UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR PARTIAL SUMMARY RELIEF GRANTED;
DENIED IN PART: March 22, 2011

CBCA 1346

CINDY KARP,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

John M. Comolli of McLanahan & Comolli, Athens, GA, counsel for Appellant.

Lesley M. Busch, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT, VERGILIO**, and **SHERIDAN**.

HYATT, Board Judge.

This appeal presents claims arising under a lease for office, warehouse, and storage space in Athens, Georgia. Appellant, Cindy Karp, seeks four years of property tax increases, as well as expenses she incurred in repairing damages to the building following the tenant's vacation of the premises. Respondent, the General Services Administration (GSA), has moved for partial summary relief with respect to appellant's claim for reimbursement of property tax increases for the years 2000 through 2003.

The Board grants the motion. Appellant has not established either that she complied with the requirement for timely notice of tax increases provided for in the Tax Adjustment clause of the lease or that the requirement was waived. The Board thus denies this element of appellant's claim.

Findings of Uncontested Facts

1. On June 29, 1999, GSA awarded lease GS-04B-39093 to appellant, Cindy Karp. The lease was for approximately 6400 square feet of office, warehouse, special, and storage space located in Athens, Georgia, to be occupied by the U. S. Fish and Wildlife Service. The lease commenced on July 1, 1999, for a ten-year term, with the proviso that the Government could terminate at any time on or after July 1, 2004, upon at least sixty days' written notice to the lessor. Respondent's Statement of Uncontested Facts (RSUF) ¶¶ 1-2; Appellant's Response to Respondent's Statement of Uncontested Facts (ASUF) ¶¶ 1-2.

2. GSA negotiated to lease these premises through its regional broker contractor, Amelang Management Corporation. An Amelang employee, Mary Nix, dealt directly with appellant. The lease was executed by Ms. Karp and a GSA contracting officer, Kenneth Day. RSUF ¶¶ 3-4; ASUF ¶¶ 3-4; Appeal File, Exhibit 1; Deposition of Mary Gore Nix (July 17, 2009) at 7, 51 (Nix Deposition).

3. The lease provided for the determination of a base property tax. The tax base represented the amount from which all tax increases were to be calculated throughout the duration of the lease. RSUF ¶ 5. The parties disagree on the year that should serve as the base year,[1] but for the purpose of resolving this motion, this dispute has no relevance.

4. The Tax Adjustment clause in the lease states in pertinent part:

> (b) Base year taxes as referred to in this clause are the real estate taxes for the first twelve (12) month period coincident with full assessment, or may be an amount negotiated by the parties that reflects an agreed upon base for a fully assessed value of the property.
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> . . . .
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> (d) The Lessor shall furnish the Contracting Officer with copies of all notices which may affect the evaluation of said land and buildings for real estate taxes thereon, as well as all notices of a tax credit, all tax bills and all paid tax receipts, or where tax receipts are not given, other similar evidence

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[1] GSA uses the amount of $3572.70, the taxes paid in 2000, as the tax base. RSUF ¶ 5. Appellant contends that the appropriate base property tax is the amount of $3072, paid in 1998, the latest year for which tax information was available at the time the lease was executed. ASUF ¶ 5.

