this extension, also provided, "All other terms and conditions of the lease shall remain in force and effect." Appeal File, Exhibit 59.

19. In November 1999, GSA Realty Specialist Barry L. Simon asked 2160 Partners to extend the lease for another year, until the completion of a new facility which was expected to occur in December 2000. Mr. Davis responded that he had an offer to buy the property and would extend the lease only if the annual rent were to be increased to $160,000. GSA accepted this offer. Appeal File, Exhibits 64-65; Davis Declaration ¶ 8. On December 13, 1999, the parties signed SLA No. 14, which extended the lease to December 13, 2000, at an annual rent of $160,000. As with other supplemental lease agreements, this one contained the sentence, "All other terms and conditions of the lease shall remain in force and effect." Appeal File, Exhibit 66. According to Mr. Davis, "At no time during our discussions did Mr. Simon suggest, let alone expressly state, that the new rental rate . . . would need to encompass all tax escalations." Davis Declaration ¶ 9. GSA's reaction to Mr. Davis's declaration is as described at the end of paragraph 17 above.

20. By SLA No. 15, dated October 10, 2000, the parties extended the lease a final time, until January 13, 2001. Again, the SLA included the sentence, "All other terms and conditions of the lease shall remain in force and effect." Appeal File, Exhibit 67.

21. After some discussion between the parties as to tax escalation payments, on July 16, 2001, GSA sent to 2160 Partners a check in the amount of $19,588.36, which was intended to represent the tax escalation payment for the year 2000. In calculating this figure, GSA subtracted from the lessor's 2000 tax bill ($25,198.36) the taxes due and paid in 1979 ($5,610). Appeal File, Exhibit 72 at 259-65.

22. More discussion ensued, and on May 3, 2002, 2160 Partners sent to a GSA contracting officer an uncertified claim demanding payment of $155,181.89 in unreimbursed tax escalation amounts. Appeal File, Exhibit 80.

23. On July 25, 2002, the contracting officer issued a decision partially granting this claim in the amount of $32,340.74. For the period 1987 to 1991, he concluded that the payment of $6,067.39 for 1987, which was specified in SLA No. 7, was the only tax escalation payment due the lessor. For the period 1992 to 1996, he held that the lessor was due $51,929.10 in tax escalation payments. For each of the years 1992, 1995, and 1996, he said, the correct amount was $12,190. For reasons described in paragraph 24 below, he reduced the calculated tax escalation amount of $12,786.43 by $596.43 so as not to pay rent in excess of the Economy Act limitation. He held that GSA owed a tax escalation payment of only $8,597.58 for 1993 and $6,761.52 for 1994. He opined that because the Government had in 1992-94 paid for the services of tax reduction consultants who persuaded the taxing authorities to reduce the taxes on the property, the Government was entitled to receive the

benefit of the tax savings. The contracting officer determined that no tax escalation payments were owed for any years beyond the first twenty years of the lease. The payment of $19,588.36 for 2000 was therefore, in his estimation, error. The amount $32,340.74 represents $51,929.10 less $19,588.36. Appeal File, Exhibit 87. GSA has paid 2160 Partners the amount determined by the contracting officer to be due as tax escalation payments. Complaint ¶ 25; Answer ¶ 25.

24. The contracting officer calculated the Economy Act limitation and its impact, affecting tax escalation payments for 1992, 1995, and 1996, in the following manner. The limitation itself is fifteen percent of the fair market value of the property on the date of the lease. Since that value was $543,000, the limitation is fifteen percent of that figure, or $81,450. The gross annual rent for the second lease renewal period was the rent specified in the lease, $77,500, plus the calculated tax escalation payment, $12,786.43 – a total of $90,286.43. From this gross annual rent, the contracting officer subtracted the estimated annual cost of services and utilities, which he considered to be $8,240.[4] He consequently found the net annual rental cost for the unserviced space to be $82,046.43. The net annual rental cost exceeded the Economy Act limitation by $596.43. Appeal File, Exhibit 86 at 314.

25. On October 3, 2002, 2160 Partners resubmitted to the contracting officer its claim for unreimbursed tax escalation payments. This time the claim was certified and was in the amount of $172,495.60. Appeal File, Exhibit 89. On October 18, the contracting officer affirmed his earlier decision. Id., Exhibit 90.

26. 2160 Partners filed this appeal on October 22, 2002. Appeal File, Exhibit 91. In its motion for summary relief, the appellant has reduced the amount claimed to $121,109.78. It has amended its claim to provide for only one-twelfth of the tax escalation payment it calculated for 2001, to reflect the extension of the lease through only a part of January of that year. Appellant's Brief in Support of Its Motion for Summary Relief at 27.

