



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS TO DISMISS AND FOR SUMMARY RELIEF DENIED:
February 14, 2017

CBCA 5210

CFP FBI-KNOXVILLE, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Diana Parks Curran of Curran Legal Services Group, Inc., Johns Creek, GA, appearing for Appellant.

Leonard E. Lucas, III, Office of General Counsel, General Services Administration, Nashville, TN, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GOODMAN**, and **BEARDSLEY**.

BEARDSLEY, Board Judge.

CFP FBI-Knoxville, LLC (CFP) appealed a General Services Administration (GSA) contracting officer's final decision demanding reimbursement for increased taxes erroneously paid for leased office and related space. CFP also requested that the Board issue a declaratory judgment. GSA moved to dismiss the appeal, or in the alternative, for summary relief. For the reasons set forth below, the motion to dismiss and the motion for summary relief are both denied.

Statement of Facts for Purposes of the Motions

This appeal arises from a lease between Fedcar Company Ltd. (Fedcar) and GSA for newly constructed office and related space in Knoxville, Tennessee. The parties executed the lease on August 13, 2007. The original lease term was for fifteen years beginning on March 1, 2009, and ending on February 28, 2024. Effective October 17, 2007, the lessor changed from Fedcar to Knoxbi Company, LLC (Knoxbi). Effective July 16, 2012, the lessor changed again from Knoxbi to CFP.

Paragraph 1 of the lease read:

The Lessor hereby leases to the Government the following described premises:

A total of 99,130 rentable square feet (89,100 BOMA [Building Owners and Managers Association] usable square feet) of office and related space to be newly constructed according to the provisions set forth in this lease on approximately 9.44 acres of vacant land located in the Dowell Springs Office Park, Lot 27, Knoxville Tennessee 37909, as described in the Land Option Agreement dated September 20th, 2006 attached herein.

Appeal File, Exhibit 1 at 1.¹

The lease incorporated solicitation for offers (SFO) PTN-01-KX06. Paragraph 1.4 of the SFO stated:

This will be a dedicated campus facility for the Federal Bureau of Investigation. The campus will consist of a main office facility, an annex and a secured parking garage. All occupied structures, with the exception of the Visitors Screening Facility and Guard Booth, will be located inside of a secured 100-foot setback.

Exhibit 1 at 31.

Paragraph 1.5(A) of the SFO, as amended, stated, “Rent will not be paid for delivery of any space in excess of 99,130 rentable square feet nor will any additional space be authorized (rent free or otherwise) in the Present Value analysis computations.” Exhibit 1 at 6, 32. The lease also incorporated GSA form (GSAF) 3517B, General Clauses, Federal

¹ All exhibits are found in the appeal file, unless otherwise noted.

Acquisition Regulation (FAR) 552.270-20, PAYMENT (SEP 1999) (VARIATION), which read, in part: “(b) Payment will not be made for space which is in excess of the amount of ANSI/BOMA Office Area square footage stated in the lease.”² Exhibit 2 at 10.

Paragraph 11 of the lease read:

In accordance with Paragraph 4.4 (Tax Adjustment), the percentage of Government occupancy is established as 100% (Based on Government occupancy of 99,130 rentable sq. ft., total project net building area, and entire building complex of 99,130 rsf [rentable square feet]) [sic] Percentage of occupancy is subject to revision based on actual measurement of Government occupied space at time of final inspection, not to exceed the maximum BOMA square footage stated in the SFO PTN-01-KX06, and in accordance with GSAF 3517B, GENERAL CLAUSES.

Exhibit 1 at 3. Paragraph 4.4(A) of the SFO, Tax Payment, stated, “Real estate taxes, as referred to in this paragraph, are only those taxes which are assessed against the building and/or the land upon which the building is located, without regard to benefit to the property, for the purpose of funding general Government services.” Exhibit 1 at 73.

GSA was responsible for payment of its share of the real estate tax increase each year over the amount established for the base year taxes. Paragraph 4.4(F) of the SFO stated:

The Government shall pay its share of tax increases or shall receive its share of any tax decrease based on the ratio of the rentable square feet occupied by the Government to the total rentable square feet in the building or complex (percentage of occupancy). . . . This percentage shall be subject to adjustment to take into account additions or reductions of the amount of space as may be contemplated in this lease or amendments hereto.

