



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: January 28, 2011

CBCA 1576

TST TALLAHASSEE, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Michael J. Brandt and Cecil H. Macoy, Jr., of Wallace, Jordan, Ratliff & Brandt, LLC, Birmingham, AL, counsel for Appellant.

Joylyn Winter, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **GILMORE**, **BORWICK**, and **DRUMMOND**.

DRUMMOND, Board Judge.

This appeal involves a dispute arising out of lease number 084B-03-91 (lease) between appellant, TST Tallahassee, LLC (TST), and the Department of Veterans Affairs (VA or Government). TST alleges that the VA breached the lease by failing to pay additional rent for taxes in excess of the base year taxes. TST claims \$15,618.11 for excess taxes in 2006, \$60,105.81 for excess taxes in 2007, and \$69,040.14 for excess taxes in 2008, for a total of \$144,764.06. TST also seeks declaratory relief for past and future excess taxes,

attorney fees and costs. The VA seeks to recoup an alleged overpayment in rent in the amount of \$111,291.54.¹

The parties have submitted this appeal for decision on the written record.² For the reasons stated below, the VA's claim is denied and TST's claim is granted in part.

Findings of Fact

In 1991, the VA issued a solicitation for offers to lease space for a VA outpatient clinic together with parking spaces in Tallahassee, Florida. Mr. Roger J. Osborne, TST's predecessor, responding to the VA's solicitation, proposed to build and lease a one-story building at \$13.50 per square foot per annum. Mr. Osborne also supplied a lessor-completed standard form (SF) 1217 dated August 26, 1991. Appeal File, Exhibit 1 at 1-3, 220-24. Under section II, captioned "estimated annual costs of ownership exclusive of capital charges," on line 28, Mr. Osborne entered \$49,200 as the estimated annual real estate taxes. *Id.* at 220-24.

By letter dated October 2, 1991, the contracting officer (CO) wrote to Mr. Osborne stating that the VA had accepted his offer and sent him a copy of the lease. Appeal File, Exhibit 1. The lease term was to begin on July 30, 1992, and was for a term of twenty years. The building is used entirely by the VA. *Id.*; Supplemental Appeal File, Exhibit 14.

The annual rental consisted of a square footage charge for 41,800 square feet of space (\$13.50 per square foot times 41,800, or \$564,300 annually). Appeal File, Exhibit 1 at 1-3; Supplemental Appeal File, Exhibit 14. There is no evidence in the record that the parties engaged in any substantive discussion of the square foot rental rate proposed by Mr. Osborne.

The lease contained a Tax Adjustment clause, which states:

The VA shall pay additional rent for its share of increases in real estate taxes over taxes paid for the calendar year in which its lease commences (base year). Payment will be in a lump sum and become due on the first workday of the month following the month in which paid tax receipts for the base year and the

¹ The VA asks that the \$111,291.54 be applied to the taxes it withheld for 2007 and 2008 totaling \$97,909.72, and the remaining \$13,381.82 be paid to the VA or applied as a credit to the VA's 2010 tax liability.

² The record includes the pleadings, the appeal file, the supplemental appeal file, Declaration by Wende Dottor, written stipulations of the parties, and their briefs.

current year are presented, or the anniversary date of the lease, whichever is later. The VA will be responsible for payment only if the receipts are submitted within 60 days of the date the tax payment is due. If no full tax assessment is made during the calendar year in which the VA lease commences, the base year will be the first year of a full assessment

In the event of any decreases in real estate taxes during the term of the occupancy under the lease, the rental amount will be reduced accordingly.

Appeal File, Exhibit 1 at 27-28. The Tax Adjustment clause makes no reference to SF 1217, and there is no evidence in the record that the parties engaged in any substantive discussion of this provision prior to signing the lease.

The building is located within the assessment jurisdiction of the Leon County Tax Office. Appeal File, Exhibit 4 at 4; Joint Stipulation of Facts (JSF) ¶ 9. The record includes a tax summary from the Leon County Tax Office for this property. Appeal File, Exhibit 5 at 4. Real estate taxes were assessed and paid on a calendar year basis. The first year that the building was fully assessed for taxes was calendar year 1994. *Id.*; JSF ¶ 7. The parties have stipulated that the “base year,” for the purpose of the tax adjustment clause, was 1994. JSF ¶ 7. The property taxes paid in 1994 totaled \$33,581.89. Appeal File, Exhibit 5 at 4; JSF ¶ 9.

