ISSN 1553-9571

WINTER 2008 A REPRINT FROM VOL. 4, NO. 4

GOVERNMENT LEASING NEWS

A QUARTERLY NEWSLETTER FOR OWNERS, MANAGERS AND DEVELOPERS OF GOVERNMENT-LEASED PROPERTY

Should GSA Add a Limited Termination for Convenience Clause To Its Leases? Some Recent Decisions Counsel that it Should.

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Recent decisions issued by the Government Accountability Office ("GAO") and the U.S. Court of Federal Claims ("CFC") suggest that it may be time for the General Services Administration ("GSA") to seriously consider incorporating a limited termination for convenience clause that would allow GSA to terminate a lease for convenience if a protest is sustained. Such a limited termination for convenience clause would assure more rigorous competition for GSA leases, lead to better value for the Government, and could save the GSA from significant damages if it must breach a lease by court order to ensure a fair competition.

Background

Traditionally, when a private contractor does business with the Government, it can expect to have a termination for convenience clause in its contracts that allows the Government to terminate a contract with little notice, for any reason. In these standard procurement contracts, boards and courts will incorporate a termination for convenience provision by operation of law even if the Government fails to include such a provision in the contract.

Not so with lessors who rent space to the Government (at least using a GSA lease). GSA generally takes the position that real property leases do not need to adhere to the Federal Acquisition Regulation's requirement that a termination for convenience clause be included in contracts. Most courts, boards, and the GAO have agreed—and for good reason. By statute, GSA leases can last for 20 years. These leases often require the construction or renovation of buildings, which usually entails the use of financing to raise sufficient funds. Even in the sunniest of financial times, no lender would provide financing for the construction of a building that will depend on rental payments when the Government tenant can terminate at any time, for any reason. Thus, in most of its leases, GSA willingly and justifiably deletes the termination for convenience clause seen on GSA's Standard Form 2 that is available online.*

Recent Cases

Some recent cases explore how GAO and the CFC respond to the absence of a termination for convenience clause in an awarded lease and, taken together, strongly suggest that GSA and offerors would be better served by including some limited termination for convenience clause in future leases.

In *New Jersey & H St., LLC*, No. B-311314.3, June 30, 2008, 2008 CPD ¶ 133 and *Trammell Crow Co.*, B-311314.2, June 20, 2008, 2008 CPD ¶ 129, GAO heard two challenges to GSA's award of a lease to a lessor to provide up to 524,000 BOMA rentable square feet of space to combine and house various sections of the U.S. Department of Justice in Washington, DC. GAO sustained the two protests, concluding that GSA had improperly conducted the procurement by relaxing the requirements for the awardee's proposal, but failing to give the protesters' proposals the same benefit and credit. Additionally, GAO found that GSA failed to discuss certain proposal weaknesses regarding New Jersey & H Street's access to amenities and Trammell Crow's key personnel. Despite its conclusion that GSA conducted the procurement improperly, GAO did not require GSA to correct the errors in the procurement and make a new award decision as GAO normally would do in this circumstance. Instead, GAO ex-

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*See *http://contacts.gsa.gov/webforms.nsf/0/57A58CDEC8239E0485256BFA004F65F3/$file/*

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plained:

The lease here has been awarded and signed by the agency and awardee, and the lease does not contain a termination for convenience clause. In the absence of a termination for convenience clause, we ordinarily do not recommend termination of an awarded lease, even if we sustain a protest and find the award improper. Here, we do not think there is any basis to recommend termination.

Ultimately, GAO only awarded bid preparation and proposal costs and the costs of protesting the award to the successful protesters.

Protesters have avoided this fate by making it to the courthouse or GAO before a challenged lease has been signed. In *Fedcar Co., Ltd.*, B-310980 *et al.*, Mar. 25, 2008, 2008 CPD ¶ 70 and *Hunt Building Co., Ltd. v. United States*, 61 Fed. Cl. 243 (2004), *modified*, 63 Fed. Cl. 141 (2004), the protesters both succeeded in overturning the award and getting another shot of being awarded the lease because no fully signed lease existed. In *Fedcar Co.*, the protester challenged GSA's award of a 15-year lease for the construction and lease of a dedicated facility of 6–9 acres (including the development of 110,531 rentable square feet of office and related space) to be used by the Federal Bureau of Investigation in Indianapolis, Indiana. GAO sustained the protest because GSA failed to properly calculate the awardee's price and, therefore, also failed to properly conduct a price/technical tradeoff analysis of the two offerors. While it appeared that the lease had already been signed by GSA and the awardee, GAO disagreed because GSA had proposed several changes to the draft lease and sent the lease to the awardee for its signature and agreement. GSA failed to produce the signed lease as part of the record before GAO, which concluded that the record showed "GSA's conditional acceptance of [awardee's] offer did not form a legally binding lease contract." Thus, GAO concluded that GSA should re-evaluate the proposals and make a new award.