27. The following table shows, for each year in which the lease was in effect, the amount of property taxes imposed by local taxing authorities;[5] the average of two years' taxes

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[4]The lease required 2160 Partners to provide various services and utilities in addition to the leased space itself. The lessor had to provide cleaning and janitorial services; labor, materials, and supervision to maintain the buildings; and heat, electricity, and gas. Appeal File, Exhibit 6 at 47-52, 64. These requirements remained unchanged throughout the duration of the lease. Id., Exhibits 7-9, 17, 21, 22, 34, 38, 48, 52, 53, 55, 59, 66, 67 (supplemental lease agreements, none of which mentioned services or utilities). Government determinations as to the estimated annual cost of services and utilities appear five times in our record. In June 1977, March 1983, and August 1984, the figure was $5,671. Id., Exhibits 4 at 13, 16 at 87, 20 at 93. In July 1987 and April 1989, it was $8,240. Id., Exhibits 27 at 114, 116; 33 at 127.

[5]The Appeal File contains information about tax bills on the property as follows. Each of the references is to an actual tax bill, except as noted. 1977: Exhibit 15 at 80; 1978: Exhibit 15 at 81; 1979: Exhibit 15 at 82; 1980: Exhibit 15 at 83; 1981: Exhibit 15 at 84; (continued...)

used in calculating tax escalation amounts; the tax escalation payments initially made by GSA during the lease period; the tax escalation payments which are due, according to 2160 Partners; and the tax escalation payments which have been made by GSA pursuant to the contracting officer's decision, and which the agency continues to maintain are correct.

Year	Tax bill	Average of current year tax and previous year tax	Tax escalation payments initially made	Payments due, according to 2160 Partners	Payments made (and due, according to GSA)
1977	3,176.34				
1978	3,879.66		0	0	0
1979	5,610.00	4,744.83	0	0	0
1980	6,900.40		0	0	0
1981	5,915.44		0	0	0
1982	5,566.10	5,740.77	995.94	995.94	995.94
1983	6,514.26		995.94	995.94	995.94
1984	7,750.16		995.94	995.94	995.94
1985	9,083.50		995.94	995.94	995.94
1986	8,836.08		995.94	995.94	995.94
1987	12,788.36	10,812.22	6,067.39	6,067.39	6,067.39
1988	12,274.00		0	6,067.39	0
1989	15,709.00		0	6,067.39	0
1990	17,720.06		0	6,067.39	0
1991	19,737.62		0	6,067.39	0
1992	15,324.90	17,531.26	0	12,786.43	12,190.00
1993	11,359.92		0	12,786.43	8,597.58
1994	11,652.78		0	12,786.43	6,761.52
1995	23,605.70		0	12,786.43	12,190.00
1996	25,207.60		0	12,786.43	12,190.00
1997	25,834.96	25,521.88	0	20,776.45	0
1998	25,016.66		0	20,776.45	0
1999	22,926.00		0	20,776.45	0
2000	25,198.36		19,588.36	20,776.45	0
2001	25,198.36		0	1,731.37	0

(...continued)
1982: Exhibit 15 at 85; 1983 and 1984: Exhibit 71 at 258 (statement by 2160 Partners); 1985: Exhibit 23 at 103; 1986: Exhibit 30 at 121; 1987: Exhibit 30 at 118; 1988 and 1989: Exhibit 71 at 258 (statement by 2160 Partners); 1990: Exhibit 60 at 214; 1991: Exhibit 36 at 136; 1992: Exhibit 50 at 174; 1993: Exhibit 54 at 187; 1994: Exhibit 60 at 206; 1995: Exhibit 60 at 203; 1996: Exhibit 60 at 201; 1997: Exhibit 60 at 199; 1998: Exhibit 60 at 197; 1999: Exhibit 71 at 258 (statement by 2160 Partners); 2000: Exhibit 70 at 244. The figure for 2001 is taken from Appellant's Brief in Opposition to Respondent's Motion for Summary Relief, Appendix B.

Total	30,635.45	184,085.97	62,976.19

The difference between the amount 2160 Partners believes is due, and the amount GSA believes is due and has paid, is $121,109.78. It is that amount which 2160 Partners asks us to award in this appeal.