Following the base year, Mr. Osborne paid the following taxes on the building:

1995: \$34,945.54	- a \$	1363.65	increase in taxes
1996: \$34,293.49	- a \$	711.60	increase in taxes
1997: \$35,120.69	- a \$	1538.80	increase in taxes
1998: \$33,961.42	- a \$	379.53	increase in taxes
1999: \$33,699.72	- a \$	117.83	increase in taxes
2000: \$32,459.24	- a \$	1122.65	decrease in taxes
2001: \$31,554.01	- a \$	2027.88	decrease in taxes
2002: \$37,749.65	- a \$	4167.76	increase in taxes
2003: \$39,262.94	- a \$	5681.05	increase in taxes
2004: \$43,642.02	- a \$	10,060.13	increase in taxes
2005: \$42,656.78	- a \$	9074.89	increase in taxes

Appeal File, Exhibit 5 at 4; JSF ¶ 9. The taxes paid by Mr. Osborne from 1994 through 2005 total \$432,927.39. JSF ¶ 9. There is no evidence in the record that Mr. Osborne ever invoiced the VA for any additional rent due to increased taxes or that the VA reduced the rent

in 2000 or 2001 due to decreased taxes. There was a net tax increase of \$29,944.71 during the period 1995 through 2005.

In 2006, TST purchased the building from Mr. Osborne and succeeded to the interest of the lessor. Appeal File, Exhibit 2 at 1-3; JSF ¶ 11; Appellant's Brief at 3. As part of the transaction, Mr. Osborne, as assignor, and TST, as assignee, executed a succession agreement dated March 8, 2006. The agreement stated in part:

This Assignor confirms the transfer to the Assignee, and waives any claims and rights against the United States of America that it now has or may have in the future in connection with the subject lease.

This Assignee assumes, approves, adopts, and agrees to be bound by and to perform the contract in accordance with the terms and conditions contained in subject lease. The Assignee also assumes all obligations and liabilities of, and all claims against, the Assignor under the lease as if the Assignee were the original party to the lease.

Appeal File, Exhibit 2 at 2-3. The VA officially recognized the change in ownership to TST by lease amendment dated March 8, 2006. *Id.* at 1-3.

In December 2006, TST submitted an invoice for tax increase to the CO for the tax year 2006 in the amount of \$19,677.42 (\$68,877.42, the amount of taxes paid in 2006, minus \$49,200, the amount that Mr. Osborne had estimated for taxes on the SF 1217). Appeal File, Exhibit 4 at 4; JSF ¶ 14. Attached to the invoice was the 2006 tax bill which showed taxes were due in November. The VA paid this invoice without any objection.

In December 2007, TST submitted an invoice for tax increase to the CO for the tax year 2007 in the amount of \$44,487.70 (\$93,687.70, the full amount of taxes paid in 2007, minus \$49,200, the amount that Mr. Osborne had estimated for taxes on the SF 1217). Supplemental Appeal File, Exhibit 25; JSF ¶ 14. Attached to the invoice was a 2007 tax bill which showed the taxes were due in November 2007.

By letter dated February 18, 2008, TST wrote to the CO concerning errors in the invoiced amounts and the actual tax increases above the base year amount. TST advised the CO that pursuant to the terms of the lease the VA was required to pay TST additional rent for increases in the taxes over \$33,581.89, the taxes paid in 1994, rather than \$49,200, the amount estimated for taxes on the SF 1217. Appeal File, Exhibit 4 at 1.

TST submitted corrected invoices to the CO for the tax adjustments in 2006 and 2007. The corrected invoice for tax year 2006 computed the additional rent owed by the VA as \$15,618.11 (\$68,877.42, the full amount of taxes paid in 2006, minus \$33,581.89, the base year taxes, minus \$19,677.42, the amount previously paid by the VA for excess taxes). Appeal File, Exhibit 4 at 4; JSF ¶ 14. The corrected invoice for tax year 2007, as amended, computed the additional rent owed by the VA as \$60,105.81 (\$93,687.70, the full amount of taxes paid in 2007, minus \$33,581.89, the amount of the base year taxes). Appeal File, Exhibits 4 at 4, 7; Supplemental Appeal File, Exhibit 18; JSF ¶ 14. TST attached the tax summary from the Leon County Tax Office showing the base year taxes as well as the taxes paid in 2006 and 2007. Appeal File, Exhibit 5 at 4.