Exhibit 1 at 75.

² In the lease, “the Government recognizes the American National Standards Institute/Building Owners and Managers Association (ANSI/BOMA) international standard (Z65.1-1996) definition for Office Area, which means ‘the area where a tenant normally houses personnel and/or furniture, for which a measurement is to be computed.’” The lease described how the ANSI/BOMA office area (ABOA) square feet were to be computed by taking certain measurements. Exhibit 1 at 76-77.

Paragraph 4.5(A) of the SFO stated, “The percent of the building occupied by the Government, for purposes of tax adjustments, will be established during negotiations.” Exhibit 1 at 75. Paragraph 4.14(B) of the SFO further addressed an adjustment for vacant premises, stating, “If the Government fails to occupy any portion of the leased premises or vacates the premises in whole or in part prior to expiration of the term of the lease, the rental rate will be reduced.” Exhibit 1 at 78.

The lease also included a program of requirements (POR). In POR section 10.3(A), the Government was given “exclusive use of the site, unless otherwise agreed to by the Government.” Exhibit 3 at 60. POR section 4.2(A), Expansion, Flexibility and Adaptability, stated, “The Lessor shall be capable of providing a minimum of 35% contiguous office space expansion including a corresponding increase in parking (secured and general) over the length of the Government’s lease term.” Exhibit 3 at 18.

The lessor decided to expand the space at the time of the buildout instead of waiting until the Government requested an office space expansion at a later date. The lessor determined that “[t]he grade and slope of the site upon which the Leased Premises was constructed made the opportunity to retain a footprint on the site for SFO required expansion at a later date problematic and potentially cost prohibitive.” Exhibit 9 at 2. The expansion space was built and in place as of August 10, 2010.

Supplemental lease agreement (SLA) no. 4, dated September 2, 2010, replaced paragraph 1 of the lease with the following: “A total of 99,130 rentable square feet which yields 89,100 useable square feet of office and related space at 1501 Dowell Springs Boulevard, Knoxville, TN 37909.” Exhibit 5 at 4.

The lease was amended bilaterally in SLA no. 11, dated July 6, 2012, to read:

Paragraph 4.2(A) of the POR FBI Field Facilities SFO NO. PTN-01-KX06 06-DEC-06 (Page 18 of 125 of the Lease) is deleted in its entirety and the following is substituted in lieu thereof:

Tenant acknowledges that Lessor has built an additional 25,850 rentable square feet located on the third floor of the Building in which the Leased Premises is located (the “Expansion Space”). Tenant agrees that the Expansion Space is not part of Tenant’s Leased Premises and shall only be made available to the Tenant upon execution of a mutually acceptable amendment to the Lease or a new lease for the Expansion Space, as determined by the Lessor and the Tenant. Lessor has no obligation whatsoever to Tenant to allow, limited or otherwise, any Tenant access to the Expansion

Space, nor to perform any work whatsoever in the Expansion Space, until such time as Tenant and Lessor execute either a Supplemental Lease Agreement or a new lease for the Expansion Space.

All other terms and conditions of the lease shall remain in force and effect.

Exhibit 5 at 18.

For tax years 2013 and 2014, CFP billed GSA for real estate taxes based on GSA having exclusive use of 100% of the property, despite the fact that GSA only paid rent for 99,130 rentable square feet. GSA paid the invoiced real estate taxes in full.

On November 25, 2015, GSA notified CFP that it had overpaid real estate taxes on the premises. GSA asserted in the contracting officer's final decision that it had erroneously paid taxes for the expansion space in the amount of \$109,486.57 for tax years 2013 and 2014. GSA further demanded that per 41 CFR 105-55.016, if the money was not returned within thirty days, interest, penalties, and administrative costs would be added to the amount owed.

CFP alleges that it was unaware of the claim or potential for a claim until receipt of the Government's final decision. On May 15, 2012 and prior to the purchase of the leased premises by CFP, GSA issued a statement of lease as required by the lease and incorporated FAR 552.270-24, Statement of Lease (AUG 1998). The statement of lease did not indicate that there was a potential issue regarding percentage of occupancy or real estate taxes owed by GSA. Exhibit 9 at 14.

CFP appealed the final decision and sought the Board's declaration that GSA "may not unilaterally modify the lease or alter the percentage of occupancy of the premises to less than 100%." Exhibit 13. CFP contends that reducing the percentage of occupancy to less than 100% "would alter and increase the costs of real estate taxes burdening the Lessor." Exhibit 13.

In the contracting officer's final decision, GSA asserted a claim in the amount of \$109,486.57 against CFP. CFP appealed the final decision and filed a complaint in which it asked for (1) an order directing GSA not to deduct the claim amount from the rent paid to CFP; (2) declaratory relief; (3) award of any sums recouped from CFP by GSA due to GSA's claim; and (4) award of costs and attorney fees.

On March 31, 2016, and in lieu of an answer, GSA filed a motion to dismiss appellant's appeal for failure to state a claim upon which relief may be granted, and moved for an order that appellant reimburse the Government for the overpayment of taxes, interest,

penalties, and administrative costs. On May 3, 2016, GSA filed a motion for summary relief, in the alternative, asserting that GSA is entitled to relief as a matter of law. Per the Board's order, GSA filed its answer.

Discussion

GSA filed a motion to dismiss this appeal for failure to state a claim upon which relief could be granted pursuant to CBCA Rules 6 and 8 (48 CFR 6101.6, .8 (2015)). For purposes of assessing whether there is a claim upon which relief can be granted, the claim is appellant's complaint. While appellant can request and the Board can order that the Government file a complaint, neither occurred in this appeal. Thus, appellant filed the complaint, and the Government filed a motion to dismiss the complaint in lieu of an answer.

For a motion to dismiss, the scope of our review is limited to considering the sufficiency of allegations set forth in the complaint, "matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record." *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014) (alteration in original) (quoting 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. 2004)); *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789 (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). Federal Rule of Civil Procedure 12(b)(6)³ provides that when matters outside the pleadings are presented and not excluded by the court, the motion shall be treated as one for summary relief. GSA and appellant rely on documents outside the pleadings in the motion to dismiss. Accordingly, the motion to dismiss should be treated as one for summary relief. Since GSA filed a motion for summary relief in the alternative to the motion to dismiss, we will deny respondent's motion to dismiss this appeal for failure to state a claim upon which relief can be granted and consider the motion for summary relief.

Summary relief is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial burden of informing the Board of the basis for its motion and identifying those portions of the pleadings, depositions, affidavits,

³ Our rules permit us to look to the Federal Rules of Civil Procedure for guidance, particularly in areas not addressed by our own rules. 48 CFR 6101.1(c), (d); *Mission Support Alliance, LLC v. Department of Energy*, CBCA 4985, 16-1 BCA ¶ 36,210, at 176,683 (quoting *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, et al., 15-1 BCA ¶ 36,027, at 175,983 n.2).

admissions, and answers to interrogatories, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The Government's motion requires the Board to decide a contract interpretation issue. "The primary objective of contract interpretation is to determine the intent of the parties at the time an agreement is created." *Belle Isle Investment Co. v. General Services Administration*, CBCA 4734, 16-1 BCA ¶ 36,416, at 177,554 (quoting *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 16-1 BCA ¶ 36,333, at 177,129).

Contract interpretation begins with an examination of the plain language of the contract. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (citing *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004)). The contract must be read as a whole, giving reasonable meaning to all its parts. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). If the plain language of the contract is unambiguous on its face, the inquiry ends, and the contract's plain language controls. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). But if the contractual language at issue is susceptible of more than one reasonable interpretation, it is ambiguous, and the Board's task is to determine which party's interpretation should prevail. *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,151.

Ace American Insurance Co., CBCA 2876-FCIC, et al., 14-1 BCA ¶ 35,791, at 175,058; *see also Columbia Construction Co. v. General Services Administration*, CBCA 3258, 15-1 BCA ¶ 35,856, at 175,319.

