



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER
AND IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY
ON DECEMBER 22, 2014**

DENIED: December 11, 2014

CBCA 2618, 2673

ASP DENVER, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Neal J. Sweeney and Tyler P. Scarbrough of Kilpatrick Townsend & Stockton LLP, Atlanta, GA, counsel for Appellant.

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

Before Board Judges **HYATT**, **VERGILIO**, and **WALTERS**.

HYATT, Board Judge.

These consolidated appeals concern claims asserted by appellant, ASP Denver, LLC (ASP), under a lease of office space to respondent, the General Services Administration (GSA). The appeal docketed as CBCA 2618 seeks reimbursement of real estate tax increases

for the year 2010, calculated by ASP to be \$383,362.35.¹ The appeal docketed as CBCA 2673 asserts entitlement to a lump sum of \$899,850, in addition to rent, for the provision of overtime heating, ventilation, and air conditioning (HVAC) services in the first year of the lease.²

Under the lease, ASP is responsible to pay real estate taxes for a base year amount that reflects a full assessment of the property; this amount is considered to be included in the rent. Once the base year rate is determined, GSA will, in subsequent years, pay for its proportionate share of increases over that baseline for real estate taxes. Here, the parties dispute whether the amount of base year taxes was affirmatively negotiated prior to award of the lease (as ASP contends) or the lease provided that the base year taxes are the taxes paid coincident with the first twelve-month period after the property has been fully assessed (as GSA contends). In addition to this disagreement, although both GSA and ASP were aware that the building would be located in the Stapleton redevelopment area, neither party, apparently, realized that a portion of the property tax assessment issued by the City and County of Denver would include an amount imposed by a quasi-municipal governmental subdivision, the Westerly Creek Metropolitan District (WCMD). ASP claims that the full burden of this assessment should be borne by GSA. GSA disagrees and also contends that the WCMD assessment does not qualify under the definition of taxes covered by the lease's Tax Adjustment clause. We reject ASP's interpretation of the lease. ASP is liable for base year taxes, which are to be part of the rent. Any mistakes about assessments are not borne by GSA. Moreover, a congressionally-imposed budgetary limit would have made the now-proposed price unacceptable.

The lease also requires ASP to provide two separate HVAC systems for the facility. One system provides HVAC services for the building during normal business hours. The other system is a dedicated system required to provide both (1) continuous twenty-four hour

¹ For the subsequent tax years, ASP filed additional appeals for real estate tax increases. The Board docketed each of those appeals as follows: CBCA 3470 (2011 tax year); CBCA 3551 (2012 tax year); and CBCA 4273 (2013 tax year). Each of these cases was stayed during the pendency of CBCA 2618.

² For the subsequent lease years, ASP filed appeals claiming similar lump sum payments for overtime HVAC services. The Board docketed each of those appeals as follows: CBCA 3469 (March 12, 2011, to March 11, 2012); CBCA 3492 (again for March 12, 2011, to March 11, 2012); CBCA 3476 (March 12, 2012, to March 11, 2013); and CBCA 3961 (March 13, 2013, to March 12, 2014). Each of these cases has been stayed pending resolution of CBCA 2673

service to specifically designated areas of the building, and (2) an on-demand capability to activate the system with a manual override in other, specifically designated areas. The dispute between the parties arises because ASP believes it is entitled to a lump sum amount for provision of on-demand services during non-working hours. It derived that amount by using overtime rates quoted in the lease provision addressing overtime hours for the general building system and applying them to a formula set forth in a provision applicable to the twenty-four-hour HVAC system. GSA contends that although ASP was permitted by the latter clause to submit, prior to award, a specific lump sum representing the cost of providing the dedicated system hours outside of normal business hours, ASP did not do so. Thus, GSA maintains that it has no obligation to pay the lump sum demanded by ASP. We agree with GSA's interpretation of the lease and deny this claim as well.

Findings of Fact

The General Acquisition Process

In 2006, Congress appropriated funds for the construction and long-term lease of a facility to house the regional office of the Federal Bureau of Investigation (FBI) in Denver, Colorado. Subsequently, on February 23, 2007, GSA issued a pre-solicitation notice for a "build-to-suit" office facility, annex, and secured parking garage, to be leased to GSA for occupancy by the FBI. The facility was to be located on approximately ten acres of land in the Stapleton Redevelopment area in Denver. Interested parties had the opportunity to submit a written statement of interest by March 5, 2007.

Alex S. Palmer & Company³, a large real estate developer headquartered in Nashville, Tennessee, has a wealth of experience in developing and managing commercial real estate, including build-to-suit projects. The company has successfully completed previous building projects for the Federal Government, including GSA. ASP submitted a written statement of interest on March 2, 2007, advising that it "was looking forward to submitting a proposal for the upcoming project in the Stapleton Redevelopment Area in Denver, CO."

³ The proposal was submitted by and negotiated with Alex S. Palmer & Company. ASP Denver, LLC was substituted for this company as lessor shortly after award. In this decision we treat the two affiliate entities as one, referring to them both as "ASP."

GSA implemented a two-phase negotiated procurement for the project, with the objective of making an award following a best value analysis.⁴ Phase I required submission of technical proposals from interested offerors; phase II invited qualified offerors to develop complete technical and pricing proposals. The solicitation for offers (SFO) envisioned a turn-key project under which the rental rate was to include all costs, with few, if any, adjustments available under the lease for cost increases occurring over the life of the lease.

Phase I of the SFO was issued on April 12, 2007. ASP submitted an offer responding to the SFO on May 29, 2007. GSA evaluated the offers it received under phase I and, on July 3, 2007, provided the phase II SFO and related documents to ASP and other qualified offerors. These related documents included: the FBI's Program of Requirements (POR); the site plan; the option agreement for the land purchase; unit costs for adjustment; GSA Form 1264, Proposal To Lease Space; GSA Form 1217, Lessor's Annual Cost Statement; GSA Form 3517B, General FAR Clauses; GSA Form 3518, Representations and Certifications; a small business subcontracting plan; and Form B, Document Security.⁵

The SFO was incorporated into the lease agreement, and included the following provisions of general application:

1.5.H. There is a Congressionally-imposed rent limitation of \$6,130,425 per annum on this project. The average annual rental rate will not exceed the

⁴ In this context, the use of a negotiated procurement permitted GSA flexibility to conduct discussions with offerors, to seek clarifications of the proposals, and to make tradeoffs among cost, price, and other factors in selecting the offer that presented the best value to the Government. Federal Acquisition Regulation (FAR) 15.306(d) explains that:

Negotiations are exchanges . . . between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.

⁵ On July 25, 2007, ASP received supplemental documents to the July 3 SFO. These additional documents included a room data matrix and room data legend. On August 16, 2007, ASP received a revised room data matrix. The room data legend stated that the rooms identified in the room data matrix as "dedicated" and the rooms identified in the room data matrix as "on demand" would both be served by the twenty-four-hour HVAC system.

approved rental rate of \$35 [per rentable square foot] per annum for a lease term of 20 years, as stated in the Committee Resolution, dated July 19, 2006.

1.7.B. The successful offeror must purchase the property at the negotiated price within no more than 30 days after award of the Lease and in accordance with the terms set forth in the Assignable Option Agreement (to be provided by the Government).