> of payment acceptable to the Contracting Officer (hereinafter, evidence of payment), and a proper invoice (as described in the Prompt Payment clause of this lease, GSAR 552.232-71) of the tax adjustment including the calculation thereof, for each year that real estate taxes are incurred during the lease term or any extension thereof. All such documents are due within ten (10) calendar days of receipt except that the proper invoice and evidence of payment shall be submitted within sixty (60) calendar days after the date the tax payment is due from the Lessor to the taxing authority. **Failure to submit the proper invoice and evidence of payment within such a time frame shall be a waiver of the right to receive payment resulting from an increased tax adjustment under this clause.**
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> (e) The Government shall make a single annual lump sum payment to the Lessor for its share of any increase in real estate taxes during the lease over the amount established as the base year taxes, or receive a rental credit or lump sum payment for its share of any decreases in real estate taxes during the lease term below the amount established in the base year taxes.
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> . . . .
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> (g) The Government may direct the Lessor upon reasonable notice to initiate a tax appeal or the Government may decide to contest the tax assessment on behalf of the Government and the Lessor or for the Government alone. The Lessor shall furnish to the Government information necessary to appeal of the tax assessment in accordance with the filing requirements of the taxing authority. If the Government decides to contest the tax assessment on its own on behalf of the Government and the Lessor, the Lessor shall cooperate and use all reasonable efforts including but not limited to affirming the accuracy of the documents, including documents required for any legal proceeding and taking such other actions as may be required.

RSUF ¶ 6; ASUF ¶ 6; Appeal File, Exhibits 1, 2 (emphasis in original).

5. GSA's notice of intent to vacate the property in sixty days was transmitted to the lessor on July 30, 2004. The lease was terminated effective September 30, 2004. RSUF ¶ 7; ASUF ¶ 7; Appeal File, Exhibit 8.

6. Sometime after the lease was terminated, the lessor sent tax adjustment documentation for the years 2000 through 2004 to GSA, asking for payment of the increased amounts. RSUF ¶ 8. Appellant does not contest this statement, but adds that:

> Ms. Karp testified [at her deposition] she also sent copies of the paid ad valorem tax bills to Mary Nix the first two years into the Lease. During the course of the Lease she sent copies of the tax bills to Mary Nix, Vince Aliffi, Mary Curr[i]n, and Elaine Peters, among others. It is believed Elaine Peters became the contracting officer for the Lease shortly after it was signed by Kenneth Day.[[2]] Also, Ms. Nix indicated that had she received the tax bills, she would have forwarded them to GSA.[3] Because of the high turnover of personnel and the method for routing faxes involving tax matters at GSA, it is possible the faxes were misdirected or misplaced by GSA.

ASUF ¶ 8.

7. In October 2005, approximately one year after the lease was terminated, Ms. Peters, the contracting officer assigned to this lease at that time, compensated the Lessor for the tax increase incurred for the year 2004, even though timely notice had not been received. RSUF ¶ 9; ASUF ¶ 9.

8. By letter dated April 17, 2008, addressed to Mr. Day, appellant filed a formal claim with respect to the subject lease. As to the issue presented in this motion, the claim stated the following:

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[2] Respondent proffered the affidavit of Elaine D. Peters, a contracting officer employed by GSA in Atlanta, Georgia. In her affidavit, Ms. Peters attested that she has been a contracting officer with GSA for a total of six years. She stated that she was not the contracting officer for the lease prior to its termination in September 2004, although she was responsible for drafting the contracting officer's final decision dated June 23, 2008. She further averred that as contracting officer she had limited communications with Ms. Karp, and did not advise Ms. Karp that payments for tax adjustments would be resolved at the end of the lease term. She stated that she did advise Ms. Karp that the GSA tax division would review the tax information she submitted after the lease was terminated. Affidavit of Elaine D. Peters (Oct. 4, 2010) ¶¶ 2, 4-7.

[3] Ms. Nix testified in her deposition that she did not recall receiving tax notices from Ms. Karp or having any discussions with her concerning taxes, but stated that any notices or information directed to her would have been forwarded to the GSA contracting officer she worked with on the lease, Mr. Day. Nix Deposition at 13-15, 35-36. She also stated that she explained to Ms. Karp that she was a subcontractor, not a GSA employee, and that the contracting officer for the lease was Mr. Day. *Id.* at 7, 51.

> Under the terms of the Lease, the following ad valorem taxes are due and owing for the property for the following years:
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> | | |
> |---|---|
> | 2000: | $3,572.70 |
> | 2001: | $3,572.70 |
> | 2002: | $4,438.91 |
> | 2003: | $4,506.77 |
>
> Each was paid by the Lessor in October of the Tax Year. GSA paid the ad valorem taxes on the property for the year 2004, the pro-rated sum of $3,374.99, in November of 2005. The amount paid for 2004 included the adjusted increase of the taxes for that year. The Lessor gave timely notice also of the adjusted increases for the years 2002 and 2003, per the tax adjustment provisions of the Lease. The total demanded for taxes owed is $16,091.08, plus interest thereon from the date of payment. Attached to this letter are copies of the applicable tax bills in documentation of the applicable tax bills paid by the Lessor.

Appeal File, Exhibit 10. In her opposition to the motion for summary relief, appellant concedes that the base year taxes were amortized throughout the lease term and that her claim must be limited to the amount of tax increases over and above the base year tax amount. ASUF ¶ 12.[4]

9. On June 23, 2008, Ms. Peters denied the lessor's claim for tax increases for the years 2000 through 2003, stating that the requests for payment had not been timely made under the terms of the lease. Appeal File, Exhibit 11.

10. In an affidavit submitted with the appellant's supplemental appeal file, Rule 4(b), the lessor, Cindy Karp, provided the following statement:

> 2. In connection with the denial of compensation for unpaid taxes under the terms of the Lease, the Letter Opinion is factually incorrect. I, in fact, gave timely notice to GSA for the tax years 2000 and 2001. A copy of my fax

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[4] In its brief, respondent notes that the lessor was inadvertently overpaid for the full amount of taxes in 2004 and suggests that appellant actually owes the Government money as a result. The contracting officer has not written a decision making such a claim, however, so this issue is not before us and we do not address it.

> to Mary G. Nix, GSA Contract[ing] officer, of October 26, 2001, is attached hereto.[[5]] I have been unable to locate my fax of the tax bill for 2000 but it was timely sent to Mary G. Nix. Neither of these bills was paid by GSA. When I continued to call and request payment, I was told by Ms. Nix that GSA would pay the tax bills at the end of the term of the lease when an accounting would be had at that time. Please note that I later sent Elaine Peters a fax, attached, in which I confirmed what Nix had advised me.
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> 3. In reliance on the direction of Ms. Nix, I did not thereafter send the yearly tax bills to GSA believing the notice provision had been waived.
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> 4. Please note as well that the GSA paid the pro-rata share of the tax bill for 2004, the last year of the Lease, in November of 2005, over a year after termination of the Lease, thereby confirming no notice was required for that year or any other year. I in fact re-sent all five years several times to several employees of GSA as they seemed to have "misplaced" or "misdirected" directed them to the wrong people. In this regard, I contacted and spoke with [Ms. Nix and twelve named] individuals at GSA.

Supplemental Appeal File, Exhibit 1, Affidavit of Cindy Karp (Nov. 20, 2008) ¶¶ 1-4 (Karp Affidavit).

11. In her deposition, Ms. Karp attested that she was new to leasing with the Government and that she dealt mostly with Ms. Nix and relied on her advice. Deposition of Cindy Karp (July 17, 2009) at 20-21. She stated that she sent copies of the tax bills and invoices to Ms. Nix for the first two years of the lease and that Ms. Nix told her the tax payments would be resolved at the end of the lease. *Id.* at 33-34. At some point, Ms. Karp also started to send tax documentation to Vince Aliffi at GSA because she had been told that he was in charge of the tax issue. Ms. Karp said she never developed "a clear understanding of all of the different people involved and what their role was," but she also talked with

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[5] As noted in finding 2, Ms. Nix was employed by Amelang Management Corporation, not by GSA. The attachments to the affidavit include a fax cover sheet from Ms. Nix to Ms. Karp, dated May 14, 1999, prior to the execution of the lease. There is an undated fax cover sheet addressed to Mary Nix, with the notation "tax bill enclosed," and there is a tax cover sheet dated October 26, 2001, addressed to Brenda Driskell, with no subject matter noted. An undated fax cover sheet from Ms. Karp to Ms. Peters stated that Ms. Karp had been "waiting as told for the end of the lease to be compensated."

other employees of GSA, including Ms. Peters, in an effort to resolve this issue. *Id.* at 35-36.