This dispute concerns the amount of increased real estate taxes the Government must pay under the lease. Per the lease, GSA was required to pay a portion of the increase in real estate taxes as determined by a defined ratio called the "percentage of occupancy." The ratio was based on a comparison of the rentable square feet occupied by the Government to the total rentable square feet in the building or complex. The question is whether this ratio changed as a result of the expansion of the building.

GSA and CFP both assert that the percentage of occupancy did not change and remained 100%. The parties, however, disagree as to the square feet totals to use in calculating the percentage of occupancy.

In the lease, the 100% percentage of occupancy ratio was calculated based on 99,130 rentable square feet occupied by the Government and 99,130 rentable square feet for the total project net building area and entire building complex. GSA asserts that the numbers used to calculate the ratio should remain the same because GSA only rents 99,130 square feet. Under this interpretation, the percentage of occupancy would remain 100%, and would not include the expansion space square feet in the ratio calculation. GSA further asserts that because the parties did not renegotiate or amend the basis for or the percentage of occupancy in the lease, the addition of the expansion space had no effect on the total numbers used to calculate the ratio. GSA also points to the lease terms precluding payment by GSA for space in excess of 99,130 rentable square feet, arguing that this precludes GSA's payment of taxes on the expansion space square footage.

CFP contends that while the 100% percentage of occupancy did not change, the total square footage numbers used to calculate the percentage of occupancy did change as a result of the addition of the expansion space. Under this interpretation, the percentage of occupancy would remain 100% but would be calculated differently, using 124,980 rentable square feet (99,130 rsf plus 25,850 rsf for the expansion space) as the numerator and denominator of the ratio. CFP asserts that the percentage of occupancy, for purposes of taxes, had to be negotiated, and the parties to the lease anticipated an adjustment to the percentage of occupancy in the event that additional space was added. CFP also references paragraph 4.14(B) of the SFO to argue that GSA would be allowed a reduction in rent if it vacated occupied space, but there would be no relief from tax adjustment obligations because the lease clause is silent as to taxes.

Contract interpretation is a legal question that is often resolved by summary disposition, *JAVIS Automation & Engineering, Inc. v. Department of the Interior*, CBCA 938, 09-2 BCA ¶ 34,309, at 169,478 (citing *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002)), although “the question of interpretation of language, the conduct, and the intent of the parties, *i.e.*, the question of what is the meaning that should be given by a court or board to the words of a contract, may sometimes involve questions of material fact and not present a pure question of law.” *Systems Management & Research*, 16-1 BCA at 177,129 (quoting *DJM/Reza, A Joint Venture, VABCA 6917*, et al., 05-1 BCA ¶ 32,943, at 163,208). “To the extent that the contract terms are ambiguous, requiring weighing of external evidence, the matter is not amenable to summary resolution.” *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988).

Reading the lease as a whole, we find the lease language to be ambiguous, supporting two reasonable interpretations. The lease terms raise the question as to whether the parties intended that the percentage of occupancy would be adjusted for tax purposes as a matter of

course, without an amendment, when space was added to the building. Additionally, the term “total rentable square feet in the building or complex” is ambiguous.

Total rentable square feet in the building or complex for tax purposes was originally defined as 99,130 rentable square feet.⁴ Once the new expansion space was added, the question became whether that added space increased the total square feet available to rent. GSA argues that total rentable square feet in the building or complex remained at 99,130 rentable square feet because, per SLA no. 11, the “Government did not rent or occupy the expansion space.” While SLA no. 11 disclaimed the expansion space as part of the leased premises, however, it did not state that the space was not available to be rented. It was available to be rented but only by GSA and at GSA’s discretion at a later date. However, appellant’s decision to build the expansion space early to save costs does not necessarily translate into the Government agreeing to pay the taxes on that space before it occupied the space.

CFP contends that the total rentable square feet in the building or complex includes the expansion space based on the plain meaning of the term and because SLA no. 11 was silent as to whether the expansion space was part of the percentage of occupancy ratio for tax purposes. Both interpretations of the term “total rentable square feet in the building or complex” are reasonable, and the term is ambiguous. The intended effect of the expansion space on the percentage of occupancy and the taxes to be paid by the Government present questions of material fact that require extrinsic evidence, and thus, the issue cannot be resolved by a motion for summary relief.

Nonetheless, the term “rentable square feet occupied by the Government” describing the nominator in the percentage of occupancy ratio is not ambiguous. CFP contends that the rentable square feet occupied by the Government increased because GSA had exclusive use of the site and the expansion space. We disagree. The rentable square feet occupied by the Government did not change. In calculating the percentage of occupancy originally, the parties agreed in the lease that the rentable square feet occupied by the Government was 99,130. The lease specifically allowed for the percentage of occupancy to be revised at final inspection based on the actual measurement of Government-occupied space. No such revision occurred. Instead, even though the expansion space had been built in August 2010, SLA no. 4 confirmed in September 2010 that the Government occupied 99,130 rentable

⁴ The lease also identifies the 99,130 rentable square feet in the denominator of the percentage of occupancy calculation as the total project net building area and entire building complex. This other description adds to the ambiguity of the lease terms related to the percentage of occupancy.

square feet. Moreover, SLA no. 11 specifically excluded the expansion space from the premises leased by GSA.

CFP's contention that GSA's exclusive use of the site should lead to a finding that the GSA-occupied space equaled the entire site or 100% of the building, including the expansion space, lacks support. The lease always allowed the Government exclusive use of the site, but the space occupied by the Government for tax adjustment purposes was, nonetheless, limited in the lease from the beginning to 99,130 rentable square feet. We find that the GSA-occupied space for tax adjustment purposes remained 99,130 rentable square feet.

It is important to note that despite the ambiguity surrounding the term "total rentable square feet in the building or complex," if this term does include the expansion space (25,850 rentable square feet), the percentage of occupancy could not be 100% because the Government-occupied space is 99,130 rentable square feet. In other words, either the percentage of occupancy changed to 79% ($99,130 \text{ rsf} \div 124,980 \text{ rsf}$) or it remained at 100% ($99,130 \text{ rsf} \div 99,130 \text{ rsf}$). Drawing all inferences in favor of CFP, questions of material fact remain as to the meaning of ambiguous contract language and extrinsic evidence is required to interpret the ambiguous terms of the lease related to taxes.⁵

CFP argues that any ambiguity was latent and the lease language must be construed against GSA, the drafter. Before we reach this issue, however, "we must determine whether the extrinsic evidence that the parties have presented, and may present in a future hearing or Rule 19 record submission, is sufficient to resolve the ambiguity." *A-Son's*, 15-1 BCA at 176,213 (citing *Gardiner, Kamya & Associates, P.C. v. Jackson*, 467 F.3d 1348, 1354 (Fed. Cir. 2006)). "[C]ontra proferentem is a 'rule of last resort' that 'is applied only where there is a genuine ambiguity and where, after examining the entire contract, the relation of the parties and the circumstances under which they executed the contract, the ambiguity remains unresolved.'" *Gardiner, Kamya & Associates, P.C. v. Jackson*, 467 F.3d 1348, 1354 (Fed. Cir. 2006) (quoting *Lewis v. United States*, 1982 WL 36718, at *7 (Ct. Cl. 1982)). Moreover, contra proferentem may be inapplicable in the event that the lease terms and SLA no. 11

⁵ "If a contract provision appears ambiguous on its face, extrinsic evidence may assist in discerning the parties' intent and may show that language appearing on its face to be ambiguous is not because, for example, the parties shared a mutual understanding as to its meaning." *A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,208 (citing *Metropolitan Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006)). The intent of the parties negotiating the lease terms and SLA no. 11 is unknown at this time, however, because CFP did not negotiate the lease terms or SLA no. 11 or present any evidence regarding the intent of the predecessor lessors.

were negotiated. *Prince George Center, Inc. v. General Services Administration*, GSBCA 12289, 94-2 BCA ¶ 26,889, at 133,847 n.9 (citing *Tulelake Irrigation District v. United States*, 342 F.2d 447 (Ct. Cl. 1965)). Similarly, the question of whether the ambiguity was patent or latent cannot be decided in a factual vacuum. See *Carmon Construction, Inc. v. General Services Administration*, GSBCA 13412, 96-2 BCA ¶ 28,354, at 141,585. As stated in *Tera Advanced Services Corp.*, GSBCA 6713-NRC, 83-1 BCA ¶ 16,301, “[i]n an opinion on a motion for summary judgment, we do not have to get all the way to the bottom – it is sufficient to acknowledge that on the present state of the record we cannot do so. . . . [I]f there are legitimate questions about what the contract means . . . we must make further inquiry before deciding that issue.” *Id.* at 81,004. This case requires such further inquiry.

Mistake

Appellant contends that GSA cannot reform the lease to change the percentage of occupancy from 100% to 80% due to GSA’s unilateral mistake. CFP further asserts that GSA cannot argue mutual mistake. GSA, however, does not argue that there was any mistake. It asserts that the percentage of occupancy should be 100% and that the lease terms need not be reformed. A mistake that would allow for or preclude reformation of the contract, however, must have occurred at contract formation. *McClure Electrical Constructors, Inc. v. Dalton*, 132 F.3d 709, 711 (Fed. Cir. 1997) (to obtain reformation of the contract to correct a mistake under a theory of unilateral mistake requires that a mistake in fact occurred prior to contract award); *Atlas Corp. v. United States*, 895 F.2d 745, 750 (Fed. Cir. 1990) (obtaining relief for mutual mistake requires that both the contractor and the Government had, at the time of contract formation, made a mistake as to a basic assumption). No such mistake has been alleged. Instead, the actual percentage of occupancy upon which taxes must be paid is the core issue of contract interpretation that is in dispute between the parties. “Interpretation is determining the true meaning of the contract as applied to the specific situation; reformation is changing the terms of the contract.” *Framlau Corp.*, IBCA 228, 61-2 BCA ¶ 3198, at 16,571 (quoting *Prestex, Inc.*, ASBCA 6572, 61-1 IBCA ¶ 2937, at 15,320).

Course of Dealing

CFP alleges course of dealing with GSA in an attempt to justify why the lease should be read to obligate GSA to pay 100% of the tax escalation. “A course of dealing is defined as ‘a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.’ . . . The emphasis is on a sequence of events; a single transaction cannot constitute a course of dealing.” *IAP World Services, Inc. v. Department of the Treasury*, CBCA 2633, 12-2 BCA ¶ 35,119, at 172,446 (quoting *DeLeon Industries, LLC v.*

Department of Veterans Affairs, CBCA 986, 12-1 BCA ¶ 34,904, at 171,630 (2011)). Recovery under a theory of course of dealing requires a showing of reliance on the course of dealing to the appellant's detriment. *Id.*

“[E]vidence of a prior course of dealing may demonstrate that a contract requirement has effectively been waived. A contract requirement for the benefit of a party becomes dead if that party knowingly fails to exact its performance over such an extended period that the other side reasonably believes the requirement to be dead.” *Business Management Research Associates, Inc. v. Department of Health & Human Services*, CBCA 814, 08-2 BCA ¶ 33,906, at 167,786 (citing *4J2R1C Limited Partnership v. General Services Administration*, GSBCA 15584, 02-1 BCA ¶ 31,742). CFP points to the silence in the statement of lease and SLA no. 11 regarding taxes and the 2013 and 2014 tax payments to argue that its interpretation of the tax adjustment clause was accepted by GSA, and GSA waived its right to claim mutual mistake or to collect its overpayment. Two tax payments over a two-year period, even coupled with the statement of lease and SLA no. 11, do not establish a common basis of understanding between the parties for interpreting the lease. Notably, it is unknown as to whether GSA paid taxes on the expansion space in 2010 or 2011 in contradiction to the alleged understanding between the parties. Moreover, CFP has not shown that it did anything different from what it otherwise would have done in reliance on the tax payments.

“A waiver is the ‘intentional relinquishment or abandonment of a known right.’” *Cindy Karp v. General Services Administration*, CBCA 1346, 11-1 BCA ¶ 34,716, at 170,936 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). CFP has the burden of proving that the Government waived a contract provision. *Id.* (citing *Westfed Holdings, Inc. v. United States*, 407 F.3d 1352, 1360 (Fed. Cir. 2005)). CFP must also show that it relied on GSA's alleged relaxation of a requirement. *Id.* (citing *Gresham & Co. v. United States*, 470 F.2d 542, 554-55 (Ct. Cl. 1972)). There is no evidence that GSA knew that it may be paying more taxes than required by the lease or that GSA intentionally abandoned the contract term requiring that it only pay the tax increase for the percentage of occupancy as adjusted.

Two payments over two years is not the extended period required to render the lease term dead. *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, et al., 16-1 BCA ¶ 36,468, at 17,711; *Davis Group, Inc.*, ASBCA 48431, 95-2 BCA ¶ 27,702, at 138,092 (no waiver or estoppel by course of dealing where there were no prior contracts and only two incidents of payment) (citing *L.W. Foster Sportswear Co. v. United States*, 405 F.2d 1285, 1290 (Ct. Cl. 1969) (course of dealing found for 200,000 jackets delivered over the performance of five or six previous contracts), and *Doyle Shirt Manufacturing Corp. v. United States*, 462 F.2d 1150, 1154 (Ct. Cl. 1972) (no course of dealing found where only three waivers had been approved in prior contracts)).

The facts, in the light most favorable to appellant, do not establish a course of dealing resulting in waiver of the relevant lease clauses or waiver of the Government's rights to claim mutual mistake or collect an overpayment. We conclude that two payments, SLA no. 11, and the statement of lease, are inadequate to establish waiver or modification of the lease through a course of dealing.

Promissory Estoppel

CFP contends that it was induced to purchase the leased premises based on the statement of lease which failed to mention taxes or an overpayment in taxes. According to CFP, GSA should, therefore, be estopped from recouping the tax overpayment. CFP calls this promissory estoppel. The Board, however, does not have jurisdiction to decide promissory estoppel. *P.J. Dick, Inc. v. General Services Administration*, CBCA 461, 07-1 BCA ¶ 33,534, at 166,120 (citing *Embarcadero Center, Ltd.*, GSBCA 8526, 89-1 BCA ¶ 21,362, at 107,681 (1988)).

To prevail under the theory of equitable estoppel, over which the Board does have jurisdiction, CFP

must establish three elements: (1) misleading conduct, which may include not only statements and actions but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted.

MLJ Brookside, LLC v. General Services Administration, CBCA 3041, 15-1 BCA ¶ 35,935, at 175,625 (quoting *Mabus v. General Dynamics C4 Systems, Inc.*, 633 F.3d 1356, 1359 (Fed. Cir. 2011)). Further, "it is well settled that the Government may not be estopped on the same terms as any other litigant." *Id.* (quoting *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 (1984)). "Beyond a mere showing of acts giving rise to an estoppel, [the contractor] must show 'affirmative misconduct [as] a prerequisite for invoking equitable estoppel against the government.'" *Id.* (alteration in original) (quoting *Rumsfeld v. United Technologies, Inc.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003)).

There has been no showing of acts giving rise to equitable estoppel, and no evidence of affirmative misconduct on the part of the Government. The statement of lease, the alleged misleading conduct upon which CFP relied in purchasing the leased premises, included the information required by the lease and FAR 552.270-24, Statement of Lease (AUG 1998), incorporated into the lease. Exhibit 2 at 4. There was no requirement that GSA list all potential claims in the statement of lease, or that failure to list such a potential claim waived the right to bring such a claim at a later date. GSA had not made or discovered

its alleged erroneous payment at the time the statement of lease was issued. Therefore, GSA could not be held to have affirmatively misled CFP about the tax issue. GSA will not be equitably estopped from recouping any tax overpayment.

Decision

For the foregoing reasons, respondent's motions are **DENIED**.

ERICA S. BEARDSLEY
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ALLAN H. GOODMAN
Board Judge