

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED: June 16, 2004

GSBCA 16238

BGK MAIN STREET OPERATING ASSOCIATES,
LIMITED PARTNERSHIP, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Barbara A. Fuller of Stallings & Bischoff, P.C., Virginia Beach, VA, counsel for Appellant.

Robert M. Notigan, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **PARKER**, **BORWICK**, and **GOODMAN**.

GOODMAN, Board Judge.

Appellant, BGK Main Street Operating Associates, Limited Partnership, Inc. (BGK), has appealed the final decision of a General Services Administration (GSA) contracting officer dated May 1, 2003, denying BGK's claim for a payment of real estate taxes pursuant to the tax adjustment clause of a lease entered into between appellant's predecessor in interest and respondent. The parties have submitted the appeal for a decision on the written record pursuant to Board Rule 111. We grant the appeal.

Findings of Fact

1. On December 27, 1995, GSA entered into lease contract no. GS-03B-60026 with Neva Properties, Ltd. (the lease). Appeal File, Exhibit 1 at 1. The lease provides for government occupancy of approximately 90,000 square feet of office and related space as an office for the United States Coast Guard in a building located in the City of Norfolk, Virginia. Under the original lease and supplemental lease agreement 3, dated August 1,

1996, the lease term is from May 15, 1996, to May 14, 2011, and is subject to termination after ten years upon 120-days' notice in writing. Appeal File, Exhibits 1, 4.

2. The lease provides that the total percentage of space occupied by the Government is equal to 53% of the total space available in the lessor's building, and that this percentage is to be used as the basis for computing "the Government's pro-rata share of real estate taxes, as defined in the Annual Real Estate Tax Escalation Clause." Appeal File, Exhibit 1.

3. The lease contains a Tax Adjustment clause, GSAR 552.270-24 (Aug. 1992), which provides:

(a) The Government shall make annual lump sum payments to cover its share of increases in real estate taxes over taxes paid for the calendar year in which its lease commences (base year). . . .

(b) The Government's share of the tax increase will be based on the ratio of the rentable square feet occupied by the Government to the total rentable square feet in the building.

Appeal File, Exhibit 1 at 11.

4. On February 9, 1999, through Ordinance No. 39,454 (the ordinance), the City of Norfolk established a Downtown Service District and imposed an additional real estate tax on appellant's property located in the service district. The ordinance created new sections of the Norfolk City Code and read in relevant part:

Whereas, pursuant to Section 15.2-2400 et seq. of the Code of Virginia, 1950, as amended . . . the City is authorized by state law to levy and collect an annual tax . . .

Article IV Real Estate Taxes . . .

Section 24-212.4 Additional Tax Imposed for specified periods

To provide for the additional facilities and services in the Downtown Service District, there is hereby imposed and levied an additional tax on taxable real property and improvements subject to local taxation located in the Downtown Service District . . . which tax is in addition to all other taxes and fees as may be imposed by law and which is imposed.

The additional tax was imposed for the period of April 1, 1999, through June 30, 2003. Appeal File, Exhibit 24.

5. On March 18, 2003, Ordinance No. 40,982 was passed by the City of Norfolk, extending the additional tax for the period of July 1, 2003, through June 30, 2009. Appeal File, Exhibit 25.

6. The amount of the additional tax imposed by the ordinance was included on the real estate tax statement prepared by the City of Norfolk and sent to Neva Properties. Appeal File, Exhibit 14.

7. On May 23, 2002, GSA executed supplemental lease agreement 7, which substituted BGK for Neva Properties, Ltd. as lessor. Appeal File, Exhibit 7.

8. On May 22, 2001, Divaris Property Management Corp. (Divaris), acting as property manager for appellant, submitted an invoice for tax increase to the contracting officer for tax year 2000-2001 in the amount of \$65,844.24. The invoice included the additional tax assessed by the ordinance. Appeal File, Exhibit 12.

9. On May 29, 2001, GSA prepared a real estate tax escalation analysis that concluded that the lessor was due a \$50,535.11 tax increase for tax year 2000-2001. GSA's analysis did not include the ordinance's assessment, and noted: "The Federal Government does not pay business district taxes." Appeal File, Exhibit 13.

10. On May 31, 2002, Divaris submitted an invoice for tax increase to the contracting officer for tax year 2001-2002 in the amount of \$66,076.94. The invoice included the additional tax assessed by the ordinance. Appeal File, Exhibit 14.

11. On June 11, 2002, GSA prepared a real estate tax escalation analysis that concluded that the lessor was due a \$50,741.30 tax increase for tax year 2001-2002. GSA's analysis did not include the ordinance's assessment, and noted: "The Federal Government does not pay business district taxes." Appeal File, Exhibit 19.

12. On June 27, 2002, Divaris sent a letter to GSA noting the discrepancy between the invoiced amount and GSA's analysis, and requested further explanation as to why the additional tax imposed by the ordinance was not included. Appeal File, Exhibit 15.