By letter dated April 5, 2008, the CO responded to TST's letter dated February 18, 2008. The CO's letter stated:

At the time the VA entered into the lease, the annual taxes were estimated to total \$49,200. This estimate was factored into our monthly rental amount due and owing for the past thirteen (13) years. It has come to our attention that the actual taxes paid were significantly less than the estimated amount . . . , and the base year was never determined following the initial tax assessment Consequently, an adjustment was never made to the VA monthly lease payments Based on the information you provided . . . the VA overpaid property taxes in the amount of \$111,291.54,³ calculated through 2007.

Appeal File, Exhibit 6. The CO did not explain how the \$49,200 was factored into the VA's monthly payment. The CO informed TST that the VA was withholding the requested payments to recoup the overpayment. *Id.*; Respondent's Brief at 7.

On November 6, 2008, TST sent a letter to the CO disagreeing with her position regarding the alleged overpayments and decision to withhold payments on the corrected invoices for 2006 and 2007. Appeal File, Exhibit 8. The letter included the corrected invoices for payment. Shortly thereafter, on November 24, 2008, TST submitted an invoice for additional taxes to the CO for the tax year 2008 in the amount of \$53,422.02 (\$102,622.02, the full amount of taxes paid in 2008, minus \$49,200, the amount estimated for taxes on the SF 1217). Supplemental Appeal File, Exhibit 8. TST later submitted a corrected invoice to the CO for the tax adjustment in 2008. The corrected invoice for the tax year 2008 computed the additional rent owed by the VA as \$69,040.14 (\$102,622.02, the full

³ The CO computed the overpayment due as the difference between the actual taxes and the estimate for years 1994 through 2007. See the finding below, regarding the CO's final decision, for details of the calculation.

amount of taxes paid in 2008, minus \$33,581.88, one cent less than the amount of taxes paid in the base year of 1994).⁴ Supplemental Appeal File, Exhibit 19. The parties have treated the corrected invoices as claims.

The parties have stipulated that the VA paid the following amounts to TST as tax adjustments for the tax years 2006 through 2008:

2006: \$19,677.42 (\$68,877.42 - \$49,200)
 2007: \$0
 2008: \$0

JSF ¶ 15.

On February 6, 2009, the CO issued a final decision which denied TST's requested payment and initiated the VA's claim for \$111,291.54 for overpayment of real estate taxes. Appeal File, Exhibit 9. The VA's claim assumes that the \$49,200 estimated on the SF 1217 is a component of the annual rent. Appeal File, Exhibit 6. The calculation for the adjustment the VA alleges is due, using the \$49,200 as a component of the annual rental rate, follows:

Year	Actual Taxes Paid	Monies the VA alleges it included in rent for taxes	Balance owed VA
1994	\$33,581.88 ⁵	\$49,200	-\$15,618.12
1995	\$34,945.54	\$49,200	-\$14,254.46
1996	\$34,293.49	\$49,200	-\$14,906.51
1997	\$35,120.69	\$49,200	-\$14,079.31
1998	\$33,961.42	\$49,200	-\$15,238.58
1999	\$33,699.72	\$49,200	-\$15,500.28
2000	\$32,459.24	\$49,200	-\$16,740.76
2001	\$31,554.01	\$49,200	-\$17,645.99
2002	\$37,749.65	\$49,200	-\$11,450.35
2003	\$39,262.94	\$49,200	-\$ 9,937.06
2004	\$43,642.02	\$49,200	-\$ 5,557.98
2005	\$42,656.78	\$49,200	\$ 6,543.22

⁴ The base year taxes were \$33,581.89 and therefore the taxes in 2008, increased by \$69,040.13 (\$102,622.02, full amount of the taxes paid in 2008, minus \$33,581.89, the base year taxes).

⁵ The correct amount is \$33,581.89.

2006	\$69,594.89 ⁶	\$68,877.42	\$ 717.47
2007	\$94,663.61 ⁷	\$49,200	\$ 45,463.61
Total sought by the VA			\$111,291.54

In its notice of appeal and complaint, TST claims \$15,618.11 for additional taxes in 2006, \$60,105.81 for additional taxes in 2007, and \$69,040.14 for additional taxes in 2008. TST also claims \$29,944.71 for excess taxes for 1995 through 2005 and declaratory relief as to future taxes. Additionally, TST seeks an unstated amount for interest, costs, and attorneys fees.

