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Court Decision Carves Out Broad Right to Injunctive Relief for Protesters of GSA Lease Awards

By Robert C. MacKichan Jr. and Gordon N. Griffin*

In Springfield Parcel C, LLC v. United States, *the U.S. Court of Federal Claims carved out a broad right for injunctive relief for would-be lessors protesting a lease award. Until now, prior bid protest decisions before the court suggested that the absence of a standard termination for convenience clause in a fully executed U.S. General Services Administration's lease insulated both the government and the awardee from meaningful post award bid protests. The authors of this article discuss this decision and its implications.*

In a decision that may fundamentally alter the landscape for competitors protesting the U.S. General Services Administration's ("GSA") fully executed lease awards, the U.S. Court of Federal Claims (the "Court") has set aside GSA's award of a lease for more than 600,000 rentable square feet for the Transportation Security Administration's ("TSA") consolidated Northern Virginia office.

In *Springfield Parcel C, LLC v. United States*, Judge Charles F. Lettow carved out a broad right for injunctive relief for would-be lessors protesting a lease award. Until now, prior bid protest decisions before the court suggested that the absence of a standard termination for convenience clause in a fully executed GSA lease insulated both the government and the awardee from meaningful post award bid protests.

The court held that the provisions of a Congressionally approved lease prospectus are legally binding on GSA and, in this instance, a deviation from the square footage requirements of the lease prospectus constituted a violation of the Anti-Deficiency Act. Such a violation of law provided the basis for the Court to declare that the lease was void *ab initio*.

BACKGROUND

In 2014, the U.S. General Services Administration sought to consolidate the

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Transportation Security Administration's multiple Northern Virginia offices into one campus. As this process would require a lease award in excess of $2.85 million, GSA prepared and submitted to both houses of Congress a lease prospectus, which the authorization committees in both the House and Senate subsequently approved.

Included in both the Request for Lease Proposals and a subsequent amendment thereto was an explicit requirement that the leased space be capped at 625,000 rentable square feet ("RSF"). This RSF cap was also noted in the lease prospectus approved by the committees in both houses of Congress.

LEASE AWARD AND PROTEST

On August 11, 2015, after conducting negotiations with several offerors, GSA awarded the lease to Eisenhower Real Estate Holdings, LLC ("Eisenhower"), whose offer, according to several government officials, exceeded the lease prospectus cap of 625,000 RSF. Eisenhower included rent free an additional 24,207 RSF in excess of the 625,000 RSF in order to meet the office area requirements of the lease. GSA and Eisenhower signed a lease that same day.

Springfield protested the award of the lease, first at the U.S. Government Accountability Office ("GAO"), and then, after an anonymous tip that Eisenhower's proposal exceeded the RSF cap, on September 25, 2015, at the U.S. Court of Federal Claims, where the case was assigned to Judge Charles F. Lettow. The Court granted a temporary restraining order ("TRO") on the same day. The parties agreed to extend the TRO until November 12, 2015, with the expectation that the Court would issue its ruling by then. The Court issued its ruling in *Springfield Parcel C, LLC v. United States*,[1] under seal, on November 11, 2015, and released a redacted public version on November 25, 2015.

LEASE PROSPECTUS PROCESS

Initially, after dismissing the three-pronged assertions of GSA to the contrary, the Court found that the square footage limitations of the Congressionally approved lease prospectus were legally binding on GSA. The Court concluded that lease prospectus process was not a violation of the separation of powers doctrine, thereby compelling GSA to adhere to the defined terms of the lease prospectus.

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[1] https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2015cv1069-46-0.

VIOLATION OF LAW VOIDS THE LEASE

By GSA agreeing to accept rent free the additional 24,207 RSF of space, the Court first held that GSA had violated the Anti-Deficiency Act by awarding a lease for space that exceeded the maximum amount indicated in the lease prospectus. Noting that under 40 U.S.C. § 3307, an appropriation for a lease in excess of $2.85 million is made only when House and Senate committees approve a lease prospectus, Judge Lettow held that by exceeding the terms of the lease prospectus, GSA had exceeded its appropriation authority, and violated the Anti-Deficiency Act. Accordingly, the Court held that the lease was void *ab initio*, and had never been legally binding.

By finding the lease void *ab initio*, the Court both set aside the award and insulated GSA from any claims for breach damages.

INJUNCTIVE RELIEF

In groundbreaking fashion, the Court went on to carve out a broad right for injunctive relief for would-be lessors protesting a lease award. Until now, bid protest Court decisions had suggested that the absence of a standard termination for convenience clause in GSA leases insulated a lease award from injunctive relief in a bid protest. Judge Lettow disagreed.

Beginning his discussion of the Court's authority to grant injunctive relief, Judge Lettow noted that "[i]n a bid protest, the court is empowered to award 'any relief that the court considers proper, including declaratory and injunctive relief.' "[2] Judge Lettow found that the threshold for determining whether injunctive relief is appropriate, as laid out in *Centech*, was met by a successful protestor.

The Court then addressed the absence of a termination for convenience clause. The government argued that injunctive relief would subject the government to millions in breach damages because of the lack of a termination for convenience clause. The Court dismissed this notion, noting that GSA could not use the lack of a clause to justify an award:

> GSA now argues that its decision cannot be undone. If the court were to accept this argument, it would mean that GSA could immunize itself from post-award injunctive relief by signing flawed contracts and then claiming in court that the awards cannot be vacated. It would be inequitable to permit the government 'to preserve its ill-gotten gain' in

[2] Quoting *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037, Fed. Cir. 2009.

> such a manner . . . .[I]f the government is correct, then all of GSA's leases are immune from post-award injunctive relief. This cannot be correct. Congress could not have intended in enacting the Competition in Contracting Act, 31 U.S.C. §§ 3301, 3304, 3551–3556, and the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (Oct. 19, 1996) (codified in relevant part at 28 U.S.C. § 1491(b)(1)), to grant GSA such sweeping immunity.

After granting a broad right for protestors to seek injunctive relief, the Court expressly declined to address whether or not a termination for convenience clause is implied in GSA leases, as the Court has previously suggested. Noting a split in the authority on that subject, Judge Lettow wrote that "the court expresses no opinion as to the answer."

WHAT THIS MEANS FOR OFFERORS/COMPETITORS IN GSA LEASE PROCUREMENTS

The Court has thrown the long-held presumption that GSA lease awards (i.e. fully executed leases) are inviolate into doubt. This means unsuccessful offerors may now have an opportunity to protest lease awards like more traditional government contracts, and that the relief available is no longer limited to bid and proposal costs but may now have improper awards set aside. This is despite the absence of the traditional termination for convenience clause found in the Federal Acquisition Regulations.

It is likely that the government will appeal this ruling, particularly as it relates to the findings relating to the enforceability of the terms of a lease prospectus and the Court's claimed injunctive authority, so lessors should stay tuned for future developments in this case. Additionally, it remains unclear whether GAO, where the majority of bid protests are heard, will follow the Court's lead and recommend termination of improperly awarded leases, even in the absence of a termination for convenience clause, or whether remedies at GAO remain limited to bid and proposal costs, as its previous decisions have indicated.