Life After Springfield Parcel:
The Changed Landscape in Federal Real Estate

by Robert C. MacKichan, Jr. and Gordon N. Griffin

In a decision that may fundamentally alter the landscape for unsuccessful offerors 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. For what appears to be the first time, the Court has declared a recently-executed GSA lease to be void, while simultaneously ruling that an unsuccessful offeror could potentially expect to have a lease award set aside if a bid protest is sustained.

Conventional wisdom has long held that GSA lease awards are more or less immune to bid protests. Lessors and contracting officers alike have long assumed this to be the case because, unlike more traditional government contracts, GSA leases do not contain a "termination for convenience" clause. The Federal Acquisition Regulations ("FAR") mandate the inclusion of these clauses in most U.S. Government contracts. These clauses provide that "[t]he Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest." This broad authority to terminate a contract allows the government to terminate a contract, in the event of a successful protest, without incurring any liability for breach.

Because these "T4C" clauses are lacking in GSA leases, the Court of Federal Claims and the Government Accountability Office, the two venues with jurisdiction over bid protests, have until now consistently declined to set aside lease awards in the face of a successful bid protest. Instead, the only remedy available to protestors has been bid and proposal costs. This contrasts with more traditional government contracts, for which the Court and GAO have provided injunctive relief, setting aside awards they found unreasonable, and forcing agencies to re-compete the procurement, or at the very least re-evaluate proposals.

In *Springfield Parcel C, LLC v. United States*, Judge Charles F. Lettow has upended the conventional wisdom surrounding bid protests and lease awards. In a ruling that puts lease awards on an even playing field with more traditional government contracts, the Court has opened the door to injunctive relief (or the setting aside of awards) for unsuccessful offerors protesting fully-executed leases.

However, before addressing the issue of injunctive relief, 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 violation of law provided the basis for the Court to declare that the lease was void *ab initio*, or that no legally binding lease existed in the first place. This ruling had the effect of insulating GSA from any liability for breach damages.

Background

In 2014, GSA sought to consolidate the 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 a lease prospectus, which 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 cap on rentable square feet was also noted in the lease prospectus approved by the committees in both houses of Congress.

On Aug. 11, 2015, after conducting negotiations with several offerors, GSA awarded the lease to Eisenhower Real Estate Holdings, LLC, whose offer, according to several government officials, exceeded the 625,000 RSF cap in the lease prospectus due to Eisenhower's decision to provide some 24,207 RSF to the government rent-free. 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

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then, after an anonymous tip that Eisenhower's proposal exceeded the RSF cap, on Sept. 25, 2015 at the Court of Federal Claims. The Court granted a temporary restraining order (TRO) on the same day. The parties agreed to extend the TRO until Nov. 12, 2015, with the expectation that the Court would issue its ruling by then. The Court issued its ruling, under seal, on Nov. 11, 2015, and released a redacted version on Nov. 25, 2015.

Lease Prospectuses

First, Judge Lettow ruled that by failing to strictly adhere to the terms of its lease prospectus, the government had violated the Anti-Deficiency Act, and the lease was therefore void *ab initio*.The Public Buildings Act of 1959, as amended and now codified at 40 U.S.C. § 3307, requires the Administrator of GSA to submit a Lease Prospectus to committees in both houses of Congress for approval in order to obtain funding for any lease with a value over $2.85 million. As GSA's Leasing Desk Guide notes, "40 U.S.C. § 3307(a)(1) and (2) impose a limit on Congress's ability to appropriate funds for GSA to lease space or to alter leased space, if the expenditure exceeds threshold dollar amounts as adjusted annually according to 40 U.S.C. § 3307(h)." The limit referenced in the Leasing Desk Guide is currently set at $2.85 million.

The Court read the language of 40 U.S.C. § 3307 to mean that a violation of the prospectus terms meant that GSA had effectively violated the Anti-Deficiency Act. The Anti-Deficiency Act, codified at 31 U.S.C. § 1341, prohibits U.S. government agencies from incurring obligations or making expenditures (outlays) in excess of amounts available in appropriations. Judge Lettow strictly construed the Public Buildings Act to mean that exceeding the terms of a prospectus equates to exceeding budget authority. This reading of the law led the Court to conclude that GSA violated the Anti-Deficiency Act by awarding a lease in excess of the square footage called for in the prospectus:

> "Because no appropriation has been made for a space exceeding 625,000 rentable square feet, the lease signed by the government and Eisenhower triggers the AntiDeficiency Act, 31 U.S.C. § 1341, which provides that an "officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation . . . unless authorized by law."
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> Without an appropriation, GSA's lease with Eisenhower is void *ab initio*."

Injunctive Relief and Termination For Convenience Clauses

Judge Lettow then went on to carve out a broad right for injunctive relief for would-be lessors protesting a lease award. Judge Lettow began his discussion of relief available to protestors by noting that "[i]n a bid protest, the court is empowered to award 'any relief that the court considers proper, including declaratory and injunctive relief."'(quoting *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037, Fed. Cir. 2009). Judge Lettow went on to hold that a successful protest would, by definition, pass the *Centech* test for injunctive relief.

The Court then addressed the absence of a termination for convenience clause. The government had argued that injunctive relief would subject the government to millions in breach damages because of the lack of a termination for convenience clause.

Judge Lettow dismissed this notion, holding that GSA could not use the lack of a T4C clause to defend an otherwise indefensible award, and concluding as follows:

> "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 such a manner. …
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> [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

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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."

Looking to the Future

The Court has cast doubt on two widely-held presumptions about federal leases. First, it has held that lease prospectuses for high-value leases are binding, and GSA may not deviate from their terms without seeking Congressional approval. Next, the Court has made it clear that it is willing to provide injunctive relief to successful protestors of lease awards, regardless of whether or not such leases have termination for convenience clauses.

It remains uncertain whether GSA or Eisenhower Real Estate Holdings, LLC may appeal this ruling, but in the absence of an appeal, GSA is now on notice that lease awards may no longer be inviolate, at least not according to one judge in the U.S. Court of Federal Claims. However, it's important not to read too much into this decision just yet. Judges at the Court of Federal Claims are not required to follow the precedent set by other judges, and the GAO isn't required to either. An appeal and a final ruling at the Federal Circuit could change this, and create a binding precedent. But until that time, and in the absence of a change in GSA's policy defining an award as a fully executed lease, this ruling may be the basis for new protests at the U.S. Court of Federal Claims.

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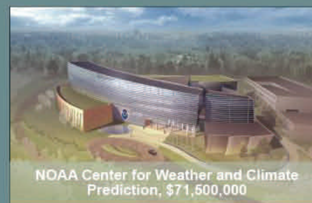

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