The VA argues that it relied on the tax estimate on SF 1217 and for twelve years (1994-2005) paid \$49,200 in rent for taxes. According to the VA, it paid the former lessor \$111,291.54 more than it should have paid. The VA maintains it is entitled to recoup that amount from TST on the basis of the succession agreement.

The VA has produced a Declaration by Wende Dottor, Chief, Finance Service, dated March 2, 2010. Ms. Dottor states:

I was Assistant Chief, Acting Chief and Chief, Finance Service on Contract No. V08-4B-03-91, and I am familiar with the process of making payments on this Lease and lump sum tax adjustments payments to TST Tallahassee and to the prior owner, Roger Osborne.

Once an obligation was created annually, monthly rent payments were automatically paid to the Landlord(s).

Payments to TST Tallahassee and Roger Osborne are outlined on the attached spread sheet, detailing amounts paid, dates paid, check numbers and dates of Electronic Funds Transfers. Additionally, the two instances where lump sum tax payments were required are shown on the attached spread sheet for 2006

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⁶ The 2006 taxes were first due in November 2006 for a total of \$68,877.42. TST paid taxes in December 2006 at the increased amount of \$69,594.89. The parties have stipulated that \$68,877.42 is correct amount to use.

⁷ The correct figure is \$93,687.70.

Dottor Declaration (Mar. 2, 2010) ¶¶ 3-4. The spreadsheet attached to the declaration does not show any additional payments by the VA for taxes for the period 1995 through 2005 or that the annual rent included \$49,200 for taxes.

Discussion

VA's Claim

Our first duty in resolving this appeal is to determine what the parties intended when they wrote the contested provision. 4 Williston on Contracts, 3d., § 601. The VA argues that it relied on the tax estimate on SF 1217 and for twelve years (1994-2005) paid \$49,200 in rent for taxes. According to the VA, it paid the former lessor \$111,291.54 more than it should have paid. VA maintains it is entitled to recoup that amount from TST on the basis of the succession agreement.

Generally, when the Government makes an erroneous payment, it is obligated to seek recovery. *Fansteel Metallurgical Corp. v. United States*, 172 F. Supp. 268, 270 (Ct. Cl. 1959); *Advanced Injection Molding, Inc. v. General Services Administration*, GSBCA 16504, et al., 05-2 BCA ¶ 33,037, at 163,756; *Arboreal, Inc.*, AGBCA 88-136-3, 88-2 BCA ¶ 20,635, at 104,309. As the party seeking recovery of the alleged overpayments, the VA bears the initial burden of proof. *Nash Janitorial Services*, GSBCA 7338, 88-2 BCA ¶ 20,809, at 105,187. The record contains no dispute concerning the meaning of the succession agreement. What is in dispute is whether the overpayments actually occurred.

The VA refers to the lease and asserts that the annual rental amount included \$49,200 for taxes. This is a difficult proposition to swallow. The plain language of the lease states that the VA will pay annual rental payments computed by multiplying the net usable square feet contained in the leased premises by \$13.50, as contained in the lessor's offer. The record does not address how the \$13.50 was computed or what component of rent the \$49,200 represented, if any. The lease states further that the VA will pay additional rent for increases in real estate taxes from those paid in the first-twelve month period coincident with a full assessment. The tax adjustment clause in the lease is not ambiguous. Here the first twelve months with a full tax assessment was 1994. Accordingly, the base year from which increases and decreases in real estate taxes are to be figured for the duration of the lease is 1994. There is no dispute that the base year taxes totaled \$33,581.89 and the lessor was fully responsible for taxes in that year.

All the evidence that the VA can muster as documentation suggesting that the annual rental amount included \$49,200 for taxes is the SF 1217 prepared by Mr. Osborne in 1991. Although the lessor submitted a figure on the SF 1217 as estimated real estate taxes, the VA has offered no evidence which proves that the \$49,200 was a component of the annual rent.