Discussion

The parties have filed cross-motions for summary relief. Resolving a dispute on such a motion is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. A fact is material if it might significantly affect the outcome of the case. An issue is genuine if enough evidence exists that the fact could reasonably be decided in favor of the nonmovant at a hearing. The fact that both parties have moved for summary relief does not dictate that the Board grant one of the motions. Rather, each party's motion is to be evaluated independently on its own merits, with all reasonable inferences being resolved against the party whose motion is under consideration. Clark College District 14 Foundation v. General Services Administration, GSBCA 15603, 02-2 BCA ¶ 32,005, at 158,136-37 (citing cases). These are stringent standards, but because the case features no genuine issues of material fact – indeed, few issues of fact at all, and none of them material – we are able to resolve the case without further proceedings.

The parties have divided their analysis of the matters raised chronologically. We find this structure useful and follow it.

1977 to 1986

The lease was entered into in 1977. Its Real Estate Tax Escalator clause provided for no adjustment in the rent until "the end of the first 5 years . . . of Government occupancy." The parties agree that the clause consequently had no impact on the rental amount due from GSA to 2160 Partners from the inception of the lease through 1981.

The parties also agree that the implementation of the clause at the end of the first five years of occupancy was proper. GSA compared (a) the average of the property taxes due from 2160 Partners to local taxing authorities in 1981 and 1982 with (b) the average of the taxes due from the lessor to those authorities in 1978 and 1979. The former figure was $995.94 greater than the latter figure. This amount of increased taxes was added to the base rent in each of the years 1982, 1983, 1984, 1985, and 1986.

There are no disputes regarding tax escalation payments for the years 1977 through 1986.

1987 to 1991

In 1987, at the end of the first ten years of Government occupancy of the leased space, GSA exercised its option to renew the lease for a five-year period. The exercise of this option triggered the Tax Escalator clause's requirement for an adjustment of rent commensurate with changes in the tax on the property. GSA followed its practice of five years earlier in calculating the amount of the adjustment. It compared (a) the average of the

taxes in 1986 and 1987 with (b) the average of the taxes in 1978 and 1979. The former figure was $6,067.39 greater than the latter figure. 2160 Partners agrees that this calculation was made correctly.

Unlike the practice of five years earlier, however, GSA did not add the calculated increase to the base rent in each of the following five years. Instead, it agreed in SLA No. 7 that "the Lessor will be paid a lump sum payment in the amount of $6,067.39 that represents full settlement of the tax escalation for Calendar 1987," and made no tax escalation payment for 1988, 1989, 1990, or 1991. 2160 Partners claims entitlement to a payment equal to that made for 1987 for each of the four following years. GSA insists that the payment made for 1987 is the only one due for the period 1987 to 1991.

The Tax Escalator clause provides that at the end of the first ten years of Government occupancy under the lease, "the annual rental rate will be adjusted" in accordance with a prescribed formula. GSA applied the formula in a manner consistent with the clause's requirements, as it did at the end of the first five years of occupancy – and as it did at the end of the first fifteen years of occupancy. Yet uniquely at the end of the first ten years, GSA did not adjust the annual rental rate in accordance with the formula; it merely adjusted the rental amount for a single year. This determination appears to be plainly at odds with the mandate of the clause.

GSA advances two theories to support its determination not to make payment of the tax escalation amount for 1988, 1989, 1990, or 1991. First, it maintains that the doctrine of laches precludes 2160 Partners from demanding in its claim, long after it agreed to SLA No. 7, that it receive these escalation amounts. Second, GSA contends that SLA No. 7 constituted an accord and satisfaction in which 2160 Partners agreed to forgo the payments for those four years.

Laches

The Court of Appeals for the Federal Circuit has explained that laches –

> may be defined generally as "slackness or carelessness toward duty or opportunity." In a legal context, laches may be defined as the neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party and operates as an equitable bar.

A.C. Aukerman Co. v. R.L. Chaides Construction Co., 960 F.2d 1020, 1028-29 (Fed. Cir. 1992) (en banc) (citations omitted). The Court has explained further:

> The doctrine of laches is based upon considerations of public policy, which require, for the peace of society, the discouragement of stale demands. It recognizes the need for speedy vindication or enforcement of rights, so that courts may arrive at safe conclusions as to the truth.

S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1, 5 (Fed. Cir. 1985) (quoting Brundage v. United States, 504 F.2d 1382, 1384 (Ct. Cl. 1974), cert. denied, 421 U.S. 998 (1975)).

The Board has held:

> To prove laches, the party asserting it must show that the party bringing the claim inexcusably delayed in doing so for an unreasonable length of time from the time the party knew of the claim and that the delay operated to the prejudice or injury of the party against whom the claim is asserted. There are two kinds of prejudice for laches – defense prejudice, where the delay makes the litigation more difficult than if suit had been brought earlier, and liability prejudice, where the delay increases the litigant's liability.