13. The contracting officer, in a letter dated July 29, 2002, stated the downtown business tax was not paid in the previous year because:

The tax escalation clause in your lease . . . states in part that . . . "the Government shall make lump sum payments to cover its share of increases in real estate taxes . . ." This language has been interpreted to include only taxes of a general nature. The General Services Board of Contract Appeals Decision #6973-R ruled that such special assessments (as in downtown business taxes) could not be considered for the purpose of calculating the tax escalation as provided in the tax escalation clause of the lease.

Appeal File, Exhibit 16

14. On April 9, 2003, appellant wrote the contracting officer, disagreeing with her analysis regarding the ordinance tax and requesting a final decision on whether GSA would pay the \$15,335.64 it excluded from its tax escalation adjustment for the tax year 2001-2002. Appeal File, Exhibit 20.

15. On May 1, 2003, the contracting officer issued a final decision denying appellant's claim. Appeal File, Exhibit 21. Appellant filed an appeal which was docketed July 31, 2003.

16. In its notice of appeal and complaint, appellant stated that the relief sought is reimbursement of the \$15,335.64 that represents the tax assessment under the ordinance for tax year 2001-2002, and a determination that the tax adjustment clause applies to adjustments resulting from the additional real estate tax imposed by the City of Norfolk in the current and future years. Notice of Appeal at 1; Complaint at 3.¹

Discussion

The Tax Adjustment clause in the lease entered into by respondent and appellant states that the Government will make annual lump sum payments to appellant to cover the Government's share of increases in real estate taxes over taxes paid for the calendar year in which its lease commences. This dispute arises because respondent has denied payment of a portion of the amount of increased real estate taxes requested by appellant which resulted from the City of Norfolk's imposition of a real estate tax on property in the downtown business district in which the leased property is located.

Respondent asserts that the Tax Adjustment clause does not obligate respondent to pay for increases in real estate taxes which are the result of a special assessment and that the tax imposed by the city was a special assessment. Respondent relies upon our decision in McDaniel Brothers Construction Co., GSBCA 6973, et al., 84-2 BCA ¶ 17,497, aff'd on reconsideration, 84-3 BCA ¶ 17,683. In that decision, the Tax Adjustment clause in the lease referred to adjustments resulting from "general real estate taxes." Because the language of the lease qualified the taxes as "general," the Board considered sua sponte the distinction between general real estate taxes and special assessments on real property. In that case, the Board concluded that the Government was not obligated to pay for increases that were special assessments and therefore were not considered general real estate taxes in the state where the property was located. Respondent also cites Woodbridge Construction Corp. v. General Services Administration, GSBCA 14200, 98-2 BCA ¶ 30,003, in which the Tax Adjustment clause of the lease also contained a reference to "general real estate taxes."

Appellant asserts that the factual circumstances of the instant case are distinguishable from those in McDaniel Brothers and Woodbridge Construction, in that the Tax Adjustment clause in appellant's lease is applicable to "real estate taxes" and does not refer to "general real estate taxes." Additionally, the ordinance refers to the additional tax imposed as a "real estate tax" and the real estate tax statement prepared by the City of Norfolk includes the additional tax imposed by the ordinance. Accordingly, appellant asserts that the Tax Adjustment clause obligates respondent to pay the increase in real estate taxes as a result of the additional tax imposed by the ordinance.

Appellant prevails in this case. Contract interpretation is said to "begin with the plain language" of the contract, and that language must be read in accordance with its express

¹ Appellant did not seek reimbursement for the amount denied by respondent for tax year 2000-2001.

terms and plain meaning. See James A. Prete v. General Services Administration, GSBCA 15884, GSBCA 15724, 03-1 BCA ¶ 32,163; Saul Subsidiary II Ltd. Partnership v. General Services Administration, GSBCA 13544, 98-2 BCA ¶ 29,871. The plain language of the Tax Adjustment clause in appellant's lease does not qualify the taxes which result in adjustments as "general real estate taxes," as was the case in the clauses in the decisions cited by the respondent. The Tax Adjustment clause states that the taxes which result in an adjustment are "real estate taxes," and the clear and unambiguous language of the ordinance and the City of Norfolk Code state that the tax at issue is a "real estate tax." We need look no further. Appellant's interpretation is supported by the clear language of the lease and the ordinance. Respondent's interpretation is not reasonable, as respondent attempts to add a qualification that is not contained in the clear language of the lease.

Appellant's quantum calculation appears correct, and it has not been questioned or rebutted by respondent.

Decision

The appeal is **GRANTED**. Appellant is entitled to the amount of \$15,335.64 respondent excluded from its tax escalation adjustment for the tax year 2001-2002 and to adjustments in future years as the result of the additional tax imposed by the ordinance.

ALLAN H. GOODMAN
Board Judge

We concur:

ROBERT W. PARKER
Board Judge

ANTHONY S. BORWICK
Board Judge