2.1.E. The Contracting Officer will negotiate the rental rate for the initial term and any renewal options and evaluate the proposed costs. The Contracting Officer will negotiate with those offerors determined to be in the competitive range in accordance with [Federal Acquisition Regulation part] 15. The competitive range is determined by the combination of price and technical factors - not just price alone. The Contracting Offer will negotiate the rental rate for the initial term and evaluate the proposed costs against the prospectus limitation and the scoring model for sufficiency, [i.e.,] Present Value⁶ (PV) of the Net Operating Income (NOI) over the life of the lease does not exceed 90% of the Fair Market Value (FMV) of the asset.

2.1.F. After technical and price evaluations, discussions, and/or negotiations, the Contracting Officer will request final proposal revisions. The final proposal revisions will be evaluated by the [source selection evaluation board], and a recommendation for award will be provided to the Source Selection Authority for approval. The recommendation will be the proposal that represents the best value to the Government considering technical evaluation factors and price.

2.1.G. All proposals must consistently use the same terminology . . . as stated in the SFO.

On October 11, 2007, ASP submitted an initial offer with its pricing and technical proposals.⁷ On November 8, 2007, the contracting officer sent ASP a letter requesting that

⁶ The present value analysis creates an “apples to apples” comparison of every offer received by GSA.

⁷ ASP’s chief financial officer (CFO) undertook primary responsibility for reviewing the financial aspects, financial modeling, and initial budgeting of the lease when preparing ASP’s proposal. ASP’s founder and president was also active in the review and

it submit final proposal revisions and reciting his understanding of the terms negotiated between ASP and the Government. On November 16, 2007, ASP responded to the contracting officer's November 8 letter with its final offer.

Evaluation of ASP's Offer

This procurement was overseen by the assigned GSA contracting officer and realty specialist who, in coordination with a source selection board, selected a contractor for the project. The contracting officer testified that, prior to award, he was "the source selection official that signed off on the decision of the source selection board to make an award to ASP." He also testified that the realty specialist assumed primary responsibility for the conduct of negotiations with the offerors and would consult with him when she had questions. She performed the present value analysis and he reviewed it with her. As the contracting officer, he signed the actual lease document.

GSA's realty specialist chaired the source selection board and drafted the source selection plan and reports. She also prepared a memorandum to serve as a yardstick for GSA's objectives in the negotiation process. This document, denominated the "Price Negotiation Document," was prepared early in the procurement process prior to the receipt of any phase II proposals. It identified GSA's negotiation objectives and its goal, or bottom line, in negotiating the deal. The document states that GSA's ultimate goal was to negotiate a full service rental rate below the prospectus limitation, with either a low or no lump sum payment required from the agency. In this document, GSA stated an objective range for base year taxes to be \$4.50 per square foot of rentable footage, using a Stapleton-area average, and for the hourly overtime rate to be \$50 per hour.

Negotiations with ASP were conducted from May 28 through November 19, 2007. A written memorialization of these negotiations is contained in the report of the source selection board, dated December 17, 2007. Under a section entitled "Record of Negotiations," the report states:

The offer submitted by [ASP] was the best technically as well as price. In their original Phase Two offer, there was no lump sum price for building specific security items nor was there a breakdown on their unit price list for security items. Upon discussions with the [ASP] team they had include[d] these costs in their shell rent costs. This caused some concern with the Government as

preparation of ASP's proposal.

the[ir] shell rent cost was substantially lower than the other offerors and also included the security costs that other offerors wanted paid by lump sum in an RWA [reimbursable work authorization]. The Contracting Officer cautioned the [ASP] team on several occasions to review and ensure that their proposal included all requirements in the SFO.

The Government's synopsis of ASP's revisions in its final offer states that ASP's "OFFERED Rate per RSF [rentable square foot]" for the tax base year was \$3.88 and its proposed overtime rate was \$25 per hour per floor.⁸

In addition to the source selection board's report, GSA prepared several iterations of an occupancy agreement between GSA and the FBI, memorializing the financial aspects of the lease. Each version of the occupancy agreement shows an annual charge of \$679,601.40 and an annual rate of \$3.88 per rental square foot for real estate taxes for the duration of the lease. Every iteration of the occupancy agreement also provides that the rental amount will be adjusted annually for operating costs and real estate taxes. GSA's realty specialist explained the purpose of the occupancy agreement. She testified that:

The occupancy agreement . . . is a budgeting tool that we prepare for the agencies. It outlines our agreement with them in the written text, but the financial portion is meant to be used as a budgeting tool. So, we put in the breakdown of the rental rates . . . the base rent, operating costs, tenant improvements. [We note the possibility of escalation so that agencies] budget a little more money because [it is] maybe not in the rent, but on an annual basis, they're going to be paying a little bit more in taxes.

The occupancy agreement notes: "The tenant's financial obligations for years beyond the current year do not mature until the later year(s) are reached. Thus, there is no requirement that the tenant agency certify that current year funds are available to defray future year obligations."

⁸ The base year tax rate of \$3.88 is used on another GSA form entitled "SCORE." Under the subheading "Constant Dollar Input Values," a category of real estate taxes and insurance cost per square foot is listed as \$3.88. A document setting forth lease scoring information lists the pricing information from ASP's final proposal and includes the line item "REAL ESTATE TAXES AND INSURANCE: \$3.88."

Lease Awarded to ASP

The source selection board determined that ASP's proposal provided the best value for the Government and selected ASP as the awardee on December 17, 2007. ASP was notified of award and given the opportunity to review and comment upon the entire lease prior to executing it. The lease sets forth a price of \$35 per rentable square foot. This figure includes real estate expenses. The lease does not expressly identify a base year rate for taxes.

On December 18, 2007, GSA entered into a lease agreement with ASP, under which that company was to design and construct a new office facility, annex, and secured parking garage, with approximately 175,155 rentable square feet of office and related space, located on approximately ten acres in the Stapleton Redevelopment Area of Denver, Colorado, to be leased upon completion to GSA for occupancy by the Federal Bureau of Investigation (FBI). At that time, the lease agreement provided that the term of the lease would begin on December 1, 2009, and extend through November 30, 2029.⁹

CBCA 2618

Several general provisions of the SFO as incorporated into the lease are specifically relevant to CBCA 2618:

3.3.G.1. Using the SFO, Program of Requirements, Special Requirements, Attachments, etc., the Offeror must provide a rental rate that will deliver all requirements as a turn-key project. The rate structure . . . must include all costs to deliver the space.

⁹ The documents comprising the lease consist of the following: (a) Standard Form 2; (b) phase II SFO and amendments thereto; (c) the FBI's POR; (d) a space planning guide; (e) a security unit price list completed by ASP; (f) the site plan; (g) a unit cost for adjustment form completed by ASP; (h) a Document Security Form completed by ASP; (i) GSA Form 3516A (FAR Clauses); (j) GSA Form 3517B (General Clauses); (k) GSA Form 3518 (Representations and Clarifications); completed by ASP, (l) GSA Form 1364 (Proposal to Lease), completed by ASP; (m) Appendix A (Room Data Matrix); (n) Appendix B (Squad Adjacencies); (o) ASP's November 29, 2007 final proposal clarification; (p) ASP's November 16, 2007 final proposal revisions; (q) ASP's May 29, 2007 phase I offer; (r) ASP's October 11, 2007 phase II offer; and (s) ASP's second final proposal clarification.

3.3.G.2. The rental rate structure . . . must include the following:

3.3.G.3. The lease rate per square foot for the building shell rental, fully serviced. All improvements in the base building, lobbies, common areas, and core areas must be provided by the Lessor, at the Lessor’s expense. This rate must include, but not be limited to, property financing (exclusive of Tenant Improvements), insurance, taxes, management, profit, etc., for the building. . . . If the shell rate changes during the term of the lease, state the new shell rates(s) and corresponding period(s) of time for which that rate is applicable.

Paragraph 4.4 of the lease sets forth the Tax Adjustment clause. It states as follows:

A. Real estate taxes, as referred to in this paragraph, are only those taxes which are assessed against the building and/or the land upon which the building is located, without regard to benefit to the property, for the purpose of funding general Government services. Real estate taxes shall not include, without limitation, general and/or special assessments, business improvement district assessments, or any other present or future taxes or governmental charges that are imposed upon the Lessor or assessed against the building and/or the land upon which the building is located.

B. Base year taxes as referred to in this paragraph are 1) the real estate taxes for the first 12-month period coincident with full assessment or 2) may be an amount negotiated by the parties that reflects an agreed upon base for a fully assessed value of the property.

C. The term “full assessment” as referred to in this paragraph means that the taxing jurisdiction has considered all contemplated improvements to the assessed property in the valuation of the same. Partial assessments for newly constructed projects or for projects under construction, conversion, or renovation will not be used for establishing the Government’s base year for taxes.

....

E. The Government shall 1) make a single annual lump sum payment to the Lessor for its share of any increase in real estate taxes during the lease term over the amount established as the base year taxes or 2) receive a rental credit or lump sum payment for its share of any decreases in real estate taxes during

the lease term below the amount established as the base year taxes. The amount of lump sum payment or rental credit shall be based upon evidence of valuation and payment submitted by the Lessor to the Contracting Officer in accordance with subparagraph D.

1. In the event of an increase in taxes over the base year, the Lessor shall submit a proper invoice of the tax adjustment including the calculation thereof together with evidence of payment to the Contracting Officer. **THE GOVERNMENT SHALL BE RESPONSIBLE FOR PAYMENT OF ANY TAX INCREASE OVER THE BASE YEAR TAXES ONLY IF THE PROPER INVOICE AND EVIDENCE OF PAYMENT IS SUBMITTED BY THE LESSOR WITHIN 60 CALENDAR DAYS AFTER THE DATE THE TAX PAYMENT IS DUE FROM THE LESSOR TO THE TAXING AUTHORITY. . . .**

2. . . .

F. The Government shall pay its share of tax increases or shall receive its share of any tax decrease based on the ratio of the rentable square feet occupied by the Government to the total rentable square feet in the building or complex (percentage of occupancy). For the purpose of this lease, the Government's percentage of occupancy as of the date hereof [July 23, 2007] is 100% percent [sic] based upon occupancy of TBD [To Be Determined] rentable square feet in a building of TBD rentable square feet. This percentage shall be subject to adjustment to take into account additions or reductions of the amount of space as may be contemplated in this lease or amendments hereto.

ASP's Initial Offer, as Relevant to CBCA 2618

ASP's offer included GSA Form 1364, Proposal To Lease Space. The proposal stated that ASP's composite square foot rate per annum is \$35, which includes \$3.88 for base year taxes. Therefore, based on total rental square feet of 175,155, the rent per annum was to be \$6,130,425.

ASP's offer also included GSA Form 1217, Lessor's Annual Cost Statement. In this form, ASP estimated that the annual real estate taxes for the building would be \$680,000. This amount is provided under section II of the form, entitled "Estimated Annual Cost of Ownership Exclusive of Capital Charges." ASP asterisked this number and advised:

For Property Tax Purposes, we have assumed a favorable tax valuation of \$35,000,000. The assessment rate for commercial is 29%, which would create an assessed value of \$10,150,000. This assessed value would then be multiplied by the Mill Levy; currently 66.948 (.066948) for a property tax bill of \$679,522[.] [O]f major concern is if the valuation more closely reflects actual project costs (\$60 Million). Discussions are ongoing with Denver Assessor Office to address.

On October 12, 2007, one day after it submitted its offer, ASP sent the contracting officer a letter highlighting certain points relevant to real estate taxes under the lease. Specifically, ASP stated its “concern about the prospectus rental rates proposed by the GSA being sufficient to provide the quality and type of office building you . . . want to construct in Denver.” ASP also expressed misgivings with respect to the potential for a “[s]ignificant impact on operating expenses if a Mill Rate of 66.948 is applied to a higher evaluation of the property then [sic] assumed by the developer; this could impact the value and financing viability of the asset.”

The GSA realty specialist and ASP’s CFO both testified to their respective understandings of the real estate tax rate quoted by ASP and its purpose with respect to the overall process of negotiating and evaluating the rental rates proposed by the competing offerors. ASP’s CFO testified that in providing the \$3.88 per square foot number, he understood the parties to be negotiating a firm base tax year rate using the alternative method under paragraph B of the tax adjustment clause.

The realty specialist interpreted paragraph 12 of Standard Form 2 to seek from offerors an estimated amount of real estate taxes to apply until the property was fully assessed after completion of the building. When ASP proposed an estimated \$3.88 per square foot, GSA did not interpret this to mean that this was to establish the base year for price adjustments based on increases in tax assessments. She regarded section 4.4 as referring to the adjustment in taxes later in the life of the lease — in her mind, the \$3.88 per square foot estimate was a portion of the rental rate to be allocated by the lessor to pay taxes until the building was fully assessed. After that, the parties would establish the base year and determine the first full year of assessment. Her rationale for using the first option under SFO paragraph 4.4, was that this was a new construction project and “it is a very risky thing to attempt to negotiate a base because you have no history.” She stated further that with respect to this lease, “[t]he tax assessor’s office assessed — gave a full assessment in 2010, so the calendar year 2010 would be the base year.” Thus, ASP was required to pay the full amount assessed for that year in taxes.

In his letter dated November 8, 2007, soliciting ASP's final offer, the contracting officer stated, with respect to real estate taxes, that the "[p]ercentage of Government occupancy for tax purposes based on the first full assessment calendar year is 100%. The tax base indicated in your offer is \$3.88 per rentable square foot." At the conclusion of the letter, the contracting officer advised ASP that, if it wished "to submit changes or modifications, please do so in th[at] letter in a different colored ink, initialing them, signing the concurrence line . . . and returning the letter to this office."

In its final offer, dated November 16, 2007, responding to that request, ASP acknowledged that the building site is located in Denver, Colorado, in zip code 80238, and "the percent of government occupancy for tax purposes based on the first full assessment calendar year is 100%, and the tax base in our offer is \$3.88 per rentable square foot."

