ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Bruce E. Zoeller	)	ASBCA No. 54205
	)	
Under Contract No. DACA41-1-99-532	)	

APPEARANCE FOR THE APPELLANT: Mr. Bruce E. Zoeller

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
David J. Benson, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Kansas City

OPINION BY ADMINISTRATIVE JUDGE COLDREN
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant has filed a motion for reconsideration of our decision dated 12 December 2003, holding that the Chief of the Military Branch, Real Estate Division, Kansas City District, U.S. Army Corps of Engineers had the authority to partially terminate appellant's lease for agricultural or grazing purposes at Fort Leavenworth, Kansas, for five crop years with an option to renew for an additional five years.

Appellant's reconsideration motion argues that the Chief of the Military Branch lacked that revocation authority under Army Regulation 405-80 (AR) (ex. A-1). As it previously argued in its post hearing brief at paragraph 6 of page 32, appellant argues that Paragraph 4-4 of AR 405-80 provides that Army controlled real property may only be leased to a non-Army party after a report of availability determines that the land is available for lease to a non-government party. Subparagraph f. of Paragraph 4-4 also provides that the revocation or termination of availability for that land must be approved at the same level of command "needed" for the original report of availability. We did not fully consider this argument in our decision and make the following additional findings.

ADDITIONAL FINDINGS OF FACT

1. Paragraph 4-4 of AR 405-80 is entitled "Availability" and provides in pertinent part as follows:

> a. Army controlled real property will be authorized for use by a non-Army party after it has been determined available by

> an appropriate official who approves a Determination of Availability (DOA) with supporting Report of Availability (ROA). . . .
>
> b. A ROA for proposed outgrants is initiated and prepared at the installation/project level. This document provides the information necessary for review and approval of availability and preparation of the real property instrument which will authorize the approved use. . . .
>
> . . . .
>
> e. ROAs will be submitted through command channels to the . . . MACOM [Major Army Command] . . . having accountability of the real property for a DOA. . . . The authority to determine availability may be redelegated for actions redelegated in accordance with paragraph 3-3.
>
> f. When real property under outgrant is needed for Army purposes, the revocation/termination of availability will be approved at the same level of command that was needed for the original DOA.

2. Paragraph 3-3 of AR 405-80 is entitled "Additional Redelegation" and provides as follows:

> e. The MACOM [Major Army Command] Commander . . . for military outgrant actions . . . may redelegate the authority to make the DOA when authority to execute has been redelegated below the USACE division level.

3. Paragraph 4-1 c. of AR 405-80 describes the purposes of the leases involved in this appeal as follows:

> Use of Army-controlled real property is granted for non-Army use only when authorized by law or administrative authority. The use granted must be of direct benefit to the US, promote the national defense or an Army mission, or be in the public interest. The use must also be compatible with the installation/project mission.

4. The record does not indicate that AR 405-80 was published in the Code of Federal Regulations or the Federal Register. AR 405-80 states at page i that this

regulation was distributed to various command levels of the Army with no indication that it was made available for publication in the Federal Register or Code of Federal Regulations. We have searched the Federal Register and Code of Federal Regulations and have not been able to determine that AR 405-80 was published there.

5. No redelegation under Paragraph 3-3 of AR 405-80 as quoted in additional finding 2 appears to have occurred (tr. 92). Prior to the award of appellant's agricultural lease, the U.S. Army Training and Doctrine Command at Fort Monroe, Virginia, on 12 February 1999 approved the report of availability from Fort Leavenworth by determining that the land was available for agricultural lease and that the lease was compatible with the Fort Leavenworth installation mission (ex. A-3). This approval was sent to the Commander, Kansas City District of the U.S. Army Corps of Engineers (*id.*).

6. The decision as to what land was to be used to construct the force protection measures required by the Army for all of its installations due to the tragedy of 11 September 2001 as well as for the construction of military housing was under the base or installation commander who managed the real property on the base (tr. 26-28, 33, 34). The government post engineer was the base commander's representative for real property and had the authority over the use of that property at Fort Leavenworth where appellant was leasing the land to grow agricultural crops (tr. 23-28).

7. The government post engineer made the decision that the land covered by the revoked portions of appellant's agricultural lease was needed for force protection and military housing and no longer available to be leased to an outside party (tr. 28-30). He testified that he had the authority to determine whether the lease should be revoked (tr. 28).

8. No evidence was included in the record that his determination was sent to the Major Army Command above him for approval as had been previously done for the original Determination of Availability.

9. By a memorandum dated 12 December 2002 to the Commander of the Kansas City District, U.S. Army Corps of Engineers, the base engineer states that "Fort Leavenworth is declaring that the land [leased by appellant] is no longer available" and requesting that appellant's entire lease be terminated due to force protection and family housing construction issues (R4, tab 6).