Simply put, the VA has given us no reason to believe the tax figure on the SF 1217 was anything more than an estimate of one of the many costs the lessor might incur in owning the property. *See Cunningham-Spencer, Inc.*, GSBCA 10548, 91-1 BCA ¶ 23,341, at 117,054 (1990). Even if the VA were able to persuade us that this figure was something more from its perspective, it could not prevail unless it also demonstrated that the other party, Mr. Osborne, had the same understanding. All the VA has offered on this part is the uncorroborated allegations in a declaration by the Chief of the Finance Service. The Chief was not involved in the initial lease negotiations. The VA's unexpressed intents, understandings, and interpretations are not relevant to the interpretation of this lease. *See Sixth and E Associates v. General Services Administration*, CBCA 1149, 09-2 BCA ¶ 34,179, at 168,968.

The VA has provided no sound basis for concluding that the annual rental rate included \$49,200 for taxes. The claim and appeal processes are not meant to provide forums for the parties to renegotiate the terms of the existing lease. We hold that under the terms of the lease, the VA has failed to prove that it overpaid taxes. We deny the VA's claim.

TST's Claim for Current and Future Excess Taxes

TST contends that the VA owes additional rent for excess taxes under the lease. TST asserts that using the base year tax amount of \$33,581.89, the VA owes a balance of \$15,618.11 for excess taxes in 2006. TST also asserts that the VA owes \$60,105.81 for excess taxes in 2007, and \$69,040.14⁸ for excess taxes in 2008.

Contract interpretation begins with the plain language of the contract, and language must be read in accordance with its express terms and plain meaning. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1434-35 (Fed. Cir. 1996); *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993); *BGK Main Street Operating Associates, v. General Services Administration*, GSBCA 16238, 04-2 BCA ¶ 32,658, at 161,654. The mechanics of the tax adjustment clause are purely mathematical; one has only to compute the difference between the taxes in 1994 and those in effect during the subsequent years. TST's interpretation is supported by the clear language of the lease.

TST's calculations for the excess taxes in 2006, 2007, and 2008 appear to be correct (except for one penny's difference), and they have not been questioned or rebutted by the VA. TST is entitled to the balance of \$15,618.11 for excess taxes in 2006, \$60,105.81 for excess taxes in 2007, and \$69,040.13 for excess taxes in 2008.

⁸ The correct amount is \$69,040.13, for taxes in the base year were \$33,581.89, not \$33,581.88.

We further find that the VA is required to pay TST for taxes each year after 2008 to the extent that the taxes exceed \$33,581.89 and TST otherwise complies with the lease requirements.

TST's Claim for Excess Taxes From 1995 through 2005

TST maintains that the VA owes an additional \$29,944.71 for excess taxes during the period 1995 through 2005. The tax adjustment clause states that the VA will be responsible for payment of excess taxes only if the receipts are submitted to the VA within sixty days of the date the tax payment is due. There is no evidence in the record to suggest that Mr. Osborne ever requested payment of excess taxes, supported by copies of tax receipts. Accordingly, we find that Mr. Osborne's inaction constituted a waiver by the lessor of his rights to a tax adjustment for the years in which the adjustments would otherwise apply. Accordingly, TST's claim for excess taxes from 1995 through 2005 is denied.

Attorney Fees and Costs

TST also argues that it is entitled to attorneys' fees and costs. Claims for attorneys' fees and costs are considered under the Equal Access to Justice Act, 5 U.S.C. § 504 (2006). Applications for attorneys' fees and costs are made after Board decisions are final, in accordance with Rule 30 (48 CFR 6101.30 (2009)).

Decision

The VA's claim to recoup an overpayment in rent totaling \$111,209.54 is denied.

TST's claim is **GRANTED IN PART**. TST is entitled to the balance of \$15,618.11 for excess taxes in 2006, \$60,105.81 for excess taxes in 2007, and \$69,040.13 for excess taxes in 2008, a total of \$144,764.05. As prescribed by the Contract Disputes Act of 1978, 41 U.S.C. § 7109 (as codified by Pub. L. No. 111-350, 124 Stat. 3677, 3825-26 (2011)), TST is also entitled to interest on this award. Interest is due on \$75,723.93 from the date on which the contracting officer received TST's November 6, 2008, claim for years 2006 and 2007, until the date of payment. Interest is due on \$69,040.13 from the date on which the contracting officer received TST's November 24, 2008, claim for year 2008, until the date of payment. TST's claim for excess taxes from 1995 through 2005 is denied.

JEROME M. DRUMMOND
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

ANTHONY S. BORWICK
Board Judge