Paragraph 12 of the lease executed on December 18, 2007, provides the following (emphasis added):

In accordance with SFO paragraph 4.4 titled "Tax Adjustment," the percent of the building occupied by the Government is 100% based on a total of 175,155 per [sic] rentable square feet available in the building. The estimated annual tax base for adjustments is \$679,601.40 or \$3.88 per rentable square foot. **The base year taxes shall be the first calendar year of full assessment and will be set in accordance with Paragraph 4.4.**

In a modification to the lease, the Government agreed to commence lease payments on March 12, 2010, reflecting the actual date that the FBI occupied the facility, and changed the term of the lease to begin on March 12, 2010, and extend through March 11, 2030. A certificate of occupancy was issued for the facility on April 26, 2010.

In early 2011, the City/County of Denver sent ASP a property tax statement that reflected the 2010 tax assessment for the property. The amount of taxes due by April 30, 2011, was \$1,245,131.07. The tax statement included assessments on the facility by both the City/County of Denver and WCMD. The combined mill levy was 121.637, of which the City/County of Denver accounted for 66.591 and WCMD accounted for 55.046. After dividing the total assessment by 175,155 rentable square feet, the assessed rate comes to \$7.11 per square foot.

ASP's CFO testified that the 2010 tax statement reflected an assessment that fully encompassed improvements to the facility. On May 9, 2011, ASP submitted an invoice for increased taxes to GSA. In the cover letter to the invoice, ASP explained that it was

submitting the invoice “[p]ursuant to SFO Section 4.4(E)(1)” and requested payment of the amount of \$457,072.38 within ten days.

After the Government did not pay the invoice, ASP submitted a certified claim on August 10, 2011, for the difference between the allegedly agreed-upon base tax rate of \$3.88 and the increased tax rate of \$7.11 per rentable square foot, or the amount of \$457,072.38.¹⁰

On October 19, 2011, the contracting officer denied the claim for increased taxes because the claim did not accord with the Tax Adjustment clause in paragraph 4.4. ASP’s appeal of this decision was docketed by the Board as CBCA 2618.

Mill Rates in Years Prior to Lease Commencement

The parties filed a joint stipulation at the conclusion of the hearing in this appeal concerning the mill rates for the property on which the FBI building was to be built reflecting the following levies and their tax year dates:

2008: total mill levy of 121.821 includes both City/County of Denver and WCMD;

2009: total mill levy of 120.307 includes both City/County of Denver and WCMD;

2010: total mill levy of 121.637 includes both City/County of Denver and WCMD.

The WCMD assessment was addressed by ASP’s expert witness, Mr. Russell Dykstra, a Colorado attorney who specializes in this area of the law. Mr. Dykstra explained in his expert report:

The Westerly Creek Metropolitan District is a quasi-municipal governmental subdivision of the State of Colorado that was formed on July 13, 2000 pursuant to [Colorado state law]. . . . The District is empowered to provide facilities and services that serve the residents, property owners and public area within the area formerly known as the Stapleton International Airport. . . .

¹⁰ On June 4, 2013, the Board issued an order granting ASP’s motion for leave to amend its real estate tax claim from \$457,072.38 to \$383,062.35 for reimbursement of GSA’s alleged share of the 2010 real estate taxes paid by ASP above the alleged negotiated and agreed-upon base year tax rate. Therefore, the 2010 tax claim was for the period of March 12, 2010, to December 31, 2010.

[T]he District imposes a mill upon all property within its boundaries . . . [The revenues collected are used] to provide funding for public main-line and regional infrastructure such as public parks, streets, regional interchanges, storm drainage ways, water systems, sewer systems [and other services] to serve the area within the District. Many of these improvements have been or ultimately will be, transferred to the City and County of Denver.

The District is empowered to impose *ad valorem* property taxes on all property within the District and has done so in order to meet its general operational funding requirements and to produce revenues . . . for funding of the improvements, facilities and services.

Mr. Dykstra also advised that WCMD had not created a special improvement district nor had it imposed any special assessments.

Mr. Dykstra's report shows that as of December 2007, the mill levy on property in the Stapleton Redevelopment District, including WCMD's charges, was 121.785. In its annual cost statement submitted on October 12, 2007, and later incorporated into the lease agreement, ASP represented to the Government that the mill levy on this property was 66.948.

As required under the agreement, pursuant to GSA's option, ASP purchased the land on which the facility was to be constructed in January 2008. The closing documents for this purchase establish a mill levy at that time of 121.785. ASP's president signed this document.

CBCA 2673

Pertinent provisions of the SFO and accompanying documents relating to ASP's contention in CBCA 2673 that the lease entitled it to a lump sum payment for overtime HVAC costs include:

1.1.F. Where the SFO and [POR] conflict, the POR will apply. Contact the Contracting Officer for clarifications.

1.4.F. The building systems shall provide a dedicated, 24-Hour [HVAC] system, independent of the general building system. This system shall consist of two separate modes, a dedicated mode and an on-demand mode. The dedicated system shall be flexible to accommodate changes to meet future requirements without causing major disruptions to the tenant's operations. The

on-demand mode shall provide continuous cooling for designated equipment rooms and continuous conditioning of designated office areas. All equipment connected to the dedicated 24-hour HVAC system shall be connected to an emergency generator supplying essential power to the tenant. Refer to the Mechanical, Electrical, Plumbing section of the SFO and the Mechanical section of the POR.

3.3.G.2. The rental rate structure . . . must include the following:

3.3.G.4. The annual cost (per usable and rentable square foot) for the cost of services and utilities. This equals line 27 of GSA Form 1217, Lessor's Annual Cost Statement, divided by the building size (shown on the top of both GSA Form 1364, Proposal to Lease Space, and Form 1217) for usable and rentable square feet respectively.

Paragraph ¶ 3.3.CC¹¹ lists the necessary documents for an offeror to submit in response to the phase II SFO. Included in this list, at number 10, is the following requirement:

“An hourly overtime rate for overtime use of heating and cooling. Refer to the ‘Overtime Usage’ paragraph in the SERVICES, UTILITIES, MAINTENANCE section of this SFO.”

SFO ¶ 3.6E addresses the conduct of the present value analysis of costs submitted by offerors. Paragraph 3.6.E.6.e of the SFO provides that “[t]he cost of overtime HVAC [is] estimated to be 6,250 hours per year for the 24-hour areas This cost is present value, and it will not be discounted.”

Paragraph 3.7.A of the SFO advises that:

In accordance with OMB Circular A-11, the Government will perform calculations on the submitted price proposals that determine the present value of the net operating income over the life of the lease. This calculation cannot exceed 90 percent of the fair market value of the asset as determined by the Government's General Construction Cost Review Guide (GCCRG). The calculation will subtract operating expenses, taxes, insurance, Offeror's

¹¹ “CC” refers to the second “C” listed under paragraph 3.3 of the SFO.

management fees, building maintenance cost, and reserves for capital replacement cost from the gross annual rent, to arrive at net operating income.

Additional clauses in the lease pertaining to the HVAC systems are found in paragraph 8.0 of the SFO, which provides mechanical, plumbing, and electrical specifications. Paragraph 8.1.A requires that “[s]ervices, utilities, and maintenance shall be provided by the Lessor as part of the rental consideration.” The principal clauses at the heart of this dispute are:

8.3 NORMAL HOURS

A. Services, utilities, and maintenance shall be provided daily, extending 7:00 a.m. to 6:00 p.m. except Saturdays, Sundays, and federal holidays.

B. The Government will reimburse a portion of the cost of the HVAC for all rooms requiring 24-Hour HVAC service. The Offeror shall provide to the Government the cost, if any, for HVAC services based on 6,250 hours per year (14-hours per day of overtime HVAC x 251 days and 24-hours per day of overtime HVAC x 114 days). The Government will pay for this usage via a lump sum payment each fiscal year of the lease. The payment will be prorated for those years that the Government does not occupy the space the entire fiscal year. (This cost will be considered in the Present Value price evaluation prior to the award of a lease).

8.4 OVERTIME USAGE (SEP 2000)

A. The Government shall have access to the leased space at all times without additional payment, including the use, during other than normal hours, of necessary services and utilities such as elevators, toilets, lights, and electric power.

B. If heating or cooling is required on an overtime basis, such services will be ordered orally or in writing by the Contracting Officer or the GSA Buildings Manager. When ordered, services shall be provided at the hourly rate established in the contract. Cost for personal services shall only be included as authorized by the Government.

C. When the cost of service is \$2,000 or less, the service may be ordered orally. An invoice shall be submitted to the official placing the order for

certification and payment. Orders for services costing more than \$2,000 shall be placed using GSA Form 300, Order for Supplies and Services. . . .

D. All orders are subject to the terms and conditions of this lease. In the event of a conflict between an order and this lease, the lease shall control.

Paragraph 6.5 of the FBI's particularized needs, set forth in the POR, specifically addresses the "24 Hour HVAC System":

A. The Lessor shall provide 24 hour HVAC in those rooms identified in the SPECIFIC ROOM REQUIREMENTS¹² section of this SFO.

B. The Lessor shall provide a dedicated HVAC system, independent of the general building system, that operates 24 hours per day, 365 days per year. The dedicated 24 Hour HVAC system shall be flexible to accommodate changes to meet future requirements without causing major disruption to the Tenant's operation. The system shall provide continuous cooling for designated equipment rooms and conditioning of designated office areas when requested by a room-mounted override button.

C. The Lessor shall be responsible for servicing and performing preventive maintenance for the dedicated 24 Hour HVAC system in accordance with the manufacturer's recommendations to improve system reliability and to avoid potential equipment failure for the term of the lease.

¹² The specific room requirements for the building were referenced and shown on the room data matrix and room data matrix legend. The room data matrix legend provides that "24/7 HVAC-D (Dedicated)" means "[h]eating ventilation and air conditioning systems serving rooms identified within the matrix as HVAC-D shall be served by the 24-HOUR HVAC SYSTEM" and that "24/7 HVAC-OD (ON DEMAND)" means "[h]eating ventilation and air conditioning systems serving rooms identified within the matrix as HVAC-OD shall be served by the 24-HOUR HVAC SYSTEM, but do not require continuous 24-Hour HVAC. These rooms shall [be] conditioned on the same schedule as normal HVAC rooms, but shall be available by manual actuation of a room-mounted override button."

D. The Lessor shall provide instruction to the Tenant designated employees in the proper operation and utilization of the dedicated 24 Hour HVAC system.

E. All energy costs incurred by the operation of the dedicated 24 Hour HVAC system shall be incorporated within the lease rate.

ASP's Initial and Final Offers Pertaining to the Overtime HVAC Claim

ASP's initial offer included a section denominated "Hourly Overtime For Heating and Cooling," which stated:

Hourly overtime rate for heating and cooling, in response to item 3.3, C, 10, on page 36 of the SFO, is \$25 per hour per floor of the office building, or \$150 per hour in the event the entire building is being run. These rates are effective for the first year of operation, subject to subsequent CPI [consumer price index] adjustment and/or energy/utility charge adjustments.

ASP's initial offer did not include a lump sum amount for HVAC services covered under paragraph 8.3.B for GSA's consideration.

The contracting officer's request for final offers on November 8, 2007, confirmed the understanding that overtime rates would be "\$25.00 per hour per floor, \$150.00 per hour for the entire building," and that rates would be "effective for the first year of operation only and . . . subject to subsequent CPI adjustments and/or energy/utility charge adjustments."

In its final offer, ASP represented that the overtime rate would be "\$25 per hour per floor, \$150 per hour for the entire building, both for the first year of operation, subject to subsequent CPI adjustments and/or energy/utility charge adjustments." Furthermore, ASP indicated that it understood "normal working hours are from 7:00 AM to 6:00 PM except Saturdays, Sundays, and Federal Holidays, and we will assure the required building temperatures are met by 7:00 AM."

Paragraph 15 of the lease states the following:

In accordance with SFO paragraph 8.4 titled "Overtime Usage," the hourly overtime rate is \$25.00 per hour per floor or \$150.00 per hour for the entire building. These rates are effective for the first year of operation only and are subject to subsequent CPI adjustments.

ASP's final offer did not include a lump sum amount to be paid under paragraph 8.3.B of the SFO. GSA Forms 1217 and 1364, which are part of the lease, also do not include a lump sum charge for each year of the lease for providing the twenty-four hour HVAC services.

The Overtime HVAC Claim

On March 15, 2011, ASP submitted an invoice to the Government for the period March 12, 2010, through March 11, 2011, seeking a lump sum payment of \$899,850 for "overtime HVAC in the 24/7 rooms" for the previous year of occupancy. An ASP employee testified that the lump sum was derived by applying the overtime rates quoted in response to paragraph 8.4, and calculating an amount using a corrected version of the formula inserted into paragraph 8.3. The invoice used the hourly overtime rate of \$150 per hour because the rooms requiring the availability of on-demand HVAC services were spread throughout the project and not on a single floor.

GSA did not pay the invoice. On September 29, 2011, ASP submitted a certified claim for the lump sum amount of \$899,850 for which it claimed entitlement, attaching the invoice as well as subsequent correspondence.

On December 16, 2011, the contracting officer denied the claim for overtime HVAC usage, stating that the claim did not accord with SFO paragraph 8.4, as explicitly referenced in the standard lease agreement's paragraph 15. ASP appealed this decision to the Board. The Board docketed the appeal as CBCA 2673 and consolidated it with CBCA 2618.

After ASP submitted its claim, GSA requested an audit of the claimed expenses, which was performed by GSA's Office of the Inspector General. The auditor reviewed data supplied by ASP and calculated a monthly average of actual on-demand usage of the twenty-four-hour dedicated HVAC system of \$1878 per month, or an annual amount of \$22,542. Based on this calculation, the auditor testified that the lump sum claimed by ASP of \$899,850 is approximately forty times the amount of HVAC on-demand usage charges actually incurred by ASP.

Discussion

Overview

These appeals arise under a lease agreement entered into between ASP and GSA for the construction of an office building, parking spaces, and a secured parking garage, to be leased upon completion to GSA, and occupied by the Denver FBI field office. The legislation appropriating funding for this project included a Congressionally-imposed rent limitation of \$6,130,425 per annum and also mandated that the average rental rate could not exceed the approved annual rate of \$35 per square foot per annum for a lease term of twenty years. ASP is an experienced developer and has successfully completed similar projects for the Federal Government.