10. By a letter dated 21 February 2003, the Chief of the Military Branch of the Real Estate Division of the U.S. Army Corps of Engineers notified appellant that the portion of appellant's agricultural lease covering areas FE and FW was terminated and the government was returning $24.51 of the $247.18 annual rent appellant had already paid (R4, tab 2). The letter did not terminate area AA of appellant's lease but indicated that the option for an additional 5-year period would not be exercised at the expiration of the 5-year lease term, resulting in the expiration of the lease at that time (*id.*).

11. The Chief of the Military Branch of the Real Estate Division testified that he relied on the 21 February 2003 memorandum from the base engineer in determining that these areas of the agricultural lease were not available when he removed these portions of appellant's lease (tr. 72-74). He further testified that the base engineer had the authority to make this determination (tr. 75, 77, 78). He did not consider this a determination of availability under AR 405-80 but a finding that the land was no longer available for an agricultural lease (tr. 76, 77). He indicated he tried to keep as much land for appellant as possible by not terminating area AA of appellant's lease even though the base engineer requested a complete termination (tr. 78-79).

DECISION

In our initial opinion, we determined that the Chief, Military Branch, Real Estate Division of the Kansas City District of the Corps of Engineers had been delegated the authority to revoke the lease at issue in this appeal. Appellant argues that Paragraph 4-4 f. of AR 405-80 limits that authority by requiring that the revocation or termination of a determination of availability must be approved at the same level of command as needed for the original determination. No evidence was included in the record that that approval was made prior to the partial revocation of the lease (finding 8). The issue presented is whether appellant can use this failure to obtain the approval required by Paragraph 4-4 f. of AR 405-80 to limit the Chief of the Military Branch's authority to revoke appellant's lease.

We hold that Paragraph 4-4 f. of AR 405-80 is not a limitation on the authority of the contracting officer to revoke the lease that by its terms was revocable at will. Paragraph 4-4 establishes procedures to determine what land is available for lease on an Army facility. It also establishes how land is removed from the stock of available land. It requires that the decision as to what land is placed in or removed from the stock of land available for lease be made at the Major Army Command level.

On the other hand, the mere fact that land is available for lease does not mean that the government has to lease that land or that the government cannot revoke the lease which by its terms is revocable at will. The contracting officer acted within his authority vis-à-vis the lease and did not purport to act under AR 405-80 vis-à-vis the land. In summary, we hold that Paragraph 4-4 f. does not limit the authority of the Chief of the Military Branch to partially revoke appellant's lease.

Apart from the contractual authority discussed above, we are constrained to point out that paragraph 4-4 f. of AR 405-80 is an internal operating procedure of the government to determine its stock of real property available for lease. The Federal Circuit in *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1365 (Fed. Cir. 2000), states in this regard:

> In order for a private contractor to bring suit against the Government for violation of a regulation, that regulation must exist for the benefit of the private contractor. *See Cessna*, 126 F.3d at 1451; *Rough Diamond Co. v. United States*, 173 Ct. Cl. 15, 351 F.2d 636, 640-42 (Ct. Cl. 1965). If, however, the regulation exists for the benefit of the Government, then the private contractor does not have a cause of action against the Government in the event that a contracting officer fails to comply with the regulation. *See Cessna*, 126 F.3d at 1451-52; *Rough Diamond*, 351 F.2d at 642.

Regulations requiring that the government properly determine its requirements (*Freightliner Corp. v. Caldera*, *supra* at 1366) and/or funding (*Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1454 (Fed. Cir. 1997), *cert. denied*, 525 U.S. 818 (1998)) have been held to be for the benefit of the government, even though the contractor would derive some incidental benefit from compliance with that regulation. On the other hand, a regulation requiring that an invitation for bids designate when any item being purchased was for a Foreign Military Sale was held to be for the benefit of the contractor because of the additional costs to a contractor involved in a foreign military sale over a domestic one. *Defense Systems Company, Inc.*, ASBCA No. 50918, 00-2 BCA ¶ 30,991 at 152,964.

Paragraph 4-1 c. of AR 405-80 makes it clear that the purpose of determinations of availability is to determine whether the lease to a non-government party is in the interest of the United States, or in particular to the mission of Fort Leavenworth (finding 3). It involves a determination of the needs or requirements of the base and is for the benefit of the government not appellant as required by the decision in *Freightliner Corp. v. Caldera*.

Appellant's motion for reconsideration is granted. Upon reconsideration, our decision denying the appeal is affirmed.

Dated: 10 March 2004

JOHN I. COLDREN, III
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54205, Appeal of Bruce E. Zoeller, rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUPE
Acting Recorder, Armed Services
Board of Contract Appeals