COURSE OF DEALING (PRE-DISPUTE CONDUCT)

The General Services Administration ("GSA") provides workplaces for federal workers by leasing and managing commercial real estate. GSA is authorized by 40 U.S.C. § 585 to enter into lease Agreements to accommodate Federal Agencies in buildings. The agency occupying the premises normally pays the lease cost from its budget. There are numerous cases involving disputes about whether the Government or the Lessor is responsible for the payment of items such as utilities. *Rockside-77 Properties LLC,* CBCA 7153, May 12, 2023 is one of them, and concerns electric costs.

In February 2010, Rockside and GSA entered into a lease for a government tenant agency, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). The lease was for 10 years, and was extended for two additional years. The lease stated that operating costs (including electricity) would be included in the annual rent, and would be adjusted annually. Until April 2021, Rockside was invoicing separately for electricity and GSA was paying separately for invoices for electricity. In April 2021, the Contracting Officer issued a formal demand letter (claim) requiring that Rockside reimburse GSA $91,1776 for electric utility payments, stating Rockville violated the terms of the lease. In June 2021, the Contracting Officer issued a final decision reducing the reimbursement demand to $57,807 for the ten year period that GSA paid utilities erroneously, in partial recognition of the applicable Contract Disputes Act statute of limitations. GSA characterized this amount as "duplicate and erroneous payments" for electricity. GSA subsequently withheld $57,807 from rental amounts due, and Rockside appealed the withholding, seeking return of the full amount of GSA's recoupment.

Rockside failed to rebut GSA's assertion of erroneous payments, pointing to an unsigned amendment and to the GSA's separate payments for electricity for ten years. The Board held that the lease language was clear and unambiguous, and any separate payments made by GSA were clearly erroneous.

As for the ten years of separate payments made by the GSA for electricity, the Board noted that they could not be construed as acquiescence of a basis to interpret the lease in a matter contrary to its unambiguous terms. The Board noted that "predispute conduct can be considered [] only if a provision is ambiguous." *PJ Dick Inc v. GSA*, GSBCA 12151, 96-1 BCA 27955 (1995). GSA's conduct in making the separate payments for utilities could not be relied upon to interpret the lease provision in a manner contrary to its plain language, and recoupment of the $57,807 was clearly proper for the erroneous overpayments.

Takeaway: This case is very close to a claim or defense of a "course of dealing." The Second Restatement of Contracts identifies a "course of dealing" as

> [a] sequence of previous conduct between two parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their

> expressions and other conduct. []Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement.

Restatement of Contracts, Second § 223 (1981). Another section of the Restatement of Contracts comes very close to the Civilian Board of Contract Appeals position, and states:

> In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable[](b) express terms are given greater weight than course of performance, course of dealing, and usage of trade [.]

Restatement Second of Contracts, § 203

Therefore, the unambiguous language and express terms for electricity costs cited in the Rockside case would likely be given greater weight than the 10 year course of dealing.

For other helpful suggestions on government contracting, visit:
Richard D. Lieberman's FAR Consulting & Training
at https://www.richarddlieberman.com/, and Mistakes in Government Contracting
at https://richarddlieberman.wixsite.com/mistakes.