

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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January 12, 2006

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GSBCA 16752-RELO

In the Matter of DEBORAH A. BENTLEY

Deborah A. Bentley, Alamogordo, NM, Claimant.

Major James M. Winner, Deputy Staff Judge Advocate, Office of the Staff Judge Advocate, Department of the Air Force, Holloman Air Force Base, NM, appearing for Department of the Air Force.

**BORWICK**, Board Judge.

In this matter, claimant, Ms. Deborah Bentley, sold her residence in connection with her permanent change of station. The Department of the Air Force, agency, denied reimbursement of the owner's title insurance fee she paid for the buyer at the real estate closing. Claimant contests that denial. We sustain the agency's determination because the agency correctly applied the Federal Travel Regulation (FTR) and the Joint Travel Regulations (JTR).

## Background

Claimant transferred in the interest of the Government from Goodfellow Air Force Base (AFB), San Angelo, Texas, to Holloman AFB, Alamogordo, New Mexico. Claimant sold her house in Texas, with a closing date of July 8, 2005, and paid a premium for owner's title insurance to Stroman Abstract & Title Company in the amount of \$625 on behalf of the buyer. Claimant sought reimbursement of that amount from the agency, but the agency denied reimbursement because it considered that claimant had not met her burden of establishing that in the locality of San Angelo, Texas, sellers customarily pay owner's title insurance. The agency also determined that the sales contract did not make claimant's payment of title insurance a prerequisite either to the financing or to the transfer of the property.

As evidence of customary practice in the San Angelo area, claimant submitted the statement of the office manager of Stroman Abstract & Title Company, who stated that "this fee is customarily paid for by the seller." The agency canvassed two title agencies and three real estate companies in the San Angelo, Texas, area not involved in claimant's transaction. The firms were Bristo Realty, Coldwell Banker, Frontier Real Estate, First Title Company, and Surety Title Company. Four of the firms contacted stated that payment of owner's title

insurance was negotiable, while the fifth stated that normally the seller paid the owner's title insurance. None of the firms stated that it was customary in the San Angelo, Texas, area for the seller to pay owner's title insurance.

In response, claimant e-mailed real estate firms and asked if it was customary for sellers to provide title insurance in the San Angelo area. An employee of Dierscheke and Dierscheke Realty stated that "it is customary for the seller to provide title insurance here." An official of San Angelo Homes stated that "there are sellers['] costs when closing a home, customarily the Title Policy is one of them." He also stated that "depending on the type of financing the buyer has, there may be up to \$860 of the buyers['] costs the seller has to pay." Another real estate firm stated that "yes it is customary but everything is negotiable but I would say 99.9% it is the seller's responsibility."

### Discussion

Both the FTR and JTR authorize the agency to reimburse a transferred employee for certain miscellaneous expenses incurred in the sale of a residence at the old permanent duty station, provided those expenses are customarily paid by the seller of the residence in that locality and to the extent that the amount claimed is within the limits of the amounts customarily paid in the locality. 41 CFR 302-6.2(d) (2005); JTR C14002-A.4. It is claimant's burden to establish by a preponderance of evidence that it is customary for the seller to assume a large percentage of the buyer's closing costs in the locality of the residence sold. *Sandra L. Wilks*, GSBCA 15669-RELO, 02-2 BCA ¶ 31,962. The term "customary" means that a particular cost is invariably assumed by the seller for the buyer or that over the years a commanding percentage of sellers have contributed to buyers' closing costs. *Id.* General statements as to customary practice, particularly by real estate firms that have participated in the real estate transaction involved, are not as persuasive as sales data from independent real estate firms. *Evan E. Zillmer*, GSBCA 15728-RELO, 02-2 BCA ¶ 31,958.

In this matter, we conclude that claimant has not established by a preponderance of the evidence, that it is customary for a seller to assume the buyer's expense of owner's title insurance in the San Angelo, Texas, locality. Considering both claimant's and the agency's evidence together, it is not evident that practice is indeed "customary"; to the contrary, whether the practice is customary is a matter of debate among real estate professionals. Although some real estate agents and title companies told claimant that the practice is customary, other real estate agents and title companies disagree. Also, with one exception mentioning percentages, the statements upon which claimant relies are so general, it is not clear that the authors of those statements use the term "customary" in the same sense that is contemplated by the regulations and our case law construing those regulations. The claim must fail on that ground alone. The case of *Juanita L. Nason*, GSBCA 15746-RELO, 02-2 BCA ¶ 31,890, is not to the contrary. There the agency conceded that the practice was customary, a concession the agency does not make here.

Regulation provides that the seller's payment of the owner's title insurance is reimbursable provided that it is a prerequisite to the financing or to the transfer of the property. 41 CFR 302-11.200 (f)(9); JTR C14002-A.4.a(9). The agency argues that the payment was not a prerequisite to the transfer of the property. The agency is correct. The default clause of the contract provided that if the seller failed to provide the title commitment, the buyer "may" extend the time of performance or terminate the contract. In

other words, termination was at the buyer's option and thus the seller providing the title insurance was not a prerequisite to the transfer. This distinguishes the case from *Nason*.

The claim is therefore denied.

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ANTHONY S. BORWICK  
Board Judge