Adelaide Blomfield Management Co. v. General Services Administration, GSBCA 13929, 98-2 BCA ¶ 29,758, at 147,488-89 (citations omitted).

According to GSA, inexcusable delay is shown by 2160 Partners' never, during the thirteen years after SLA No. 7 was executed, having "complained about the payment it received under SLA No. 7, nor requested compensation for the remaining years of that escalation period (1988-1991)." Respondent's Motion for Summary Relief at 12. The resulting prejudice alleged is a form of liability prejudice: the Government "may not have exercised the option on the Lease [in 1992] had the Lessor not led it to believe it was not going to seek recovery for the additional years." Id. at 14.

We agree with 2160 Partners that laches is not a successful defense here. The factual predicate is lacking, for the record shows – in the notes of a GSA employee – that the lessor did complain, as early as June 1992, about the agency's failure to make tax escalation payments for the years in question. 2160 Partners complained again several years later, and if the contents of the letter it sent at that time are accurate, it had made "multiple attempts" to have the matter resolved in the intervening period. The supposed prejudice is lacking as well. In SLA No. 9, GSA renewed the lease for the succeeding five years several months after it had learned of 2160 Partners' objection to the failure to make these payments. Additionally, the agency has conceded that it owes tax escalation payments for those succeeding five years, even though it did not make them until after 2160 Partners had claimed entitlement to them.

GSA's argument that 2160 Partners may not receive tax escalation payments for the years 1988 to 1991 because it delayed in raising the issue is not restricted to the defense of laches. A variant of the argument is expressed through the citation to a sentence in the Court of Claims' decision in Gresham & Co. v. United States, 470 F.2d 542, 554 (Ct. Cl. 1972): "[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." For the same reasons that we did not find laches, we conclude that the rule in Gresham is inapplicable here. Factually, 2160 Partners was not failing to exact performance. As to prejudice, Gresham explains that if a contract requirement "becomes dead," it "cannot be suddenly revived to the prejudice of a party who has changed his position in reliance on the supposed suspension." Id. at 555. GSA did not

change its position as to application of the Tax Escalator clause in reliance on anything 2160 Partners did or did not do. It applied the clause in the next five-year period (1992 to 1996) as it had in the earlier five-year period from 1982 to 1986, notwithstanding the lessor's actions or inactions.

Accord and satisfaction

The other defense raised by GSA against payment of tax escalation amounts for 1988 to 1991 is accord and satisfaction. As we have recently explained:

> An accord and satisfaction has the effect of discharging an existing right. The accord occurs when one party to a contract agrees to give or to perform something other than what the second party claims the contract requires, and the second party agrees to accept the alternate thing or performance in satisfaction of the claim. The satisfaction occurs when the parties perform their agreement. The essential elements of an accord and satisfaction are competent parties, proper subject matter, consideration, and a meeting of the minds.

Trataros Construction, Inc. v. General Services Administration, GSBCA 15344, slip op. at 11-12 (Apr. 22, 2003) (citations to Court of Claims decisions omitted).

According to GSA, 2160 Partners' acceptance of SLA No. 7 (by signature, receipt of compensation, and failure to contest the amount promptly) bars it from recovering the additional tax escalation payments it seeks for 1988, 1989, 1990, and 1991. This argument is unpersuasive. There is no evidence that in agreeing to a lump-sum payment for 1987, the lessor was agreeing to accept no further tax escalation payments for the five-year period in question. Thus, we cannot find a meeting of the minds on this matter. Nor has GSA ever even intimated that there was consideration for the lessor's supposed abandonment of rights. As 2160 Partners points out, SLA No. 4 provided for a specified escalation payment for 1982, but that did not extinguish the lessor's rights to identical payments for 1983, 1984, 1985, and 1986, and GSA actually made such payments. No good reason has been advanced for interpreting SLA No. 7, with its provision for a specified payment for 1987, any differently.

We conclude that GSA's defenses to the claim for tax escalation payments for the years 1988 through 1991 are unavailing. 2160 Partners is entitled to receive, for each of those years, the same properly calculated amount GSA paid for 1987, $6,067.39. The total amount, for these four years, is $24,269.56.

1992 to 1996

In 1992, at the end of the first fifteen years of Government occupancy under the lease, GSA exercised its option to renew the lease for the last five-year period envisioned in the contract signed in 1977. For the five-year period from 1992 through 1996, as enunciated in the contracting officer's decision on 2160 Partners' claim, GSA followed its established practice of calculating tax escalation payments. It compared (a) the average of the taxes in 1991 and 1992 with (b) the average of the taxes in 1978 and 1979. The former figure was

$12,786.43 greater than the latter figure. 2160 Partners agrees that this calculation was made correctly.

