



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION FOR SUMMARY RELIEF DENIED;
RESPONDENT'S MOTION FOR SUMMARY RELIEF GRANTED IN PART:
April 20, 2011

CBCA 2075

KD1 DEVELOPMENT, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Douglas C. LaSota of Dickie, McCamey & Chilcote, P.C., Pittsburgh, PA, counsel for Appellant.

Lesley M. Busch, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **GILMORE**, **VERGILIO**, and **GOODMAN**.

VERGILIO, Board Judge.

On November 25, 2009, the Board received from KD1 Development, Inc. (lessor) a notice of appeal of a contracting officer's decision concerning two of its leases, GS-03B-70059 and GS-03B-08368, with the General Services Administration (GSA or Government). The dispute focuses upon the operating costs under the first lease. The Government contends that operating costs were to be treated as part of the agreed upon rental rate; the lessor asserts that they were to be treated as a separate or added reimbursement. Further, the lessor disputes the Government's claims that it may offset amounts due under the first lease against payments owing under the second lease.

Each party seeks summary relief. Regarding the liability under the first lease, factual disputes preclude resolution of entitlement. Thus, based upon the below findings made on the existing record for such relief, the Board denies each motion concerning the first lease.

The Board grants the Government's motion for summary relief regarding its right to offset debts due under the first lease against payments due under the second lease. Absent specific circumstances not here present, the Government has the right to offset debts of a contractor; the lessor has asserted no basis to alter that right here.

Findings of Fact

Solicitation for the First Lease

1. In addition to providing instructions on how to submit an offer to the GSA for office, lab, and related space to be used by the Department of Labor, Mine Safety and Health Administration, the solicitation states: "GSA will negotiate rental price for the initial term, any renewal periods, and any other aspect of the offer as deemed necessary." Appeal File, Exhibit 21 at 19 (¶¶ 1.8, 1.9) (all exhibits are in the appeal file).

2. A Price Evaluation (Present Value) clause in the solicitation includes direction on submitting information on operating expenses:

- (a) If annual CPI [Consumer Price Index] adjustments in operating expenses are included, Offerors are required to submit their offers with the total "gross" annual price per rentable square foot and a breakout of the "base" price per rentable square foot for services and utilities (operating expenses) to be provided by the Lessor. The "gross" price shall include the "base" price.

....

- (c) If the offer includes annual adjustments in operating expenses, the base price per occupiable square foot from which adjustments are made will be the base price for the term of the lease, including any option period.

Exhibit 21 at 19-20 (¶ 1.10). Regarding award, the solicitation specifies:

After conclusion of negotiations, the Contracting Officer will require the Offeror selected for award to execute the proposed lease prepared by GSA which reflects the proposed agreement of the parties.

....

The acceptance of the offer and award of the lease by the Government occurs upon notification of unconditional acceptance of the offer, execution of the lease by the Lessor, execution of the lease by the GSA Contracting Officer, and mailing or delivery of the fully executed lease to the successful offeror.

Exhibit 21 at 20 (¶ 1.11, Award).

3. The solicitation contains a specific clause on operating costs:

OPERATING COSTS, GSAR 552.270-33 (JUN 1985)

- (a) Beginning with the second year of the lease and each year after, the Government shall pay adjusted rent for changes in costs for cleaning services, supplies, materials, maintenance, trash removal, landscaping, water, sewer charges, heating, electricity, and certain administrative expenses attributable to occupancy. Applicable costs listed on GSA Form 1217, Lessor's Annual Cost Statement, when negotiated and agreed upon, will be used to determine the base rate for operating costs adjustment.
 - (b) The amount of adjustment will be determined by multiplying the base rate by the percent of change in the Cost of Living Index. . . . Payment will be made with the monthly installment of fixed rent. Rental adjustments will be effective on the anniversary date of the lease. Payment of the adjusted rental rate will become due on the first workday of the second month following the publication of the Cost of Living Index for the month prior to the lease commencement date.
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- (e) **The offer must clearly state whether the rental is firm throughout the term of the lease or if it is subject to annual adjustment of the operating costs as indicated above. If**

operating costs will be subject to adjustment, it should be specified on the GSA Form 1364, Proposal to Lease Space, contained elsewhere in this solicitation.

Exhibit 21 at 24 (¶ 3.5) (emphasis added). A separate clause also addresses the operating costs base: “The base for the operating costs adjustment will be established during negotiations based upon occupiable square feet.” Exhibit 21 at 24 (¶ 3.6).

Offers and Negotiations

4. Following the submission of initial offers and negotiations, this lessor submitted its best and final offer (dated April 5, 1997). The offer is for 9100 net usable (occupiable) square feet of space, with a square foot rate per year of \$17.47, at a stated total amount of \$159,000. The lessor-completed two-page GSA Form 1364 does not mention operating costs or adjustments. Exhibit 1. The lessor did submit information regarding its operating costs on GSA Form 1217 (dated March 5, 1997), with total annual operating costs of \$36,100 for the 9100 square feet; from the completed form one derives a base rate of \$3.97 per square foot. Exhibit 2 at 32.

5. The conclusion of a price negotiation memorandum states:

Based on the above, it is determined to be in the best interest of the Government to award a lease for 9,100 sf to Mr. Kevin Doody/Doody Engineering, for a 10 year firm term lease. Rate is \$17.47 per square foot or \$158,977.00 per year. Aggregate cost of this fully serviced, 10 year lease, will be \$1,589,770.00.

Exhibit 21 at 58. This memorandum is dated May 5, 1997, and signed by both the realty specialist and contracting officer.

First Lease

6. As stated in a letter dated June 16, 1997, the contracting officer accepted for award the lessor’s offer. Exhibit 21 at 98. A cover letter dated September 4, 1997, indicates that the contracting officer therewith provided a fully executed copy of the lease. Exhibit 21 at 160. Pursuant to the lease, the lessor became obligated to construct a building on a given site; upon acceptance of the leased premises by the Government the lease term would commence and continue for ten consecutive calendar years. Exhibit 2 at 4 (¶ 13).

7. The lease contains provisions not found in the solicitation, here quoted in pertinent part:

3. The government shall pay the Lessor annual rent of \$ (SEE LEASE RIDER PARA[G]RAPH 13) at the rate of \$ SEE LEASE RIDER PARAGRAPH 13) per month in arrears. Rent for a lesser period shall be prorated.

....

6. The Lessor shall furnish to the Government as part of the rental consideration, the following:
- A. All services, maintenance, repairs, utilities, alterations and other considerations as set forth in the lease.
- B. The provisions of SFO #MPA96182 are to be provided without modification.

....

11. For purposes of determining the base rate for future adjustments to the operating cost, the Government agrees that the base rate quoted on the "Lessor's Annual Cost Statement" (GSA Form 1217), dated **March 5, 1997**, at \$ 3.97 per occupiable square foot, is acceptable. . . .

....

13. . . . Upon acceptance of the leased premises by the Government, the same shall be measured and rental shall be paid, in accordance with Paragraph 3.7 of Solicitation MPA96182, "Occupiable Space" and Paragraph 22 of the General Clauses, GSA Form 3517, "Measurement for Payment" at the rate of \$17.47 per occupiable square foot per year.

Exhibit 2 at 1-4 (¶¶ 3, 6, 11, 13). The referenced paragraph 3.7 defines occupiable space and specifies how such space is determined. Exhibit 2 at 7.

8. Consistent with the solicitation, Exhibit 21 at 20 (¶ 1.11(b)), the contract specifies that it represents an integrated agreement:

This Lease, upon execution, contains the entire agreement of the parties and no prior written or oral agreement, express or implied, shall be admissible to contradict the provisions of the Lease.

