SUNSTONE OP PROPERTIES, LLC, d/b/a HAWTHORNE SUITES - SACRAMENTO,	)	**AGBCA No. 2004-166-2**
Appellant	)	
Representing the Appellant:	)	
Daniel G. Ecker, Esquire Rudner Law Offices 225 Broadway, Suite 3104 New York, New York 10007	)	
Representing the Government:	)	
Samar A. Shams, Esquire Office of the General Counsel U. S. Department of Agriculture Room 3311, South Building 1400 Independence Avenue, SW Washington, D.C. 20250	)	

DECISION OF THE BOARD OF CONTRACT APPEALS

August 25, 2004

Opinion for the Board by Administrative Judge WESTBROOK.

On May 6, 2004, the Board received a notice of appeal from Sunstone OP Properties, LLC, a Delaware limited liability corporation, d/b/a Hawthorne Suites - Sacramento (Appellant). The appeal arose out of an agreement between Appellant and the U.S. Department of Agriculture (USDA), Farm Services Agency (Respondent), reserving 410 room nights during the period June 21 and June 26, 2003. Appellant appeals the deemed denial of its claim for damages in the amount of $14,256 (subsequently reduced to $12,939).

Appellant asserts that the Board has jurisdiction over the timely appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended (CDA).

Appellant elected to proceed under the Board's Small Claims (Expedited) Procedure governed by Board Rules 12.1(a) and 12.2, providing for a decision by one judge, which is final and conclusive and shall not be set aside except in cases of fraud. Such decisions have no precedential value. The

original target date for a decision was September 7, 2004. This date was extended to September 15, 2004, when Appellant's requests for extensions to the briefing schedule were granted.

FINDINGS OF FACT

1. In November 2002, Respondent reserved rooms in several Sacramento, California, hotels for an international conference on agricultural science to be held June 21-26, 2003 (Appeal File (AF) 1).

2. One such hotel was Appellant's Hawthorne Suites Hotel in Sacramento (the hotel). The agreement between Appellant and Respondent consisted of three pages drafted by Appellant and one page headed "USDA/FSA Clauses" drafted by Respondent. Pertinent clauses from the portion of the contract drafted by Appellant are outlined in Findings of Fact (FF) 3 through 5 below. (AF 9-12)

3. The clause "RESERVATION PROCEDURES," provided that individual reservations should be made by Monday, June 2, 2003, directly with the hotel. It further provided that after that date the unused portion of the guest room block "will be released to the hotel for general sale." Prevailing hotel rates were to apply after that date. It further provided that reservations "must be guaranteed" by a major credit card or an advance deposit. Individual guest cancellations would be accepted until 4:00 p.m. two days prior to arrival. (AF 9.) The June 2, 2003 deadline for reservations was later extended to June 10, 2003, although the written agreement was not modified (AF 16, Supplemental Appeal File (SAF) 6).

4. The clause "CREDIT ARRANGEMENTS" expressed the parties' understanding that individual guests would be responsible for their own room, tax and incidental charges (AF 10).

5. The clause "CANCELLATION" provided that if Respondent should cancel the event, the United States Department of Agriculture would make every effort to rebook another event of equal or greater value within 12 months (AF 11).

6. The USDA/FSA Clauses page contained a "CANCELLATION POLICY" clause also providing that USDA would "make every effort to reschedule another event of equal revenue or size within one (1) year of the previously scheduled event (AF 12)."

7. Respondent also executed a purchase order in the amount of $15,000. The reverse side of the purchase order contained Purchase Order Terms and Conditions, including the Termination for Convenience clause. (AF 13, 13.1.) Laurie Ann Montgomery, who signed the agreement, explained that Respondent should not have to utilize it as the attendees should be paying their own way (AF 8). The Purchase order was signed by a Government Purchasing Agent but not by a representative of Appellant (AF 13).

8. On June 6, 2003, Respondent's employee, Terry Martz, left a telephone message for Appellant's employee, Robyn Cornell, stating that Respondent needed to cancel the block of rooms for the week of June 21st. By e-mail message dated June 16, 2003, Laurie Ann Montgomery confirmed Terry Martz's phone call of June 6 and confirmed the release of the entire block of 410 rooms from June 21 through June 26, 2003. (AF 14, 15.)

9. By e-mail of July 7, 2003, Robyn Cornell contacted Laurie Montgomery to "resolve the issue of non use of the contracted guestrooms." Ms. Montgomery responded: "As we are always planning meetings, we'll evaluate the appropriateness of Sacramento with our meeting needs." (SAF 21.)

10. By letter dated December 18, 2003, Appellant's counsel wrote Respondent demanding payment of $14,256 in lost profits by December 29, 2003, to avoid legal action (AF 17). A follow-up letter of February 27, 2004, acknowledged that the USDA held an event at the hotel in February 2004. Appellant claimed, however, that this event did not satisfy the Cancellation provision of the contract as its total revenue was less than $8,000. This letter also asserted written and formal demand for a decision within 60 days. (AF 22, 23.) A third letter, this one dated March 5, 2004, reviewed Appellant's contentions and calculated April 27, 2004, as the due date for a decision (AF 24-27.)

DISCUSSION

In its brief, Appellant argues that Respondent breached the contract between the parties; that the Cancellation provision of the contract was not the exclusive remedy; that even if it were the exclusive remedy, Respondent did not satisfy the requirements of that clause and that Appellant is entitled to $12,939 in lost profit damages.

Respondent's brief argues there was no breach where the contract language provided for future reservations of the individual rooms; that it cancelled the block of rooms in accordance with the terms of the contract drafted by the hotel; and, that it fulfilled its obligations under the contract to make every effort to rebook or reschedule another event. Respondent also argues that even if the Board were to find that it had breached the agreement, Appellant may not recover lost profits, as such are not recoverable under the mandatory Termination for Convenience clause. Finally, Respondent addresses the Purchase Order executed by Respondent arguing that it did not constitute a contract where it served solely as a guarantee, was not signed by the other party and where the opposing party did not perform thereunder.

The language of the agreement clearly anticipated that individual reservations would be made by prospective guests and that the reservations had to be made by a cut-off date after which the unused portion of the guest room block would be released to the hotel for general sale. Such reservations would not be effective until guaranteed by a major credit card or a deposit. (FF 3.) Clearly, those actions were conditions precedent to the formation of binding contracts to book particular rooms. The agreement that unused rooms would be released to the hotel for general sale on a particular date also anticipated the possibility that those rooms would not be used by attendees at Respondent's conference. It should be noted that the passive language used "will be released to the hotel" did not require action by Respondent or any particular person. That language describes an automatic release. Both parties fulfilled the terms of the agreement through the time of the Government's cancellation. The Government had no further obligation. The fact that no binding contract to rent a minimum number of rooms came into being means that Appellant has no entitlement to damages.

Appellant's reliance on the Cancellation clause is misplaced. That language requires only that every effort be made to rebook or to schedule another event of equal or greater size. (FF 5.) It does not require that such an event actually be scheduled. It does not define "every" effort. The fact that another event, albeit a smaller one, was booked is evidence that effort was made (FF 10). Appellant drafted the clause and has not shown that the Government did not comply with it.

DECISION

The appeal is denied.

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ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D.C.
August 25, 2004