GSA acknowledges that it is obligated, under the lease's Tax Escalator clause, to make payments of the calculated amount to 2160 Partners for each of the years in question. The agency has made two types of deductions from these payments, however. For 1992, 1995, and 1996, it reduced payments in accordance with its understanding of the limitation on total rent mandated by section 322 of the Economy Act of June 30, 1932. For 1993 and 1994, GSA reduced payments to supposedly reflect tax reductions achieved through the efforts of professional tax consultants the costs of whose services were paid by the agency.

Economy Act

Section 322 of the Economy Act of June 30, 1932, as amended (40 U.S.C. § 278a), is mentioned twice in the Tax Escalator clause, three times in all in the lease. This section limited the annual rent paid by the Government for any leased building or part of a building to fifteen percent "of the fair market value of the rented premises at date of the lease under which the premises are to be occupied by the Government." This statute was effectively suspended by Congress for several years, beginning on October 1, 1981, until it was finally repealed in 1988. Ralden Partnership v. United States, 891 F.2d 1575, 1576-77 (Fed. Cir. 1989); Pub. L. No. 100-678, § 7, 102 Stat. 4049, 4052 (1988).

Although section 322 was no longer in effect during the period from 1992 to 1996, the Court of Appeals for the Federal Circuit has held that the limitation imposed by the section was still applicable to any lease which incorporated it, such as this one. The Court reasoned that because the parties bargained for and agreed on the maximum price the Government would pay under the lease, allowing a lessor to benefit from Congress' later enactments would be inappropriate. The Court also noted that the legislature gave no indication, in those later enactments, that it intended to alter existing contractual agreements between the Government and its landlords. Ralden Partnership, 891 F.2d at 1578.

In applying the Economy Act limitation to affected leases, GSA's consistent practice was to determine how much of the stipulated rent was allocable to occupancy and how much was allocable to services being provided by the landlord, and then to compare the limitation solely to the occupancy portion of the rent. American National Bank of Chicago, GSBCA 7457, 85-1 BCA ¶ 17,811, at 89,011-12; Northwestern Development Co., GSBCA 6821, et al., 84-3 BCA ¶ 17,613, at 87,750-51; Exchange National Bank of Chicago, GSBCA 6894, et al., 83-2 BCA ¶ 16,783, at 83,423. In so doing, the agency was acting in a manner consistent with both standard principles of lease construction and a ruling of the Comptroller General contemporaneous with enactment of the Act. American National Bank, 85-1 BCA at 89,011.

Notwithstanding its reasonable practice, GSA sometimes had difficulties in implementing the limitation because it could not prove that the base amount from which it calculated the fifteen percent limitation was accurately determined. The base amount is "the fair market value of the rented premises at date of the lease," and agency appraisals as to that value could be so simplistic as to be legally invalid. J.H. Millstein & Fanny Millstein, Trustees for Millstein Children, GSBCA 7904, 86-3 BCA ¶ 19,025, at 96,085-87; Isadore

& Miriam Klein, GSBCA 6614, et al., 84-2 BCA ¶ 17,273, at 86,003-04; Exchange National Bank, 83-2 BCA at 83,425-26. In the instant case, however, no challenge has been raised to the validity of the appraisal contained in the record as to the fair market value at the date of the lease ($543,000). We will therefore use this value in our consideration of this issue.[6] Fifteen percent of $543,000 is $81,450; the latter number is the maximum annual rent which could be paid under the 1977 lease.

We do perceive a difficulty with GSA's implementation of the Economy Act limitation, however. It relates not to the appraisal of the fair market value of the property in 1977, but to the allocation of rent in 1992 between occupancy and services. The nature of the services provided by the lessor did not change during the entire period the lease was in effect. When the contracting officer performed the analysis described in Background paragraph 24, he assumed that $8,240 of the $77,500 rent being paid in each of the years 1992, 1995, and 1996 was for services. The record contains two different estimates of the lessor's cost of providing services. One is $5,671, an estimate first made in 1977; the other is $8,240, first made in 1987. Neither of these estimates was made contemporaneously with the need for applying a cost figure, however. See American National Bank, 85-1 BCA at 89,013 ("Clearly the preferable course is to use the most recent information available."). Because of inflation occurring during the period from 1977 to 1996, even if either of these estimates was accurate when made, it could not have been accurate in 1992, 1995, or 1996. If we look to the consumer price index (CPI) as a guide for measuring increasing costs, for example, we see that the index rose from 60.6 in 1977 to 113.6 in 1987 to 140.3 in 1992, and continued to rise to 152.4 in 1995 and 156.9 in 1996. Department of Labor, Bureau of Labor Statistics, Consumer Price Index, available at ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt. Thus, something which cost $5,671 in 1977 would have cost $13,129.39 in 1992, $14,261.72 in 1995, and $14,682.84 in 1996; and something which cost $8,240 in 1987 would have cost $10,176.69 in 1992, $11,054.37 in 1995, and $11,380.77 in 1996.

GSA's implementation of the Economy Act limitation cannot stand because a fundamental premise on which the calculation is based is irrational. The agency has no sound basis for concluding that the services portion of the base rent it paid in 1992, 1995, or 1996 was any particular amount. Consequently, it has no sound basis for concluding that the occupancy portion of that base rent ($77,500 less the services portion) was any particular amount. (We note that if the calculation were made using either of the service cost estimates included in our record, adjusted for inflation, the net annual rent allocated to occupancy would be less than the limiting figure of $81,450 maximum annual rent.[7]) Thus, we conclude

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[6]2160 Partners notes that when the contracting officer imposed the Economy Act limitation, he expressed concern that an appraisal of the property's value in 1992 had not been performed. See Appeal File, Exhibit 86 at 314-15. The lack of a current appraisal is of no moment, however, for the value when the lease was agreed to in 1977, not the value in 1992, is the key figure for applying the Economy Act limitation.

[7]If the figure $13,129.39 (the 1977 estimate, adjusted for inflation) is used as the cost of services in 1992, the portion of rent ascribed to occupancy becomes $64,370.61. When the (continued...)

that the agency's implementation of the limitation was improper and that 2160 Partners is due the amounts deducted in accordance with that implementation – $596.43 for each of 1992, 1995, and 1996, or a total of $1,789.29.

Tax reduction

The Real Estate Tax Escalator clause says that if the lessor, on behalf of the Government, contests any tax assessment, "the Government shall reimburse the lessor for its costs or expenses in connection with any such contest or proceeding." Three times during the course of this lease – in 1991, 1992, and 1993 – 2160 Partners contested tax assessments and the Government reimbursed the lessor for the costs it incurred in doing so. The clause says additionally, "If the lessor received any refund of taxes, the lessor shall promptly rebate to the Government the Government's proportionate share thereof." GSA contends that under authority of this sentence, it deducted $4,188.85 from the tax escalation payment due for 1993 and $6,024.91 from the tax escalation payment due for 1994. The agency maintains, "If the Lessor keeps all the tax savings it received as a result of using the services of the tax consultant for which the Government paid then it will experience a windfall." Respondent's Motion for Summary Relief at 19.

As 2160 Partners points out, GSA's actions and argument are based on fundamental misunderstandings. Most important, the clause entitles the Government to receive its proportionate share of any refunds of taxes the lessor receives (if the Government pays for the cost of successfully contesting any assessments), but 2160 Partners received no refunds as a result of the successful contests made in 1991, 1992, and 1993. The lessor simply paid taxes based on the reduced assessments. Thus, if 2160 Partners had to pay GSA any part of the tax escalation amount for any of these years, the lessor would not receive the full benefit of the bargain it struck with GSA; GSA, not 2160 Partners, would receive a windfall.

Even if GSA were entitled to some sort of rebate, the numbers used by the agency could not rationally reflect that rebate. The contests to the tax assessments occurred in 1991, 1992, and 1993, but the deductions made by GSA to tax escalation payments were for 1993 and 1994. The contests resulted in reductions of taxes in the amounts of $2,613.96 for 1991, $4,335 for 1992, and $3,060 for 1993, but the deductions made by GSA to tax escalation payments were $4,188.85 for 1993 and $6,024.91 for 1994. There is no reasonable relationship between what actually occurred and the deductions GSA took.

(...continued)
tax escalation amount of $12,786.43 is added to the occupancy portion, the net annual rent would be $77,157.04. If the figure $10,176.69 (the 1987 estimate, adjusted for inflation) is used as the cost of services in 1992, the portion of rent ascribed to occupancy becomes $67,323.31. When the tax escalation amount is added to the last number, the net annual rent would be $80,109.74. Similar calculations yield net annual rent of $76,024.71 or $79,232.06 in 1995, and $75,603.59 or $78,905.66 in 1996. All these numbers are less than the Economy Act limitation of $81,450.