Exhibit 2 at 37 (¶ 8 (GSAR 552.270-38, Integrated Agreement (AUG 1992))).

9. The realty specialist and the contracting officer signed off on a certification of funds for the annual amount of \$158,977 for the first fiscal year. Exhibit 21 at 112.

Performance

10. It appears to be undisputed that acceptance of the premises and the ten-year lease term began on August 11, 1998, and was to continue through August 10, 2008. Exhibit 21 at 59.

11. In September 1998, the Government began payments to the lessor. A Government-generated lease digest action document details financial information:

annual rent: \$195,104.00
operating rent: \$36,127.00
base rent: \$158,977.00
monthly rent: \$16,258.67

The document states the total rentable square footage as 10,465; this figure was used to calculate a stated rate per square foot of \$18.64. However, the operating rent of \$36,127 corresponds to the 9100 square feet and rate of \$3.97 per square foot found in the contract. The document, dated September 18, 1998, is signed by a contracting officer other than the contracting officer who negotiated and entered into the lease. Exhibit 21 at 59.

12. In subsequent months, the Government made payments consistent with the approach described in Finding 11, treating the base rent of \$158,977 per year, and the annual operating rent of \$36,127 subject to escalation, as separate items composing the rental payment. Exhibit 21 at 59-66.

13. In March 2006, a different contracting officer concluded that the Government mistakenly had been paying the operating cost base as a supplement to the rental payments. Exhibits 6, 9. That contracting officer unsuccessfully sought the lessor's signature on a

supplemental lease agreement that would amend paragraph three of the lease to say explicitly that “the Government shall pay the Lessor annual rent of \$158,977.00 at the rate of \$13,248.09 per month in arrears.” Exhibit 7. By April 2006, the Government sought repayment of \$272,969.28, because “[o]ur records indicate an overpayment has been made to your company erroneously.” Exhibit 8.

14. The lessor responded to the Government by letter dated April 26, 2006, explaining that no overpayment had been made:

We entered into the lease agreement with the understanding that the operating costs were to be paid in addition to the base rent of the building. We recall originally (prior to lease signing) having discussions with the contracting officer, and it was our understanding and theirs (GSA), that the second sentence of paragraph 11 in the rider to lease GS-03B-7005[9] illustrated that the figure \$3.97 for operating costs was in addition to the base rate. Specifically: “This figure represents the government’s pro-rata share of operating costs”. Subsequently, the lease was signed and executed and the payments were set-up and made, as all parties understood it.

Exhibit 9.

15. By affidavit, the lessor’s president reiterates the pertinent facts from his viewpoint, noting that after questioning the payment provisions, he executed the lease and the payments were set up and made as the realty specialist had described prior to executing the lease. Further, he specifies that the Government paid its rent consistent with this understanding from the date of the occupancy in August 1998 through February 2006. Affidavit at 3 (¶¶ 16, 17). During this appeal, the initial contracting officer (no longer with the Government) has indicated that she has no memory of the particulars of the negotiations; the realty specialist cannot be found. Board’s Conference Memorandum (Dec. 16, 2010). Affidavits addressing matters which occurred several years after award do not assist in determining the intent at the time of award.

Second Lease

16. With the disagreements over the rental payments due under the first lease remaining unresolved as the ten-year lease term expired, the parties entered into a second lease. No clause of the agreement limits the Government’s right to offset payments due the lessor for other debts of the lessor to the Government. Exhibit 12.

Discussion

The lessor pursues relief at this Board under the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 7101-7109 (previously 41 U.S.C. §§ 601-613 (2006)). What is directly at issue is the operating costs base of \$36,127 per year over the ten-year lease term under the first lease. The Government seeks repayment of the portion of this that it has paid; the lessor seeks payment of what, in its view, remains to be paid. The lessor contends further that the Government may not offset any debt from the first lease against payments owed under the second lease.