Discovery has been completed with respect to the issue raised in this motion.

Discussion

Summary relief is properly granted when there is no genuine issue of material fact and the moving party is clearly 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); *US Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001); *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 1996). In resolving summary relief motions, a fact is considered to be material if it will affect our decision and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant at a hearing. *Anderson*, 477 U.S. at 248; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). In considering summary relief, the tribunal will not make credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249; *accord JAVIS Automation & Engineering, Inc. v. Department of the Interior*, CBCA 938, 09-2 BCA ¶ 34,309 at 169,478.

The moving party bears the burden of establishing the absence of any genuine issue of material fact. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The nonmoving party is then required to "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.,* 477 U.S. at 324 (quoting Federal Rule of Civil Procedure 56(e)); *Silver Springs Citrus, Inc. v. Department of Agriculture*, CBCA 1659, 10-2 BCA ¶ 34,537, at 170,338. The existence of only a scintilla of evidence or mere denials, conclusory statements, or evidence that is merely colorable and not significantly probative, will not suffice to defeat the motion. *Anderson*, 477 U.S. at 249-52; *ERBE Elektromedizin GmbH v. Canady Technology LLC*, 629 F.3d 1278, 1287 (Fed. Cir. 2010). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (1986). When appropriate, summary relief may serve as a salutary measure designed to achieve the just and speedy resolution of disputes. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987); *CACI, Inc.-Federal v. General Services Administration*, GSBCA 15588, 03-1 BCA ¶ 32,106, at 158,755 (2002); *Adelaide Blomfield Management Co. v. General Services Administration*, GSBCA 12851, 95-1 BCA ¶ 27,514 at 137,114.

Appellant seeks to recover property tax increases for the leased premises for the years 2000 through 2003. Respondent relies on the express language of the tax adjustment clause in the lease to support its motion for summary relief. Finding 4. This clause, which

expressly warns that the contractor will lose rights if a submission is not made in the prescribed period of time, has been construed to contain a binding notice requirement that is strictly enforced. *Roger Parris dba Manchester Realty v. General Services Administration*, GSBCA 15512, 01-2 BCA ¶ 31,629 at 156,259-60; *Riggs National Bank of Washington, D.C. v. General Services Administration*, GSBCA 14061, 97-1 BCA ¶ 28,920, at 144,179; *Universal Development Corporation v. General Services Administration*, GSBCA 12138 (11520)-REIN, et al., 93-3 BCA ¶ 26,100, at 129,739-40. This contrasts with the general rule, first enunciated by the United States Court of Claims in *Hoel-Steffen Construction Co. v. United States*, 456 F.2d 760, 768 (Ct. Cl. 1972), that notice provisions should not be "applied too technically and illiberally" when the Government has full notice of the operative facts. In both *Riggs* and *Universal Development*, the board, after considering the rationale of *Hoel-Steffen*, together with the equally venerable principle that agreed-upon contract terms should be given effect, *see, e.g.*, *Madigan v. Hobin Lumber Co.*, 986 F.2d 1401, 1403-04 (Fed. Cir. 1993), concluded that this notice provision should be enforced. *Riggs*, 97-1 BCA at 144,179; *Universal Development,* 93-3 BCA at 129,739.

In response to GSA's motion, appellant asserts that she undertook to serve the requisite notice for the first two years (2000 and 2001) and that, in any event, she was assured that she could wait until the end of the lease to pursue collection of the tax adjustments that had paid. Further, appellant contends that the payment of the 2004 tax increase, for which there was also no timely notice, constituted a waiver of the notice requirement.

We first address appellant's evidence that she furnished GSA with timely notice of tax increases for the first two years of the lease. Appellant relies primarily on Ms. Karp's statements in her affidavit and deposition, to the effect that she faxed the information to Ms. Nix in the belief that Ms. Nix was the contact point for GSA. Findings 9-10.

As respondent points out, however, the adequacy of this evidence falls far short of what is needed to defeat the motion. Appellant has alleged that for tax years 2000 and 2001 the notice was faxed to Ms. Nix. Ms. Nix, however, had no authority under the lease to act on behalf of the Government and had no recollection of receiving such notices, although she stated that had she received notices she would have forwarded them to Mr. Day. Finding 6. The fax cover sheets that purport to support appellant's contentions do not include the underlying documentation and do not clearly state what the subject matter is or when the faxes were sent. Appellant has adduced no evidence showing that the faxes were actually transmitted to the contracting officer within the requisite time frame. After drawing every inference in favor of appellant, the evidence proffered does not create a genuine issue for trial. Even assuming Ms. Karp sent the tax notices to Ms. Nix, there is no basis for

concluding that the notices for 2000 and 2001 were timely received by the contracting officer. Ms. Nix was very vague, not recalling that she received the notices but stating that if she had she would have passed them on to GSA. Even after accepting these statements as true and granting every inference in appellant's favor, this evidence is insufficient to entitle Ms. Karp to a hearing on the question of whether actual notice was timely effected for the first two tax years. Under the plain language of the lease, appellant is required to establish that notice was timely provided to the contracting officer. GSA has no record of receiving the notices prior to the termination of the lease. Appellant has not produced any evidence or alleged probative facts to support an inference that the responsible contracting officer received the notices in the requisite time frame. *Cf. Sygnetics, Inc.*, ASBCA 56806, 10-2 BCA ¶ 34,576, at 170,464 (contractor had the burden to prove the contracting officer received a copy of its certified claim where the agency had no signed copy of the certification, even though the contracting officer averred she would not have issued a decision on the claim without a signed certification). The evidence relied upon by appellant is simply too speculative to meet her burden to raise a genuine dispute for trial.

Based upon the undisputed facts, the Board concludes that neither a contracting officer nor an authorized representative received a timely request for a tax adjustment for any of the four years at issue. Purported submissions to a regional broker do not constitute the necessary timely submissions for 2000 and 2001. Appellant concedes that the required notices were not provided to the contracting officer for 2002 and 2003. By 2004, submissions to the contracting officer for all four years were untimely.

Appellant also contends that the notice requirement was waived by GSA. First, according to appellant, the "frequent assurances" of GSA's agents and employees (Ms. Nix and Ms. Peters, among others) that tax issues would be resolved at the end of the lease led Ms. Karp to believe that the notice requirement of the lease would not be strictly enforced. Second, appellant points to the fact that GSA paid the tax adjustment for the final year of the lease without invoking the requirement for timely notice.

As the Court of Claims noted in *Gresham & Co. v. United States*, 470 F.2d 542, 555 (Ct. Cl. 1972):

> The 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.

It is, thus, not enough to say that Ms. Karp sent information to and received assurances from an employee of a GSA contractor or even from various individuals at GSA. It was her

responsibility to determine whether the individuals she dealt with had authority to bind the Government. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947) ("Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."); *accord Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997); *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990). *See also Potter v. United States*, 167 Ct. Cl. 28, 36 (1964) ("[N]o unauthorized officer of the Government can waive the terms of the contract."); *Walter C. Reedeger, Inc. v. United States*, 94 Ct. Cl. 120, 125 (1941); *Baucom Janitorial Service, Inc.*, GSBCA 5188, 80-2 BCA ¶ 14,514 at 71,536.[6] Likewise, oral assurances by unauthorized representatives of the contracting officer cannot confer rights on a contractor. *Baucom*, 80-2 BCA at 71,536 (citing *Industrial Engineering Co. v. United States*, 60 Ct. Cl. 766 (1925), *aff'd*, 273 U.S. 659 (1927)). Finally, where an implied waiver is not based upon consideration, it must be demonstrated by clear, decisive, and unequivocal conduct or statements of government officials authorized to waive a term of the contract. *Adelaide Blomfield*, 95-1 BCA at 137,115.