We conclude that 2160 Partners is entitled to the full amount of the calculated tax escalation payments for 1993 and 1994 – $4,188.85 more than GSA has paid for 1993 and $6,024.91 more than it has paid in 1994, for a total of $10,213.76.

We note that GSA did receive significant benefits as a result of the reductions in the taxes on the property in 1991 and 1992. The taxes for these two years were used in calculating the tax escalation payments due 2160 Partners in 1992, 1993, 1994, 1995, and 1996. If the reductions in taxes for 1991 and 1992 had not been made, the tax escalation amount for the five years in question would have been $16,260.91 annually, rather than $12,786.43.[8] Economy Act limitation caps on total net annual rent (if any) aside, GSA would have been obligated to make an additional $17,372.40 in tax escalation payments over the five-year period. GSA paid only $1,737.49 in tax consultants' fees for 1991 and 1992. It saved ten times the amount of this investment.

1997 to 2001

In 1997, the lease signed in 1977 came to the end of its twenty-year life. The ten-year firm term and the two five-year option terms had all expired. GSA wanted to remain as a tenant on the property, however. It asked 2160 Partners to quote a price for a two-year renewal of the contract. The lessor did so, and the parties then negotiated terms. SLA No. 13 incorporated the agreed-upon arrangement: two years (December 1997 through December 1999) at a rent of $100,000 per year. When this two-year period ended, GSA still wished to remain on the property. The parties again negotiated terms of a lease renewal, and SLA No. 14 incorporated the agreed-upon terms of one year (December 1999 through December 2000) at a rent of $160,000 per year. A final SLA, No. 15, carried the last arrangement through to January 2001.

None of the three SLAs covering the period of time from 1997 to 2001 mentioned the Tax Escalator clause. 2160 Partners maintains that because each of the SLAs includes the sentence, "All other terms and conditions of the lease shall remain in force and effect," and this clause is one of those "terms and conditions," the clause applies to that period. According to the lessor, "[T]his Board has repeatedly held in similar circumstances that when the Government extends the contract beyond its contemplated life, Escalation Clauses of this type continue to operate." Appellant's Brief in Support of Its Motion for Summary Relief at 3. 2160 Partners also notes that at one time, GSA actually made a tax escalation payment for 2000. GSA contends, on the other hand, that even if all the terms in the lease remained in force and effect during the years of contract extension, the Tax Escalator clause would not apply to those years because the clause by its own terms limited tax adjustments to only three specific years. GSA insists that the tax escalation payment for 2000, which the agency recouped through its net payment following the contracting officer's decision, was in error.

We agree with GSA on this issue.

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[8]The average of the 1991 taxes ($22,351.58) and the 1992 taxes ($19,659.90) would have been $21,005.74. The last figure less the base amount for tax escalation purposes, $4,744.83, would have been $16,260.91.

The cases to which the parties call our attention – primarily Plaza East Ltd. Partnership, GSBCA 5991, 84-1 BCA ¶ 17,002 (1983); Twelfth & L Streets Ltd. Partnership, GSBCA 7409, 85-2 BCA ¶ 18,067, reconsideration denied, 85-3 BCA ¶ 18,385; and Gresham Sand & Gravel Co., GSBCA 7709, 86-3 BCA ¶ 19,084 – all discuss the application of tax escalation clauses in periods of time when a lease had been renewed by the Government's exercise of an option established in the lease itself. See also Tulsa VA Clinic Associates, VABCA 3793, 95-1 BCA ¶ 27,358 (1994) (summarizing GSBCA cases). Here, however, the issue is whether the Tax Escalator clause applies in a period of time beyond the option years called for in the original lease. While the Government's tenancy during that period was technically made possible by modifications to the original lease, the terms of that tenancy were separately bargained for, so the modifications are better construed as tantamount to independent agreements. Ocean Technology, Inc. v. United States, 19 Cl. Ct. 288, 291-93 (1990); Blue Shield of Massachusetts, Inc., ASBCA 26758, 82-2 BCA ¶ 15,991, at 79,292-93.

Those modifications made no mention of tax escalation amounts as part of the compensation to be paid for GSA's occupancy of the property. Although 2160 Partners' general partner may have told GSA that he expected tax escalation payments for 1998 and 1999 – and for the purpose of resolving GSA's motion for summary relief, we must assume that he did[9] – this does not help the lessor's case. The general partner acknowledges that the GSA negotiator did not respond to his statement about tax escalation, and it is undeniable that this subject was not covered by the lease modification for those years. We therefore cannot find any meeting of the minds that tax escalation adjustments were to be made to the agreed-upon rent for the period from December 1997 to December 1999. The evidence as to the inclusion of a tax adjustment provision in the extension for the period from December 1999 to December 2000 is even weaker. We consequently agree with GSA that the tax escalation payment for 2000 (which, incidentally, was not calculated in the manner prescribed by the Tax Escalator clause, as implemented while the lease was effective) was improperly made.

