



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF GRANTED IN PART:
August 16, 2018

CBCA 5506, 5715, 5849

JBG/FEDERAL CENTER, L.L.C.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent in CBCA 5506, 5849,

and

DEPARTMENT OF TRANSPORTATION,

Respondent in CBCA 5715.

Vincent Mark J. Policy and William C. Casano of Greenstein DeLorme & Luchs, P.C., Washington, DC, counsel for Appellant.

Lesley Busch Uhr and Bradley Boettcher, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent in CBCA 5506, 5849.

Lynn M. Deavers and Michael A. Smith, Office of the General Counsel, Department of Transportation, Washington, DC, counsel for Respondent in CBCA 5715.

Before Board Judges **DRUMMOND**, **SULLIVAN**, and **CHADWICK**.

SULLIVAN, Board Judge.

JBG/Federal Center, L.L.C. (JBG), filed a motion seeking a ruling on which party bears the burden of proof in CBCA 5506. While the General Services Administration (GSA) acknowledges that it has the burden of proof regarding the government claim for repayment, it opposes JBG's motion because JBG's complaint raises several different claims. We treat the motion as one for summary relief and decide that GSA bears the burden on its claim for repayment but that JBG bears the burden of proof on its claim for amounts withheld from tax reimbursements beginning in 2015.

Background

JBG filed the first of these appeals, CBCA 5506, following receipt of a contracting officer's decision in which GSA asserted (1) a claim for repayment of tax amounts previously paid in error, and (2) a right to withhold from real estate reimbursements taxes attributable to the portion of the parking lot not included in the lease. Exhibit 62.¹ In issuing this decision, the contracting officer was responding to two claims submitted by JBG. In its initial claim, JBG demanded payment of the second half of the 2015 real estate taxes, for which, as of the date of the claim, GSA had failed to reimburse JBG. Exhibit 55. Following payment of less than the full amount, JBG submitted an amended claim in which it demanded payment of the tax amounts withheld and asserted a right to "reimbursement of one hundred percent (100%) of the real estate taxes, [business improvement district] taxes and [PILOT] payments on [the property] as levied by the District of Columbia from time to time during the term of the lease." Exhibit 59 at 14.²

On a motion for partial summary relief filed by GSA, we have already determined that GSA is not obligated to reimburse JBG the portion of the property taxes attributable to the parking lot of the building based upon the plain meaning of the tax provision in the lease. *JBG/Federal Center, L.L.C. v. General Services Administration*, CBCA 5506, et al., 18-1 BCA ¶ 37,019, at 180,276. We also held that GSA may seek repayment of amounts it overpaid to JBG for the property tax in the six years prior to September 2016, the date of the

¹ The exhibits are in the appeal file for CBCA 5506, unless otherwise noted.

² In the third appeal, CBCA 5849, JBG seeks (1) a refund of the portion of any real estate tax refunds paid to GSA over the course of the lease, attributable to the parking garage, and (2) the Government's financing savings share attributable to the real estate tax payments for the parking garage. Appeal File (CBCA 5849) Exhibit 144 at 2-3. JBG acknowledges that it bears the burden of proof on these claims.

contracting officer's final decision asserting the government's claim for repayment. *Id.* at 180,277. We denied JBG's motion to reconsider the application of the continuing claims doctrine. *JBG/Federal Center, L.L.C. v. General Services Administration*, CBCA 5506, et al., 18-1 BCA ¶ 37,087, at 180,556-57. Whether GSA has withheld from reimbursement or demanded repayment of the proper amounts remains to be determined after further proceedings before the Board.

Discussion

JBG seeks a ruling on which party has the burden of proof on the two claims at issue in CBCA 5506—GSA's demand for repayment and JBG's demand for amounts withheld from the property tax reimbursement for taxes attributable to the parking lot. Answering the question of which party has the burden is relatively simple. "The claimant bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation." *Willems Industries, Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl. 1961). This axiom applies regardless of whether the Government or the contractor is the claimant. *See, e.g., Navigant SatoTravel v. General Services Administration*, CBCA 449, 11-1 BCA ¶ 34,765, at 171,103; *Springcar Co. v. General Services Administration*, CBCA 1310, et al., 10-1 BCA ¶ 34,407, at 169,874;

The more challenging question is who has asserted the claims on appeal in CBCA 5506. Both parties characterize the Government's demand for repayment as a government claim upon which GSA bears the burden of proof. We agree. The assertion of a right to recoup funds paid in error is a government claim upon which the Government bears the burden of proof. *TST Tallahassee, LLC v. Department of Veterans Affairs*, CBCA 1576, 11-1 BCA ¶ 34,672, at 170,805. The contracting officer asserted the demand for repayment in a final decision that is now on appeal, satisfying the requirements for assertion of a government claim. *See M.G.C. Co.*, DOT CAB 1553, 85-1 BCA ¶ 17,777, at 88,781 (1984). GSA bears the burden to prove that it has calculated the correct amount.

The parties also postulate that GSA bears the burden regarding the "Government's calculation of amounts to deduct from real estate taxes." Appellants Reply Brief at 4; Respondent's Response Brief at 5.³ As noted, the Board has already determined that GSA need not reimburse JBG the property tax amounts attributable to the portion of the parking

³ JBG asserted without explanation, in a footnote to its motion on the burden of proof, that the burden issue would be "moot" if we denied reconsideration as to the statute of limitations. Appellant's Motion at 2 n1. We do not view the issue as moot.

lot not included in the lease. However, we still must decide whether the amount withheld by GSA on that basis is correct.

The claim for amounts withheld is JBG's claim, which it asserted in its certified claim and amended claim to the contracting officer. Although GSA has a claim for repayment based upon the same contract terms, GSA holds the funds for the property taxes that JBG wants. The claim is brought by "the party who does not have possession of the disputed money, and the party against whom the money has been withheld." *Paradyne Corp.*, ASBCA 29300, et al., 728, 84-3 BCA ¶ 17,600, at 87,684. This case is strikingly similar to *TST Tallahassee*, cited by both parties. In that case, GSA sought repayment of tax reimbursements it believed were paid in error based upon the tax adjustment clause of the contract, and the contractor sought payment of tax reimbursements the Government had not yet paid. Each party bore the burden to prove entitlement to the monies it was seeking. *TST Tallahassee*, 11-1 BCA at 170,805-06. JBG bears the burden to prove that the amounts withheld by GSA are incorrect.

Decision

JBG's motion for summary relief is **GRANTED IN PART**. GSA bears the burden to prove the amounts to be repaid, and JBG bears the burden to prove the amounts improperly withheld from property tax reimbursements since 2015. The Board will convene the hearing in this appeal on September 9, 2019.

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

We concur:

Jerome M. Drummond

JEROME M. DRUMMOND
Board Judge

Kyle Chadwick

KYLE CHADWICK
Board Judge