In *Hunt Building*, the CFC heard a protest of the Air Force's award of a military privatization project lease at Hickam Air Force Base, Hawaii. The CFC issued an injunction ordering the Air Force to amend the solicitation, re-evaluate proposals, and allow the protester to compete in the re-evaluation. The CFC enjoined the Air Force from entering a contract with the awardee because the Air Force unfairly relaxed a term of the solicitation for only the awardee and also allowed only the awardee to negotiate changes to the form agreement that had governed all offerors after the awardee was selected. The CFC noted that the lease did not include a termination for convenience clause. The CFC, however, recognized that it could issue its injunction because the parties had not closed and executed the lease.

The above cases stand for the principle that GAO and the CFC generally will not read a termination for convenience clause into an executed lease that does not include such a clause and, because of the absence of such a clause, will not disturb the award of a lease even where the tribunal finds GSA (or another agency) has acted improperly in awarding the lease. However, while this principle generally applies, there exists at least one CFC decision that runs counter to this principle.

In *210 Earll, LLC v. United States*, 77 Fed. Cl. 710 (2006), the CFC was unconcerned with the absence of a termination for convenience clause. The protester challenged GSA's award of a lease of office and related rental space in Phoenix, Arizona, to be occupied by the U.S. Internal Revenue Service. The CFC found that "GSA committed reversible error when it completely failed to consider the non-price factors, as required under the [Solicitation for Offers], in its analysis of the offers." The CFC vacated GSA's award decision and ordered it to correct its evaluation errors and make a new source selection decision. In coming to this conclusion, the CFC swept aside concerns voiced by GSA and the awardee that the executed lease lacked a termination for convenience clause and that the CFC would effectively require GSA to breach its contract to afford injunctive relief:

The Government and [awardee] again raised the question of whether an enforceable contract existed between [awardee] and GSA in this litigation. They argue that the existence of an enforceable contract affects what relief should be provided by the Court because it is not in the public interest to require the Government to breach a contract. However, whether there is an enforceable contract between these parties does not change this Court's jurisdiction to give appropriate relief, including vacating the award, if we conclude that the Government committed reversible error in the procurement process.

Thus, the CFC in *210 Earll* turned conventional wisdom on its head. Rather than reading a termination for convenience clause into the executed lease (as would be the case in other types of procurement contracts), which would allow the Government to limit its damages to minimal termination costs, the CFC exposed the Government to potentially significant damages for breach of contract (which could include any lost profits expected for the life of a

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lease).

Conclusion

GSA has placed itself in a quandary when an unsuccessful offeror successfully challenges an award. As with *New Jersey & H Street* and *Trammell Crow*, GSA risks awarding a lease to an offeror that does not truly represent the best value to the Government. Also, as *210 Earll* demonstrates, GSA may face the risk of significant damages for breach of contract where it does not include a termination for convenience clause that would minimize any costs to the Government. Rather than facing these concerns or making GAO and the CFC tip-toe around whether a lease has been executed as reflected in *FedCar* and *Hunt Building*, GSA should consider placing a limited termination for convenience clause in its leases pending the resolution of any protest. The Federal Acquisition Regulation—clause 52.233-3 ("Protest After Award")—contemplates termination of a contract after receipt of a final decision in a protest. In most cases, GSA already honors any stays of performance pending the resolution of a protest. For this reason, the limited termination clause should not prevent lessors from obtaining financing. Because performance is stayed during this time period, there is less risk to a lender that money lent will be spent —and financing institutions could themselves craft a clause in their lending agreements requiring lessors to honor any stay honored by GSA. Moreover, the larger concern that the Government could terminate for any reason, at any time and risk the lender's stream of repayments midway through a 20-year lease would be checked to just this one limited and mostly predictable circumstance at the beginning of performance. Ultimately, including a limited termination provision pending the outcome of any protests would allow GSA to obtain best value, reduce GSA's risk of significant breach damages, and would not adversely affect a lessor's ability to obtain financing.

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