



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: August 27, 2021

CBCA 7126

13151 W. ALAMEDA PARKWAY, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

R. Scott Fitzke of Shortridge & Fitzke, P.C., Englewood, CO, counsel for Appellant.

Kristi Singleton, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

KULLBERG, Board Judge.

Appellant, 13151 W. Alameda Parkway, LLC, appeals the contracting officer's (CO's) final decision (COFD) that denied its claim in the amount of \$22,305.68 for increased real estate taxes which it incurred on property leased to the General Services Administration (GSA). GSA contends that appellant failed to submit a timely claim as required under the lease.

Appellant has elected to have this appeal heard under the Board's small claims procedure. Rule 52 (48 CFR 6101.52 (2020)). Accordingly, this decision "is final and conclusive, shall not be set aside except for fraud, and is not precedential." Rule 52(c). For the reasons stated below, the claim is denied.

Background

On May 4, 2000, GSA and appellant's predecessor in interest, Green Mountain Office Complex, Inc. (GMOC), executed lease number GS-08P-13649 (lease) for the property located at 13151 W. Alameda Parkway, Jefferson County (county), Colorado.¹ Appeal File, Exhibit 2 at 2, 73.² Section 4.8 of the lease stated, in pertinent part, the following:

(d) The lessor shall furnish the Contracting Officer with copies of all notices which may affect the valuation 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 of payment acceptable to the Contracting Officer (hereinafter, evidence of payment), and a calculation thereof, for each year that real estate taxes are incurred during the lease term or any extension thereof. All such documents are due with[in] 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 time frame shall be a waiver of the right to receive payment resulting from an increased tax adjustment under this clause.**

(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 term 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 as the base year taxes. The amount of lump sum payment or rental credit shall be based upon evidence of valuation and payment submitted by the Lessor to the Contracting Officer in accordance with paragraph (d).

(i) In the event of an increase in taxes over the base year, the Lessor shall submit a proper invoice of the tax adjustment including the calculation thereof together with evidence of payment to the Contracting Officer. **The Government shall be responsible for payment of any tax increase over the base year taxes only if the proper invoice and evidence of payment is submitted by the Lessor**

¹ Appellant acquired the property by purchase on February 1, 2007, subject to the lease. Appellant's Record Submission Brief at 2 n.1.

² All exhibits are in the appeal file, unless otherwise noted.

within sixty calendar days after the tax payment is due from the Lessor to the taxing authority.

Id. at 17. The monthly rate for rent on the building was \$43,996.88. *Id.* at 3.

On November 15, 2004, GSA issued a supplemental agreement to the lease that stated, “In accordance with the provisions of the Real Estate Tax Adjustment Clause, the tax base is hereby established at \$53,251.86 . . . for base year 2003.” Exhibit 4 at 1. In a November 15, 2004, letter, which accompanied the supplemental agreement, GSA advised GMOC that the lease had become effective on June 21, 2002, and “[t]he tax receipt you received in 2004 was for a full year assessment in 2003, and therefore, the tax base year has now been established as 2003 and with a tax base of \$53,251.86.” *Id.* at 2. GSA’s letter further advised, “Next year, when you receive your tax receipt, we will pay you anything over the tax base in a lump sum.” *Id.*

The county assessed a real estate tax on the leased property for the year 2017 in the amount of \$75,557.54, which exceeded the tax base amount of \$53,251.86. Exhibit 3 at 6. Payment of that amount in full was due on April 30, 2018, or, in the alternative, the first payment of one-half of the tax was due on February 28, 2018. *Id.* Appellant paid the tax in full on March 16, 2018. *Id.* at 4.

The parties dispute when appellant first invoiced GSA for the difference between the real estate tax paid in 2017 and the tax base. The record includes appellant’s invoice dated July 29, 2018, in the amount of \$22,305.68 for its payment of excess real estate tax. Exhibit 3 at 5. GSA, however, did not have a record of receiving that invoice, and appellant invoiced for a second time on December 4, 2018. Exhibits 3 at 8, 11 at 2-3.

On November 18, 2020, appellant submitted its claim to the CO in the amount of \$22,305.68. Exhibit 1 at 1. On February 24, 2021, the CO issued a COFD denying appellant’s claim. *Id.* Citing section 4.8 of the lease, the COFD noted that appellant was required to pay its real estate taxes by April 30, 2018, and, consequently, the deadline to submit an invoice to GSA was June 29, 2018. *Id.* The COFD noted that GSA only possessed appellant’s second invoice, which was dated December 4, 2018. *Id.* at 2. Although the COFD acknowledged that there was an uncertainty as to whether GSA received the July 29, 2018, invoice, that invoice submission also would have been late under the terms of the lease. *Id.*

Discussion

At issue is whether appellant is entitled to recover the cost of its increased real estate taxes for 2017 even though it failed to submit an invoice for reimbursement to GSA within sixty calendar days after payment was due as required in the lease. “A long line of our precedent has established that agreed-upon contract terms must be enforced.” *Madigan v. Hobin Lumber Co.*, 986 F.2d 1401, 1403 (Fed. Cir. 1993). This Board has recognized that a tax adjustment clause with language similar to that set forth in section 4.8 of appellant’s lease “expressly warns that the contractor will lose rights if a submission is not made in the prescribed period of time, [and] has been construed to contain a binding notice requirement that is strictly enforced.” *Cindy Karp v. General Services Administration*, CBCA 1346, 11-1 BCA ¶ 34,716 (citing *Roger Parris v. General Services Administration*, GSBCA 15512, 01-2 BCA ¶ 31,629; *Riggs National Bank of Washington, D.C. v. General Services Administration*, GSBCA 14061, 97-1 BCA ¶ 28,920; *Universal Development Corp. v. General Services Administration*, GSBCA 12138 (11520)-REIN, et al., 93-3 BCA ¶ 26,100).

The record shows that appellant failed to submit to GSA an invoice for its payment of excess real estate taxes within sixty calendar days of the date payment was due, which was April 30, 2018. Under the terms of the lease, appellant was on notice as to the consequences of failing to submit a timely request for reimbursement of any payment of taxes in excess of the tax base. Even if the Board accepts appellant’s representation that it mailed its July 29, 2018, invoice to GSA on the following day, that invoice would still be late under the terms of the lease.

Appellant argues that the sixty-day period for submitting its invoice should have commenced on June 15, 2018, instead of April 30, 2018. Appellant has represented that “[r]eal estate taxes in Colorado are due either in one installment due on April 30th of each year, or in two installments due on February 28th, and June 15th of each year.” Appellant’s Record Submission at 6 (citing Colorado Rev. Stat. § 3[9]-10-104.5(2) (2018)). The record reflects that appellant paid the tax in full on March 16, 2018, that the county’s due date for full payment was April 30, 2018, and the June 15, 2018, due date did not apply to appellant.

Additionally, appellant suggests that “[t]he language in the tax adjustment clause providing that the claim be submitted within sixty days of the date the tax payment is due from the Lessor to the taxing authority is ambiguous and does not comport with Colorado’s state laws concerning the payment of real estate taxes.” Appellant’s Record Submission at 6. Such an argument suggests that the lease was somehow deficient in addressing Colorado law, but appellant fails to explain that deficiency or how it renders the lease ambiguous. Colorado law establishes the due date for appellant’s tax payment depending on whether the tax was paid in full or in two payments of one-half of the tax. The lease only instructed appellant as to the time period in which to invoice for any overpayment. Given

the fact that the lease and Colorado statute dealt with different sets of obligations for appellant, the Board will “not ‘convert an agreement’s utter silence on an issue into contractual ambiguity.’” *Gardiner, Kamyra & Associates v. Jackson*, 467 F.3d 1348, 1354 (Fed. Cir. 2006) (quoting *New Jersey v. New York*, 523 U.S. 767, 783 n.6 (1998)).

Finally, appellant argues that, “[e]ven if the government’s position [is] that the commencement of the sixty-day period began on April 30, 2018, the facts here show that the government waived the right to insist on using that date to commence the claim period by allowing the Lessor to submit its tax adjustment claim within sixty days of June 15th in 2012, 2013, 2014 and 2015.” Appellant’s Record Submission Brief at 8. This Board has recognized:

A waiver is the “intentional relinquishment or abandonment of a known right.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (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 [& Co. v. United States]*, 470 F.2d [542,] 554-55 [(Ct. Cl. 1972)]; *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.

Cindy Karp. Appellant’s contention ignores or omits relevant facts. In 2014, appellant paid the real estate tax in two payments of one-half of the tax, and the second payment was due June 15, 2014. Exhibit 13 at 3. However, appellant’s invoice, which was dated August 19, 2014, was submitted more than sixty days after June 15, 2014, and GSA denied reimbursement citing the terms of the lease. *Id.* at 5. To the extent that June 15, 2014, was the date from which the sixty-day period commenced for purposes of invoicing for an overpayment of real estate taxes in 2014, that date applied because appellant made two payments instead of one payment. Additionally, appellant has not shown whether it paid its real estate tax in a lump sum or in two payments of one-half of the tax for the years 2012, 2013, and 2015, and the Board will not speculate as to how appellant paid the tax. The Board, accordingly, has no basis for finding that GSA waived the requirement for submitting a timely invoice under the terms of the lease.

Decision

The claim is **DENIED**.

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge