UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 7, 2024

CBCA 7980, 7981, 7982

HELF INVESTMENTS,

Appellant in CBCA 7980, 7981,

and

LOS PORTALES ASSOCIATES, LP,

Appellant in CBCA 7982,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Daniel A. Kaplan of Law Offices of Daniel A. Kaplan, San Diego, CA, counsel for Appellants.

Jay Bernstein, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **RUSSELL** and **KANG**.

KANG, Board Judge.

Appellants, HELF Investments (HELF) and Los Portales Associates, LP (LPA), seek reimbursement for property tax payments in connection with three leases into which they entered with the General Services Administration (GSA). HELF and LPA argue that,

although their requests for reimbursement did not comply with the express terms of the leases, GSA nonetheless improperly denied the requests. We deny the appeals.[1]

Background

1. The Three Leases

In July 2018, GSA and HELF entered into lease no. GS-09P-LCA004969 for real property in El Cajon, California (El Cajon lease). Appeal File, Exhibit 1 at 0001.[2] In October 2017, GSA and Redding Imperial, LLC entered into lease no. GS-09P-LCA00304 for real property in Riverside, California (Riverside lease). Exhibit 4 at 0102. The Riverside lease was novated to HELF in September 2020. Respondent's Initial Brief, Attachment.

The El Cajon and Riverside leases contained nearly identical provisions concerning the reimbursement of annual property tax increases. Subsection 2.07 of each lease set forth the process for reimbursing the lessor for increases in the current year taxes over the base year taxes, as follows:

> In the event of an increase in Current Year Taxes over the Real Estate Tax Base, the Lessor shall submit a proper invoice of the tax adjustment including the calculation thereof together with all tax bills and evidence of payment to the [lease contracting officer (LCO)]. *The Government shall be responsible for payment of any tax increase over the Real Estate Tax Base only if the proper invoice and evidence of payment is submitted by the Lessor on or before June 15 of the current year*.

Exhibits 1 at 0010, 4 at 0112 (emphasis added). The leases also stated that "*[f]ailure to submit the proper invoice and evidence of payment within such time frame shall be a waiver*

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[1] HELF filed the appeals docketed as CBCA 7980 and CBCA 7981, and LPA filed the appeal docketed as CBCA 7982. The appeals were consolidated per the parties' joint request. Appellants elected accelerated disposition of the appeals, as permitted by section 7106(a) of the Contract Disputes Act, 41 U.S.C. §§ 7101–7109 (2018), and Board Rule 53 (48 CFR 6101.53 (2023)). Accordingly, this decision is being issued by a panel of two judges. The parties submitted the cases on the written record, which consists of the following documents: the notices of appeal (which were designated as a consolidated complaint), the answer, the consolidated appeal file, and the parties' initial and reply briefs with attachments.

[2] All exhibits are found in the consolidated appeal file, unless otherwise noted.

of the right to receive payment resulting from an increased tax adjustment under this clause." Exhibits 1 at 0010, 4 at 0112 (emphasis added).

In November 2008, GSA and Victorina LLC entered into lease no. GS-09B-02291 for real property in Phoenix, Arizona (Phoenix lease). Exhibit 8 at 0300-01. This lease was novated to LPA in September 2018. Exhibit 10 at 0395.

The Phoenix lease contained provisions concerning the reimbursement of annual property tax increases similar to those in the El Cajon and Riverside leases. Subsection 3.19 of the Phoenix lease set forth the process for reimbursing the lessor for increases in the current year taxes over the base year taxes, as follows:

> 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 within 60 calendar days after the date the tax payment is due from the lessor to the taxing authority*.

Exhibit 8 at 0380 (emphasis added). The 2022 property tax payments were due no later than May 1, 2023, which set the end date of the sixty-day notice in the lease as June 30, 2023. Exhibit 12 at 0433.

As with the El Cajon and Riverside leases, the Phoenix lease stated: "*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 paragraph.*" Exhibit 8 at 0380 (emphasis added).