Viewing the evidence presented "'through the prism of the substantive evidentiary burden' that would inhere at trial," *Johns Hopkins University v. CellPro, Inc.*, 152 F.3d 1342, 1359 (Fed. Cir.1998) (quoting *Anderson*, 477 U.S. at 254)), we conclude that nothing proffered by appellant, if proven, would establish a waiver of the notice requirement. There is no documentation attributable to GSA indicating that the requirement was waived. Appellant has not identified specific discussions she held with any individual who had authority to modify the terms of the lease. Although she stated in her affidavit that she discussed the tax issues with Ms. Peters, she did not directly aver that Ms. Peters promised to waive the notice requirement. Appellant's imprecise assertions that she had conversations about the tax payments with Ms. Nix and various GSA employees at unspecified times, without more, is not sufficiently probative to raise a genuine issue for trial.

Although there is no non-waiver clause in appellant's lease, appellant's argument that GSA's action in paying the tax adjustment for 2004 established a waiver as to all the tax increases for prior years cannot withstand scrutiny. A waiver is the "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst*, 304 U.S. 458, 464

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[6] Only contracting officers are authorized to enter into or modify contracts on behalf of the federal government. *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339, 1344 (Fed. Cir. 2007). Although contracting officers may, in some circumstances, delegate contracting authority to certain designated representatives, *id.*, the record does not reflect that any such limited delegation occurred with respect to this lease.

(1938); *Cherokee Nation v. United States*, 355 F.2d 945, 950 (Ct. Cl. 1966). The contractor must show that it acted in reliance on the Government's relaxation of a requirement. *See, e.g., Gresham*, 470 F.2d at 554-55; *Public Service Co. of Oklahoma v. United States*, 91 Fed. Cl. 363, 367 (2010); *4J2R1C Limited Partnership v. General Services Administration*, GSBCA 15584, 02-1 BCA ¶ 31,742, at 156,820; *General Security Services Corp. v. General Services Administration*, GSBCA 11381, 92-2 BCA ¶ 24,897, at 124,172.

The burden of proving a contract provision was waived by the Government is allocated to the contractor. *See Westfed Holdings, Inc. v. United States*, 407 F.3d 1352, 1360 (Fed. Cir. 2005); *Public Service Co.*, 91 Fed. Cl. at 367. Here, appellant has shown only that GSA paid the 2004 tax increase, despite the lack of timely notice, after the lease had been terminated. In general, when a clause requires separate notice of each claim, failure to enforce the notice requirement with respect to a single claim does not waive the Government's right to enforce the requirement as to other claims. *See Rubi's Metals, Inc.*, ASBCA 52059, et al., 01-1 BCA ¶ 31,266, at 154,450. Further, appellant could not have relied upon this waiver to justify its failure to comply with the notice requirements for prior tax years. As a matter of law, GSA's payment of the tax adjustment for 2004 cannot serve to establish a waiver of the notice requirement for tax years 2000 through 2003.

To avoid summary disposition of its claim, appellant must have advanced probative evidence to persuade a reasonable trier of fact that there is some possibility that she might prevail at a hearing. The vagueness of the assertions attested to by appellant, when weighed against the applicable legal requirements, falls short of that mark. Even accepting all of appellant's assertions as true, and drawing all favorable inferences from that evidence, appellant has not overcome respondent's motion.

Decision

GSA's motion for partial summary relief is **GRANTED**. CBCA 1346 is **DENIED IN PART**.

CATHERINE B. HYATT
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

PATRICIA J. SHERIDAN
Board Judge