GSA's solicitation for offers required the offerors to estimate their costs and evaluate whether they could perform within the confines of a set rental amount that could not be exceeded. The evidence shows that both ASP and GSA were concerned about cost containment. ASP fully recognized, and even expressed its opinion, that to construct the building within the rent limitation would be difficult. Ultimately, however, ASP offered to perform and committed to a fixed-price lease within the dictates of the Congressional mandate.

These appeals pose two distinct disputes under the lease. The first appeal, CBCA 2618, addresses the parties' disagreement with respect to establishment of a base year for real estate taxes under the lease. This determination affects the amount of increases in taxes that GSA would be obligated to reimburse ASP in subsequent years. The second appeal, CBCA 2673, addresses ASP's claim that it is entitled to an annual lump sum payment of nearly \$900,000 for providing twenty-four hour HVAC services in designated areas of the building.

CBCA 2618 - Real Estate Taxes

After the building was completed and occupied, ASP received a tax assessment bill for the calendar year 2010, in the amount of \$1,245,131.07, payable on April 30, 2011. This amount reflected an assessed mill rate of \$7.11 per square foot, nearly double the \$3.88 per square foot rate that had been calculated by ASP and provided to GSA during the lease formation process. ASP contends that GSA agreed to use \$3.88 for the base tax rate for the duration of the lease and is responsible for assessed taxes in excess of the \$3.88 rate.

This lease contains a standard clause providing that the annual rent amount shall be inclusive of base real estate taxes. The Tax Adjustment clause of the lease states that the Government will reimburse the lessor for its proportionate share of real estate taxes that exceed the base amount and will receive a credit when actual taxes are less than the base amount.¹³ Paragraph 4.4 of the lease defines the scope of eligible real estate taxes for purposes of reimbursement and provides two alternatives for establishing the base year amount. The base real estate taxes included in the rent will be either (1) the real estate taxes for the first twelve-month period coincident with full assessment, or (2) an amount negotiated by the parties that reflects an agreed upon base for a fully assessed value of the property. The Tax Adjustment clause is clear, then, that the base year taxes will be either a negotiated amount or the real estate taxes for the first twelve-month period coincident with full assessment. *Sixth & E Associates, L.L.C. v. General Services Administration*, CBCA 1149, 09-2 BCA ¶ 34,179 (interpreting the same clause). The question here is whether the facts show that ASP and GSA negotiated a base year tax rate of \$3.88 per square foot at the time the lease was signed.

In responding to the SFO, ASP proposed a rental rate of \$35 per square foot. This rate included estimated real estate taxes which ASP believed would be \$3.88 per square foot on the 175,155 square-foot building, upon completion of the build out. ASP derived this number based on a mill rate of 66.9948, which was obtained in a telephone conversation with the city and county of Denver's tax office. ASP asserts that GSA, which did not question the rate provided and used it in the evaluation of offers and in the occupancy agreement it signed with the FBI, "accepted" this rate in negotiations, and agreed to its use under the second option provided in paragraph 4.4.B. ASP thus argues that it is entitled to recover all taxes assessed in excess of this amount, starting from 2010 and lasting through the duration of the lease.

In support of its position, ASP directs us to language it included in letters and forms it submitted along with its phase II offer and final proposal revision, as well as the option to use a negotiated base year amount under paragraph 4.4.B. GSA Form 1364, submitted in its final offer, used a tax rate of \$3.88 per square foot for base year taxes. ASP also used this rate in GSA Form 1217, in which it stated its expectation that the ultimate assessed value of the property upon completion of the building would be \$35 million. Furthermore, in both its phase II offer and final proposal revision, ASP noted that its offer contained a base tax of \$3.88 per rentable square foot. Neither of these submissions, however, actually

¹³ Since the Government occupies the entire building, that share would amount to 100 % of the difference from the base year.

asserted its understanding that GSA had agreed that the base year taxes for the twenty-year lease would be \$3.88 per square foot.

There is a complete absence of any compelling evidence that GSA was aware and understood that ASP wanted to establish a fixed negotiated base rate under the lease in lieu of using the more common practice of deriving a base year tax rate based upon an assessment rendered in conjunction with the first year of tenant occupancy. GSA never directly acknowledged this as a “negotiated” rate. Rather, it viewed the proposed rate of 3.88 per square foot as an estimated amount “indicated” by ASP for purposes of ensuring its inclusion in the proposed rental rate. Of greatest significance, the lease language expressly addresses this matter and is contrary to ASP’s present interpretation: “The base year taxes shall be the first calendar year of full assessment and will be set in accordance with Paragraph 4.4”

Although the record makes clear that this was a negotiated procurement, under which various items in ASP’s and other offerors’ proposals were addressed by GSA, nothing establishes that the parties mutually intended to negotiate a fixed base tax rate at the outset and prior to full assessment.¹⁴ There is no evidence that this issue was ever directly addressed in conversation between the parties, so any negotiation process respecting the base year taxes would have to be derived by reference to the written documents memorializing the procurement process. In effect, ASP maintains that because the lease itself was denominated a negotiated procurement, the rate it proposed, which was not actively challenged by GSA, effectively became a “negotiated” base year tax rate.

As drafted, the clauses addressing real estate taxes plainly contemplate that the contractor will determine, in formulating its overall rental rate offer, the likely amount of real estate taxes that will be assessed during the first year of occupancy. This number is requested for the purpose of evaluating proposals. As GSA points out, Standard Form 2, paragraph 12, of the lease, which states that the “estimated annual tax base for adjustments is \$679,601.40 or \$3.88 per rentable square foot,” supports the agency’s understanding that the rate was not intended to establish a firm base year tax amount as ASP suggests. This comports with the Board’s reasoning in *Sixth & E Associates*, which found that the inclusion of an estimated amount for real estate taxes on a standard form did not give rise to a negotiated amount. The same paragraph in this form also stipulates that the base year shall

¹⁴ The GSA realty specialist testified that the agency would typically only negotiate a base tax rate in this manner for previously occupied space that had already been fully assessed.

be the first calendar year of full assessment and will be set in accordance with paragraph 4.4 of the lease. Thus, ASP's interpretation creates an internal inconsistency.

This dispute is largely attributable to the unanticipated assessment imposed by WCMD and collected by the city and county of Denver in a combined property tax bill. The overwhelming evidence in the record on this point leads to the conclusion that neither party considered, or was aware of, this portion of the assessment. The SFO and lease, however, contemplate a fixed-price arrangement under which the lessor assumes the risk of anticipating and recovering its expenses through the rental payment. The offerors were expected to identify the full costs of performing the project and assumed the entrepreneurial risk of unexpected or unanticipated costs.¹⁵ This is not a tax imposed after ASP committed to the lease. ASP's own expert testified that the district existed before the lease was negotiated. ASP could have identified this cost, but apparently did not. It was not GSA's responsibility to ferret out the actual tax rate in effect and inform ASP that the mill rate it used was inaccurate.

GSA also questions whether the WCMD assessment even qualifies to be considered a tax for purpose of "funding general government services" within the meaning of paragraph 4.4.A. In this regard, we note that there is no evidence in the record rebutting the expert testimony elicited by ASP to show that the assessment in fact covers the provision of general governmental services. The city and county of Denver includes it as a component of assessed real estate taxes in its property tax assessment notice. ASP's expert witness confirmed that the WCMD assessment is a real estate tax under Colorado law, and that the WCMD "is a general purpose district, which was organized for general public improvements and is not a special assessment or special improvement district."¹⁶ Additionally, the mill levy

¹⁵ As the Court of Appeals for the Federal Circuit has stated, "[B]ecause fixed-price contracts do not contain a method for varying the price of the contract in the event of unforeseen circumstances, they assign the risk to the contractor that the actual cost of performance will be higher than the price of the contract." *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed. Cir. 1996). The contractor assumes the entrepreneurial risk of unanticipated expenses.

¹⁶ We note that in *City Crescent Limited Partnership v. United States*, 71 Fed. Cl. 797 (2006), the Court of Federal Claims found that a similar supplemental annual property tax, assessed by a business district created by the City of Baltimore, was recoverable by the lessor under a GSA lease tax adjustment clause.

that is imposed by the WCMD is a general *ad valorem* tax and not a special assessment. The expert's testimony is persuasive and credible. We find that the WCMD assessment is a real estate tax for purposes of the Tax Adjustment clause.

Although ASP claims both parties agreed and intended that the estimate provided for real estate taxes would constitute the base real estate tax for purposes of future tax adjustments, the record does not support its contention that this rate was actually negotiated and mutually agreed to. As the lessor under the fixed-rate lease, ASP bore the burden to carefully research the taxes likely to be assessed on the property, and if it wanted to negotiate a firm base rate, to inform GSA of its intent. Absent this, under the Tax Adjustment clause, the base tax year for this lease is the "first twelve month period coincident with full assessment."

As a general proposition, the General Services Board of Contract Appeals (GSBCA) stated in *Parcel 49C Limited Partnership v. General Services Administration*, GSBCA 16447, 05-2 BCA ¶ 33,013, at 163,604-05,:

The Board and the Court of Appeals for the Federal Circuit have both had occasion to consider the meaning of the term "first year of a full assessment." The Board has defined the term as meaning "the first tax year in which all contemplated improvements to the assessed property had been included in the appraisal base." *W. David & Janet M. Kimbrell v. General Services Administration*, GSBCA 11325, 93-2 BCA ¶ 25,665, at 127,684 (1992) (quoting *Otto K. Wetzel*, GSBCA 7466, 85-2 BCA ¶ 18,099, at 90,858). On appeal, the Court approved that definition and added, "Thus, 'full' means an assessment on the improved property, only after all improvements contemplated in the lease have been made." *Kimbrell v. Fischer*, 15 F.3d 175, 177-78 (Fed. Cir. 1994).

¹⁷ The Federal Circuit held in *Kimbrell* that the "tax escalation clause is not to be interpreted to hold respondent responsible for tax increases resulting from improvements." 15 F.3d at 177-78 (quoting *Wetzel*, GSBCA 7466, 85-2 BCA ¶ 18,099, at 90,860). "The government has an obligation to pay for increases in taxes, but only for increases on that which it bargained for, namely a building on a piece of property, not an undeveloped piece of property." *Id.*

To conclude, under the facts and circumstances herein, ASP has not demonstrated that it is entitled to use its estimate of \$3.88 per square foot as the amount of the base year for taxes under the lease.

CBCA 2673 - Reimbursement for HVAC Overtime

In this appeal, ASP claims entitlement to reimbursement of the lump sum amount of \$899,950, for provision of overtime HVAC services. This claim is predicated upon its interpretation of paragraph 8.3.B of the lease and other related forms and correspondence. GSA counters that neither this clause nor any other relevant lease provisions support ASP's claim.

Under the terms of the lease, ASP is required to provide a dedicated, twenty-four hour HVAC system, in addition to, and independent of, the general building system. This system is to consist of two separate modes, a dedicated mode and an on-demand mode. The room data matrix furnished for purposes of identifying which rooms fall into these two categories, explains that rooms that are designated "24/7 HVAC-D (Dedicated)" must be conditioned continuously for twenty-four hours a day, seven days a week. Rooms that are designated "24/7 HVAC-OD (On Demand)" must be served by the dedicated twenty-four hour system but are not required to actually be heated or air conditioned automatically outside of normal building hours. Rather, there must be a manually operated, room-mounted override button to enable occupants to access HVAC services on demand.

The lease requires that the rental payment be inclusive of services, utilities, and maintenance. Three specific clauses cover the provision of HVAC services. Paragraph 8.3.A establishes normal hours during which the general building HVAC system is to be operational; paragraph 8.3.B governs the use of the dedicated twenty-four-hour HVAC system. Both of these provisions pertain to costs that are to be included in the rental rate under the lease. The dedicated HVAC system is required to operate continuously twenty-four hours a day in the dedicated rooms identified in the room matrix, and to be available for activation on-demand in the other rooms covered by this system. Paragraph 8.3.B offers the possibility of payment of a portion of the cost of providing such services outside of normal hours in a lump sum amount apart from the rental consideration, if the offeror provides a cost, if any, for these services based on the formula set forth in the clause. Paragraph 8.4.B addresses HVAC usage on an overtime basis. A building official must order this usage, which would be compensated on an hourly basis. No order exists, nor would one be expected, for the usage at issue.

The GSA realty specialist testified that the formula¹⁸ in paragraph 8.3.B was intended to allow some flexibility for offerors to recoup, outside of the rental rate, the cost of providing the dedicated twenty-four hour HVAC services outside of normal hours. This provision expressly contemplates that those costs, if any, were to be disclosed to the Government in the form of a lump sum, which would be used for evaluation purposes, and, if the lease was awarded to that offeror, would be paid on an annual basis. ASP argues that the lump sum amount it seeks is easily derived by using the overtime rates it submitted in responding to a request for rates under paragraph 8.4 and applying the formula for “overtime” HVAC services in paragraph 8.3.B. Thus, it was not necessary to do the calculation for GSA. ASP also maintains that the overtime rates it provided for paragraph 8.4 apply equally to paragraph 8.3.B.

Paragraph 8.4, on its face, speaks to overtime usage of the general HVAC system provided for rooms that are not served by the dedicated twenty-four-hour system. This usage would require the tenant to place an order for the services. No order is necessary for use of the dedicated system, which is either running continuously or available by manual activation. Legal precedent establishes that the term “overtime,” by definition, does not apply to services that are already required to be provided:

Because heating and cooling must always be provided to [designated] rooms and areas, it can never be required there “on an overtime basis,” so payment for such services at the [overtime] rate would be inappropriate. Although the Government, through the lease, did “request” heating and cooling services for the specified rooms and areas during nonworking hours, we consider that those hours were not “overtime,” as that phrase should be understood in the context of the lease as a whole.

6000 Metro LLC v. General Services Administration, GSBCA 15725, et al., 04-1 BCA ¶ 32,510, at 160,822 (quoting *Clark College District 14 Foundation v. General Services Administration*, GSBCA 15603, 02-2 BCA ¶ 32,005, at 158,138 (citing *Rincon Center Associates v. General Services Administration*, GSBCA 11927, 96-1 BCA ¶ 28,126 (1995), *aff'd sub nom. Rincon Center Associates v. Johnson*, 108 F.3d 1393 (Fed. Cir. 1997)).

¹⁸ The clause states: “The Offeror shall provide to the Government the cost, if any, for HVAC services based on 6,250 hours per year (14-hours per day of overtime HVAC x 251 days and 24-hours per day of overtime HVAC x 114 days).” Although the formula mistakenly allows for more hours than there are in a day, ASP has adjusted the formula and does not claim more than the actual number of hours for which service is available.

This dispute is one of contract interpretation. The fundamental objective in contract interpretation is to determine the parties' intent at the time the contract was executed. *See, e.g., King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir.1997); *Beta Systems v. United States*, 838 F.2d 1179, 1185 (Fed. Cir. 1988); *Alvin, Ltd. v. United States Postal Service*, 816 F.2d 1562, 1565 (Fed. Cir. 1987). Contract interpretation begins with an examination of the plain language of the contract. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (citing *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004)). The contract should be construed as a whole and in light of its purpose. Reasonable meaning must be given all parts of the agreement so as not to render any portion meaningless, or to interpret any provision so as to create a conflict with other provisions of the contract. *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed. Cir.1983); *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978) (“An interpretation which gives a reasonable meaning to all parts will be preferred to one which leaves a portion of [the contract] useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result.”). Contract language should also be given the plain meaning that would be derived by a reasonably intelligent person acquainted with the contemporaneous circumstances. *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971); *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965). Finally, the contract must be construed to effectuate its spirit and purpose, giving reasonable meaning to all of its parts. *Electronic Data Systems, LLC v. General Services Administration*, CBCA 1552, 10-1 BCA ¶ 34,316, at 169,505 (2009).

If the plain language of the contract is unambiguous on its face, that language controls, and the inquiry ends. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). If the language in question is open to more than one reasonable interpretation, however, it is ambiguous, and the Board must determine which interpretation should prevail. *Gildersleeve Electric, Inc. v. General Services Administration*, GSBICA 16404, 06-2 BCA ¶ 33,320, at 165,210.

The mere fact that the parties differ on the proper interpretation of contractual language, however, does not necessarily mean that it is ambiguous. *See Tri-Cor, Inc. v. United States*, 458 F.2d 112, 126 (Ct. Cl. 1972). Where a contract is amenable to but one reasonable construction on its face, it should be given that interpretation and not be read to create an ambiguity. The fact that an interpretation is conceivable does not mean that it is reasonable or, in light of the whole contract, the correct one. *See Bishop Engineering Co. v. United States*, 180 Ct. Cl. 411, 415-16 (1967) (noting that “it would not be appropriate to strain the language of other contractual provisions to create an ambiguity” when “a contract is amenable to only one reasonable construction upon its face” because this “does

violence to the intention of the parties as expressed in the contract language and specifications”); *David R. Brown, Jr.*, IBCA 1600-7-82, 83-1 BCA ¶ 16,423, at 81,704; *John McShain, Inc.*, GSBCA 2743, 70-1 BCA ¶ 8804, at 37,585-86; *see also Ja-Mar Painting Co.*, ASBCA 13592, 70-1 BCA ¶ 8158, at 37,924; *BlackHawk Heating & Plumbing Co.*, VABCA 963, 70-2 BCA ¶ 8426, at 39,201 (explaining that just because a contractor’s interpretation is conceivable does not in and of itself render the contract ambiguous because the ambiguity must be reasonable).

When these lease provisions and the contract are read as a whole, the only sensible meaning that can be attributed to the request for rates for overtime usage under paragraph 8.4 is that GSA wanted hourly pricing for those occasions when it might be necessary to order HVAC services, outside of normal business hours, for an area or areas of the building where such services were not provided by the dedicated system. ASP’s quote for this overtime usage, submitted in response to paragraph 3.3.C.10 of the lease, states that it will charge \$25 per hour per floor and \$150 per hour if the entire building is being run. ASP’s claim is premised on its interpretation that the rates provided in paragraph 8.4 were intended to be used to derive the lump sum number requested for purposes of paragraph 8.3.B. Although the term “overtime” is used in both provisions, it is readily apparent from the contexts that overtime is used in paragraph 8.3.B to differentiate the normal business hours applicable to the use of the dedicated twenty-four-hour HVAC system.

There is no indication anywhere in the lease that ASP is entitled to an annual sum of \$899,850 or that the hourly rate of \$150 is to be applied in connection with paragraph 8.3.B. A review of ASP’s offer leading up to execution of the lease, which is part of the lease, only indicates a submission with respect to paragraph 8.4. First, ASP’s October 11, 2007, offer included a section titled “Hourly Overtime for Heating and Cooling,” which stated the following:

Hourly overtime rate for heating and cooling, in response to item 3.3, C, 10, on page 36 of the SFO is \$25 per hour per floor of the office building, or \$150 per hour in the event the entire building is being run.

ASP’s reference to item 3.3.C.10 clearly indicates that the rate quoted is in response to paragraph 8.4 because 3.3.C.10 refers to the “Overtime Usage” paragraph, which is paragraph 8.4, not paragraph 8.3. In addition, the offer’s reference to the \$150 rate being applicable when “the entire building is being run” connotes actual usage of the general building services, and paragraph 8.4.

ASP's initial offer also included GSA Forms 1217 and 1364, both of which were subsequently incorporated into the lease. Nowhere in Form 1364 is there any reference to paragraph 8.3.B or any indication that ASP expects to be paid an annual lump sum of \$899,850 for overtime HVAC services. Likewise, GSA Form 1217 includes no indication that operation of the twenty-four-hour system by ASP will incur an annual charge of \$899,850. ASP's interpretation is contrary to paragraph provisions 3.3.G.2 and 3.3.G.4, which required offerors to submit all costs to deliver the space and that the rental rate must include the annual cost of services and utilities on line 27 of Form 1217. Further, in paragraph 8 of ASP's final proposal, ASP makes no mention that its overtime rates were to apply to both paragraph 8.3.B and paragraph 8.4, nor does it present an annual lump sum charge under paragraph 8.3.B.

We thus conclude that paragraph 15 of the lease agreement, which states that it is pursuant to "SFO paragraph 8.4 titled 'Overtime Usage' and establishes the hourly rate of \$25 per hour per floor or \$150 per hour for the entire building," only applies to those HVAC services ordered for the rooms that do not require twenty-four-hour HVAC services that receive services outside the normal operation hours established in 8.3.A.

A focused reading of the language would have put ASP on notice that the two provisions address different sources of HVAC services and that if ASP desired to separate out costs associated with running the dedicated on-demand HVAC services it was incumbent on it to identify what those costs were. The fact that ASP, however inadvertently, did not recognize the need to specify a lump sum amount in association with the dedicated system's added costs of normal continuous use if it wanted to recover these costs outside of the rental rate, does not entitle it after-the-fact to apply rates quoted in response to the need to order overtime HVAC services.

For the reasons stated above, the appeal must be denied.

Decision

These appeals, CBCA 2618 and CBCA 2673, are **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

RICHARD C. WALTERS
Board Judge