2. Requests for Property Tax Increase Reimbursements

On July 27, 2023, HELF requested reimbursement of $1253.20 and $18,893.74 for 2022 property tax increases for the El Cajon and Riverside leases, respectively. Exhibits 2 at 0069, 6 at 0264. Also on July 27, 2023, LPA requested reimbursement of $49,057.65 for 2022 property tax increases for the Phoenix lease. Exhibit 12 at 0430. Each request included invoices and evidence of payment of the property taxes. On July 28, 2023, GSA denied the requests for the El Cajon and Riverside leases because they had not been made by the

June 15, 2023, date specified in the leases. Exhibit 5 at 0260-61.[3] On August 28, 2023, GSA denied the request for the Phoenix lease because it had not been made by the June 30, 2023, date specified in the lease. Exhibit 11 at 0428.

On October 16, 2023, HELF and LPA submitted claims to the contracting officers seeking reimbursement of property tax increases for the El Cajon, Riverside, and Phoenix leases. Exhibits 3, 7, 14. The contracting officers did not issue final decisions on the claims. On January 8, 2024, HELF and LPA appealed the deemed denials of the three claims to this Board.

Discussion

The three leases each provided that increases in annual property taxes would be reimbursed by respondent, provided that appellants submitted invoices and evidence of payment of the taxes within the specified times. For the 2022 tax increases, appellants did not submit the required documents by the required dates. Notwithstanding the express language of the leases regarding the submission of requests for reimbursement of property tax increases, and the failure of HELF and LPA to make timely submissions, appellants argue that the contracting officers improperly denied the claims for four primary reasons: (1) the leases did not expressly authorize GSA to deny reimbursement of the property tax payment increases; (2) the denials of reimbursement were improper assessments of damages or impositions of penalties; (3) the Government's delay in reimbursing the 2021 property tax payment for the Phoenix lease shows that the Government was not harmed by appellants' late submissions of requests for the 2022 taxes; and (4) the denials of reimbursement result in unjust windfalls for the Government. For the reasons discussed below, we find that none of appellants' arguments has merit.

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[3] The record provided by respondent contains an email from GSA rejecting reimbursement for the Riverside lease, Exhibit 5, but does not contain a corresponding email concerning the El Cajon lease. The parties agree, however, that the agency rejected reimbursement for the El Cajon lease for the same reasons set forth in the email concerning the Riverside lease. *See* Appellants' Initial Brief at 9; Respondent's Initial Brief at 3. Additionally, the record contains two different versions of the email concerning the Riverside lease: the version provided in the appeal file, which incorrectly states the due date as June 5, 2023, and a version attached to the claim for the Riverside lease, which correctly states the due date as June 15, 2023. Exhibits 5 at 0260-61, 7 at 0289. None of these inconsistencies in the record affects either the party's arguments or the resolution of these appeals.

1. Breach of Contract

Although the leases required the lessors to submit invoices and evidence of payment of the property taxes by a specific date, appellants argue that the leases did not expressly authorize the Government to refuse to reimburse in the event the deadlines were missed. *See* Appellants' Initial Brief at 20 ("None of the leases provided that, upon late submission, the GSA could completely deny the reimbursement."). Appellants therefore assert that respondent's refusal to reimburse the property tax increases was a breach of the lease.

When interpreting a contract, the document must be considered as a whole and interpreted to harmonize and give reasonable meaning to all of its parts.[4] *Jowett, Inc. v. United States*, 234 F.3d 1365, 1368 (Fed. Cir. 2000). Where a contract's provisions are "clear and unambiguous, they must be given their plain and ordinary meaning," and we "may not resort to extrinsic evidence to interpret them." *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996) (citations omitted). "An interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous." *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004).

A claim for breach of contract contains four elements: "(1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach." *San Carlos Irrigation & Drainage District v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989). There is no question here that there are valid leases between the parties. The relevant questions here concern the second and third elements of the breach claims—the Government's obligation to reimburse property tax increases and whether it breached that obligation.

As discussed above, each lease provides that if the lessor submits an invoice and evidence of payment of the property taxes by a specific date, the Government must reimburse the lessor for increases to the property taxes over the base year taxes. Each lease also contains two provisions stating consequences for the lessor's failure to make the submissions by the deadlines. The first states that "[t]he Government shall be responsible for payment of any tax increase . . . only if the proper invoice and evidence of payment is submitted" by the specified date. Exhibits 1 at 0010, 4 at 0112, 8 at 0380. The second states that the failure

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[4] Although a lease concerns property interests, a lease is a contract. *1125 15th Street, LLC v. General Services Administration*, CBCA 6012, 21-1 BCA ¶ 37,828, at 183,708 (citing *Prudential Insurance Co. of America v. United States*, 801 F.2d 1295, 1298 (Fed. Cir. 1986)).

to submit the invoice and evidence "shall be a waiver of the right to receive payment resulting from an increased tax adjustment." Exhibits 1 at 0010, 4 at 0112, 8 at 0380.

This Board and one of its predecessor boards, the General Services Board of Contract Appeals (GSBCA),[5] have long held that the plain language of these types of lease provisions "expressly warns that the contractor will lose rights if a submission is not made in the prescribed period of time" and therefore "contain a binding notice requirement that is strictly enforced." *GC Columbia, LLC v. General Services Administration*, CBCA 7374, 22-1 BCA ¶ 38,197, at 185,502-03 (quoting *Cindy Karp v. General Services Administration*, CBCA 1346, 11-1 BCA ¶ 34,716, at 170,934), *aff'd*, No. 2023-1403, 2024 WL 1433162 (Fed. Cir. Apr. 3, 2024); *see Roger Parris 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 Corp. v. General Services Administration*, GSBCA 12138(11520)-REIN, *et al.*, 93-3 BCA ¶ 26,100, at 129,739-40. In *Riggs National Bank*, the GSBCA explained that the submission of an invoice with the required evidence of payment is a condition precedent to receiving reimbursement; where a lessor fails to satisfy that condition, the plain language of the lease relieves the Government of the obligation to reimburse the lessor. *Riggs National Bank*, 97-1 BCA at 144,178 (citing *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1019 (Fed. Cir. 1996)).

Here, appellants' requests for reimbursement of the 2022 property tax increases did not comply with the clear and unambiguous lease terms, which stated that invoices and evidence of payment were required by specified dates. To conclude that respondent was required to reimburse appellants despite the terms of the lease would render those terms meaningless and superfluous.

Appellants also argue that they did not waive their rights to reimbursement of property tax increases because they did not intend to forego their contractual rights. Even if appellants did not waive their rights to reimbursement under the second lease provision ("shall be a waiver"), they still failed to submit the required information under the first lease provision ("[t]he Government shall be responsible . . . only if the proper invoice and evidence of payment is submitted") thereby relieving the Government of the duty to reimburse.

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[5] The decisions of our predecessor boards of contract appeals are binding precedent for this Board. *Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464, 07-1 BCA ¶ 33,486, at 165,989 (per curiam).

In any event, appellants clearly waived their rights to reimbursement under the leases. A waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Lynchval Systems Worldwide, Inc. v. Pension Benefit Guaranty Corp.*, CBCA 3466, 14-1 BCA ¶ 35,792, at 175,067 (citations omitted). "Waiver requires only that the party waiving such right do so 'voluntarily' and 'knowingly' based on the facts of the case." *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1563 (Fed. Cir. 1990) (citing *Brookhart v. Janis*, 384 U.S. 1, 4, 5 (1966)).

Appellants do not contend that they did not enter into the leases knowingly or voluntarily. Instead, they argue that their failures to submit invoices and evidence of payment were not intended to be waivers of the right to reimbursement. Appellants' arguments misapprehend when the waivers took place. The express terms of the leases state that the failure to submit the required invoice and evidence of payment "shall be a waiver of the right to receive payment resulting from an increased tax adjustment." Exhibits 1 at 0010, 4 at 0112, 8 at 0380. Thus, the conditions establishing waiver of the right to reimbursement were set when the parties entered into the leases.

In sum, the clear and unambiguous terms of the leases regarding reimbursement of property tax increases required the submission of invoices and evidence of payment by specified dates, and the record shows that appellants did not satisfy these lease terms for the 2022 taxes. Respondent was therefore not required to reimburse appellants for the 2022 property tax increases.

2. Unreasonable Damages and Penalties

Appellants argue that such decisions by this Board and the GSBCA as *GC Columbia, LLC* and *Riggs National Bank* should not be followed here because they do not address whether respondent's refusal to reimburse property tax increases under the lease clauses constitutes the imposition of unreasonable damages. Appellants' Reply Brief at 4-5. In this regard, appellants argue that the Government did not suffer actual damages based on HELF's and LPA's failures timely to submit the invoices and evidence of payment as required by the leases and should not be allowed to withhold reimbursement. Alternatively, appellants argue that the withholding of tax payments was an improper assessment of liquidated damages because the leases did not have liquidated damages clauses, and the refusal to reimburse the property taxes therefore constituted unenforceable penalties.

As discussed above, the Government's refusal to reimburse the 2022 property tax increases was not a breach of the leases but was in accordance with the leases' clear and unambiguous terms. With regard to the arguments here, appellants appear to contend that the Government improperly found that appellants breached the leases by failing to submit the

invoices and evidence of payment by the required dates and imposed damages for these breaches by refusing to reimburse the property tax increases. *See* Appellants' Initial Brief at 21-23; Appellants' Reply Brief at 4-5. This theory of recovery also lacks merit because the leases did not create a duty or obligation on the part of the lessors to seek reimbursement for property tax increases. Rather, the leases gave the lessors the right to reimbursement, provided they satisfied the requirements to submit invoices and evidence by the specified dates. Because appellants' failure to satisfy the requirements of the leases for reimbursement was not a breach of an obligation to the Government, the Government's refusal to reimburse appellants was not an assessment of damages for breach of contract.

With regard to appellants' arguments regarding liquidated damages and penalties, parties to a contract may agree in advance to a sum representing liquidated damages for breach to save the time and expense of litigating the issue of damages, provided the amount of damages does not constitute an unenforceable penalty. *DJ Manufacturing Corp. v. United States*, 86 F.3d 1130, 1133 (Fed. Cir. 1996). Such unenforceable penalties include amounts that are "'so extravagant, or disproportionate to the amount of . . . loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression.'" *Id.* (quoting *Wise v. United States*, 249 U.S. 361, 365 (1919)). Here, again, liquidated damages and penalties in the context of a contract are relevant only in the event of a breach. As there were no breaches of the leases here, appellants' arguments regarding liquidated damages and penalties also lack merit.[6]

3. LPA's 2021 Property Tax Reimbursement

Appellants contend that the late reimbursement by GSA to LPA for 2021 property tax increases under the Phoenix lease shows that the Government did not suffer any harm as a result of appellants' late requests for reimbursement of the 2022 property tax increases. For this reason, appellants contend that nothing prevented the Government from reimbursing the 2022 property taxes based on the late-submitted requests.

The Phoenix lease incorporated GSA Federal Acquisition Regulation clause 552.232-75, Prompt Payment (SEP 1999) (48 CFR 552.232-75 (2000)), which provides for payment of interest in the event that the Government does not timely pay a contractor's otherwise proper invoices. Exhibit 8 at 0383. The El Cajon and Riverside leases have

[6] Appellants also argue that California and Arizona state laws regarding liquidated damages and penalties should apply to these leases. We need not address whether state laws have any relevance here because the interpretation of these lease provisions is well settled under federal law. *See Prudential Insurance Co.*, 801 F.2d at 1298.

similar provisions. Exhibits 1 at 0010, 4 at 0112. LPA filed a timely request for reimbursement of the 2021 property tax increases for the Phoenix lease, but the Government failed to make timely payment of the invoice thereby triggering an interest penalty. Appellants' Initial Brief at 17-18; *see* Exhibit 16 at 0001.