Summary Relief

The standards for summary relief are well established and not disputed by these parties. With a motion for summary relief, the moving party bears the burden of establishing the absence of any genuine issue of material fact to resolve its request; all significant doubt over factual issues must be resolved in favor of the party opposing summary relief. At the summary relief stage, the Board may not make determinations about the credibility of witnesses or the weight of the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). However, it is also true that “the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient.” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987) (citations omitted). To preclude the entry of summary relief, the non-movant must make a showing sufficient to establish the existence of every element essential to the case, and on which the non-movant has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). When a motion is made and supported as required in Federal Rule of Civil Procedure 56(a), the adverse party may not rest upon the mere allegations or denials in its pleadings, but must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *California Business Telephones v. Department of Agriculture*, CBCA 135, 07-1 BCA ¶ 33,553, at 166,170-71.

Lease Interpretation

In resolving this dispute, the Board must discern the intent of the parties at the time the contract was signed. *Stockton East Water District v. United States*, 583 F.3d 1344, 1362 (Fed. Cir. 2009) (“Is our reading of the plain meaning of this provision consistent with the intent of the parties at the time the contracts were executed, since contract interpretation is fundamentally a question of the contracting parties’ intent?”); *Cities of Burbank, Glendale and Pasadena v. Bodman*, 464 F.3d 1280, 1284 (Fed. Cir. 2006).

The plain language of the solicitation and lease supports the interpretation of the Government, not that of the lessor. No ambiguity exists in the written documents. The lease rate is a gross rate inclusive of operating costs. Operating costs are not identified as a separate element of payment apart from escalations. The operating costs base rate is identified for use in future (those after the first year) adjustments.

This conclusion does not resolve the dispute, given the question posited above; that is, the contracting officer may have inexactly reduced to writing the intent (understanding and agreement) of the parties. The lessor supports its interpretation with an affidavit and through the payments made by the Government. Questions of intent and of ratification (through payments by a subsequent contracting officer) are factual in nature. Similarly, the contracting officer's decision references erroneous payments, but fails to support the view that any earlier contracting officer erroneously agreed to the payments of the sum of the two elements. However, the contemporaneous certifications (Findings 5, 9) of the negotiating contracting officer and realty specialist lend factual support to the position of the Government that the intent was as described in the contract, to make the lease rate inclusive of operating costs, and the conclusion that erroneous payments occurred. The ultimate question of intent requires factual determinations which cannot be made on the existing record in resolving each motion for summary relief.

Offset

The Government asserts its right to offset from payments under the second lease amounts found due under the first lease. The lessor objects.

The law regarding the Government's right to offset debts is well-established:

It is undisputed that the government has the right to offset debts owed to its contractor with a debt owed to it by the same contractor absent explicit contractual, statutory, or regulatory language stating otherwise. *United States v. Munsey Trust Co.*, 332 U.S. 234, 239, 108 Ct.Cl. 765, 67 S.Ct. 1599, 91 L.Ed. 2022 (1947); *Applied Cos. v. United States*, 144 F.3d 1470, 1476 (Fed.Cir.1998). This right extends not only to debts on that contract but to any other contract between the government and the same contractor. *Cecile Indus., Inc. v. Cheney*, 995 F.2d 1052, 1054 (Fed.Cir.1993).

J.G.B. Enterprises, Inc. v. United States, 497 F.3d 1259, 1261 (Fed. Cir. 2007).

The lessor has identified no contractual, statutory, or regulatory language that would make improper the offset under the second lease of amounts found due under the first lease. Accordingly, the Board grants this aspect of the Government's motion for summary relief.

Decision

The Board **DENIES** each motion for summary relief regarding the first lease, **GRANTS** the Government's motion for summary relief regarding the second lease, and **DENIES** the lessor's motion for summary relief regarding the second lease.

JOSEPH A. VERGILIO
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

ALLAN H. GOODMAN
Board Judge