As GSA suggests, even if the lease extensions were to be viewed as incorporating the Tax Escalator clause of the original lease, that would not help the lessor's position. The clause specifically provides for adjustments in rent "at the end of the first 5 years, and at the end of the first 10 years, and at the end of the first 15 years of Government occupancy under the lease." The clause says nothing about adjustments at the end of the first twenty years of Government occupancy. In this respect, it is like the clauses in Gresham Sand & Gravel, 86-3 BCA at 96,424, and Tulsa VA Clinic, 95-1 BCA at 136,328 (adjustment for changed taxes "at the end of the first five years of government occupancy," held to establish a single adjustment), and dissimilar from the clause in Plaza East, 84-1 BCA at 84,679 (adjustment

[9]We would say this whether the general partner's statements were uncontested or the subject of dispute. We note that GSA has not presented any affidavits, declarations, or documents in disagreement with the statements, as is required to establish a genuine issue as to a motion for summary relief. See Rule 108(g)(3), (4) (48 CFR 6101.8(g)(3), (4) (2002)); CACI, Inc. - Federal v. General Services Administration, GSBCA 15588, 03-1 BCA ¶ 32,106, at 158,755 (2002).

"at the end of the first 3 year(s) and at the end of every subsequent 3 year(s) of Government occupancy," held to require recalculation each year that the lease was in force).[10]

We note additionally that even if we had accepted 2160 Partners' theory that (a) the SLAs extending the lease beyond its initial twenty-year life were to be construed as carrying forward the Tax Escalator clause, and (b) the clause should be understood as providing for an adjustment in rent at the end of the first twenty years of Government occupancy, we could not award any additional rent to the lessor for four of the five years in question. This is because if the 1997 to 2001 extensions were viewed as part of the original lease, we would have to apply to rental payments for the extension period the Economy Act limitation based on the 1977 fair market value of the property. That limitation, as stated above, was $81,450 in net annual rent. Even adjusting the services component of the rent for increases in the Consumer Price Index, as we did for the 1992 to 1996 period, the net annual rent for each year of the extension periods – apart from any tax escalation payment – would exceed the Economy Act limitation.[11] Thus, no tax escalation payment could be made for any of those years.

2160 Partners' claim for tax escalation payments for the years beyond the initial twenty-year term of the lease is denied.

Decision

The appeal is **GRANTED IN PART**. GSA must pay to 2160 Partners as tax escalation payments, for the lease in question, the sum of $36,272.61. GSA must also pay

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[10] Twelfth & L, 85-2 BCA ¶ 18,067, reconsideration denied, 85-3 BCA ¶ 18,385, is a confusing decision which appears to have been based on a concession by GSA that the tax escalation clause applied during the ten-year option period, notwithstanding explicit language to the contrary in the lease and a supplemental lease agreement. The lease stated that tax adjustments would be made to the rent "at the end of the first 3rd [sic] year(s) and at the end of the first 6th and 9th [sic] year(s) of Government occupancy." 85-2 BCA at 90,679. The supplemental lease agreement entered into at the end of the initial ten-year term stated that "[r]eal estate tax escalation is not applicable to the renewal term." Id. at 90,680. These provisions would seem to make clear that tax escalation adjustments would not be made after the ninth year of occupancy.

[11] Using the 1977 services cost of $5,671 as a base and the Consumer Price Index as an adjusting factor, for example, the cost of equivalent services would have been $15,253.68 in 1998, $15,590.57 in 1999, $16,114.62 in 2000, and $16,573.17 in 2001. Of the actual annual rent of $100,000 in 1998 and 1999, and $160,000 in 2000 and 2001, the portion attributable to occupancy would consequently have been $84,746.32 in 1998, $84,409.43 in 1999, $143,885.38 in 2000, and $143,426.83 in 2001.

to 2160 Partners interest on this amount, as provided by the Contract Disputes Act of 1978, 41 U.S.C. § 611 (2000), from the date on which the contracting officer received the certified claim dated October 3, 2002, until the date of payment.

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STEPHEN M. DANIELS
Board Judge

We concur:

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EDWIN B. NEILL
Board Judge

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CATHERINE B. HYATT
Board Judge