Appellants note that respondent's July 28, 2023, email in connection with the Riverside lease stated that GSA was "unable to process taxes for [2022]" due to the late submission of the invoice and evidence of payment. Exhibit 5 at 0260. Because the Government's reimbursement of LPA's 2021 property tax increases under the Phoenix lease was late, appellants contend there was no barrier to respondent's ability to reimburse appellants for their late submitted requests for the 2022 property taxes. Appellants' Initial Brief at 29.

There is no relationship between the leases' prompt payment provisions and the provisions requiring lessors timely to submit requests for reimbursement of property tax increases. Appellants appear to take the word "unable" in the Government's July 28, 2023, email out of context, as if it were meant to express a practical or legal barrier to reimbursing the 2022 property tax increases. The context of the email shows that the Government was asserting its right not to reimburse HELF for the 2022 property tax increases due to its failure to meet the lease requirements. Thus, the fact that the lease required GSA to pay the 2021 tax increases with interest penalties has no relevance to whether the lease required GSA to reimburse appellants' untimely requests for the 2022 property tax increases. As to whether respondent suffered any "harm" based on appellants' failure to comply with the terms of the leases for reimbursement of the 2022 property tax increases, such an inquiry is irrelevant based on the clear and unambiguous language of the leases, which plainly state that reimbursement was not required. *See GC Columbia, LLC*, 22-1 BCA at 185,502-03.

4. Improper Windfall

Appellants argue that GSA's refusal to reimburse the 2022 property tax increases resulted in improper windfalls to the Government. Appellants contend that to avoid such a windfall, respondent must return what they contend are the improperly withheld property tax increases.

Under state and federal law, a party suing for breach of contract "is not entitled to a windfall, i.e., the non-breaching party '[i]s not entitled to be put in a better position by the recovery than if the [breaching party] had fully performed the contract.'" *Community Health Choice, Inc. v. United States*, 970 F.3d 1364, 1375 (Fed. Cir. 2020) (quoting *Miller v. Robertson*, 266 U.S. 243, 26 (1924)). Appellants' argument about windfall therefore fails because, as discussed above, neither respondent nor appellants breached the leases.

In any event, the issue of windfalls in the context of tax increase provisions in leases with the Federal Government was specifically addressed by this Board in *DCE Properties v. General Services Administration*, CBCA 2923, 13 BCA ¶ 35,242. As with the leases here, the lease in *DCE Properties* stated that property tax increases would be reimbursed "[o]nly if the proper invoice and evidence of payment is submitted by the lessor within 60 calendar days after the date the tax payment is due from the lessor to the taxing authority." *Id.* at 173,019. We found that there was no windfall to the Government because "DCE has provided to GSA exactly what was bargained for—office area and parking spaces at a particular building—and the lessor has not suggested that GSA has paid anything less than the agreed-upon rent in exchange." *Id.* We further noted that "DCE did have the opportunity to receive even more money if it complied with a particular requirement in the contract, but it did not so comply." *Id.* at 173,020.

Appellants' failures to satisfy the requirements for reimbursement set forth in the leases did not result in unanticipated benefits to the Government. Instead, the denials of the requests for reimbursement were the anticipated result of the clear and unambiguous lease provisions. Appellants do not provide any reason to reach a different conclusion from that in *DCE Properties*.

Decision

Under the clear and unambiguous terms of the leases, GSA was not required to reimburse appellants for the 2022 property tax increases. The appeals are **DENIED**.

Jonathan L. Kang
JONATHAN L. KANG
Board Judge

I concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge