



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART; DISMISSED IN PART FOR LACK OF JURISDICTION:
December 20, 2016

CBCA 5150

1201 EYE STREET, N.W. ASSOCIATES, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Reginald M. Jones, Douglas P. Hibshman, and Nicholas T. Solosky of Fox Rothschild LLP, Washington, DC, counsel for Appellant.

Heather R. Cameron and Kristi Singleton, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SOMERS**, and **SULLIVAN**.

SULLIVAN, Board Judge.

1201 Eye Street, N.W. Associates, LLC (1201 Eye Street) appeals the final decision of a contracting officer of the General Services Administration (GSA), in which the contracting officer denied 1201 Eye Street's claim for additional amounts in operating cost adjustments for the term of the five-year lease extension that began on July 16, 2012. Based upon the plain language of the terms of the lease and the lease extension agreement between the parties, we grant the appeal and award 1201 Eye Street additional operating cost adjustments in the amount of \$1,326,687.42, for the first three years of the lease extension, and interest as allowed by the Contract Disputes Act (CDA), 41 U.S.C. § 7109 (2012).

Findings of Fact

I. Relevant Lease Terms

In 2002, GSA awarded 1201 Eye Street¹ a contract for a lease of real property, located at 1201 Eye Street, NW, Washington, D.C. Appeal File, Exhibit 1.² The lease period was ten years, *id.* at 1, and the tenant agency, the National Park Service (NPS), took occupancy on July 16, 2002. The contract, including the solicitation for offers, contained the terms and conditions that were to govern the lease.

The lease set forth the annual rent amounts that GSA would pay in the ten years of the lease:

3. The Government shall pay the Lessor annual rent of:

For lease years 1 – 4, the Government shall pay the Lessor annual rent of Eight Million Two Hundred Nine Thousand Nine Hundred Twenty and 00/100 Dollars (\$8,209,920.00) (based on a rate of \$42.76 per USF [useable square foot] payable at the rate of Six Hundred Eighty Four Thousand One Hundred Sixty and 00/100 Dollars (\$684,160.00) per month in arrears. For lease years 5 through 7, the Government shall pay the Lessor annual rent of Eight Million Seven Hundred Eighty Five Thousand Nine Hundred Twenty and 00/100 Dollars (\$8,785,920.00) (based on a rate of \$45.76 per USF) payable at a rate of Seven Hundred Thirty Two Thousand One Hundred Sixty and 00/100 Dollars (\$732,160.00) per month in arrears. For lease years 8 through 10, the Government shall pay the Lessor annual rent of Nine Million Three Hundred Sixty One Thousand Nine Hundred Twenty and 00/100 Dollars (\$9,361,920.00) (based on a rate of \$48.76 per USF) payable at a rate of Seven Hundred Eight Thousand One Hundred Sixty and 33/100 [sic] Dollars (\$780,160.00) per month in arrears.

Exhibit 1 at 1. The lease further required that, “[i]n addition to the annual rent, the Government shall pay Operating Expense Adjustments and Tax Adjustments as provided in this [standard form] 2 and the attached Solicitation for Offers during the Lease term.” *Id.*

¹ The contract was initially awarded to 1215 Eye Street as the original owner of the property, but in 2006 ownership was transferred to 1201 Eye Street. Transcript, Vol. 1 at 57-59.

² All exhibits are found in the appeal file, unless otherwise noted.

Operating expenses were defined in the lease as “cleaning services, supplies, materials, maintenance, trash removal, landscaping, water, sewer charges, heating, electricity, and certain administrative expenses attributable to occupancy.” Exhibit 1 at 19. The total of these expenses for the property at the beginning of the lease was \$1,326,720, an amount documented on the form 1217 included in the lease. *Id.* at 2, 72. This operating base amount was included in the first year’s annual rent amount for the property, with adjustments to be made every year thereafter. Transcript, Vol. 1 at 68-69.³

The lease provided direction as to how the operating expense adjustments would be calculated:

3.5 Operating Costs (Sep 2000)

A. Beginning with the second year of the lease and each year thereafter, 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. The percent change will be computed by comparing the index figure published in the month of the lease commencement date with the index figure published in the month which begins each successive 12-month period. For example, a lease which commences in June of 1995 would use the index published in June of 1995, and that figure would be compared with the index published in June of 1996, June of 1997, and so on, to determine the percent change. The Cost of Living Index will be measured by the Department of Labor revised Consumer Price Index (CPI) for wage earners and clerical workers, U.S. city average, all items figure, (1982 to 1984 = 100) published by the Bureau of Labor Statistics. Payment will be made with the monthly installment of fixed rent. Rental adjustments will be effective on the anniversary date of the lease.

³ The Board held a hearing in this matter on November 1-2, 2016, at the request of the parties. Although the appeal is resolved based upon the plain language of the lease and lease extension agreements, the Board used the hearing to confirm its understanding of the operative terms through the testimony of witnesses.

C. In the event of any decreases in the Cost of Living Index occurring during the term of the occupancy under the lease, the rental amount will be reduced accordingly. The amount of such reductions will be determined in the same manner as increases in rent provided under this paragraph.

Exhibit 1 at 19-20.

II. Calculation of Operating Expense Adjustments During the Lease Term

For the ten years of the lease, GSA paid monthly rent payments in a single sum for both the annual rent and the operating cost adjustments. Transcript, Vol. 1 at 174. The tax adjustments were paid annually in a single, separate payment. *Id.* at 62. During the lease term, the annual rent increased twice, in lease years 2006 and 2009. Exhibit 1 at 1. The base operating cost and the calculation to determine the adjusted operating costs remained the same.

GSA calculated the payments annually as paragraphs 3 and 3.5 of the lease required, on a worksheet that was provided to 1201 Eye Street. These worksheets, referred to as supplemental lease agreements (SLAs), were prepared by the budget function within GSA, Transcript, Vol. 2 at 233-34, and issued unilaterally by the contracting officer. *See, e.g.*, Exhibit 12. The contracting officer described the SLA documents as “administrative” in nature. Transcript, Vol. 2 at 323-24.

As detailed on the SLAs provided in the record, each year, GSA calculated the change in the cost of living from the base year and multiplied that figure by the base operating cost to determine the amount of the operating cost adjustment due. For example, the cost of living index in 2005, lease year four, was 191, and in 2002, the base year, was 176.1. The calculated difference between these two figures is 0.084611016. This figure was multiplied by \$1,326,720, the base operating cost, to derive the operating cost adjustment of \$112,255.12 for 2005. When this amount is added to the annual rent, \$8,209,920, the resulting amount is the total annual rent of \$8,322,175.12 for 2005. The lease required no additional steps in the calculation of the total annual rent.

In preparing the SLAs, GSA added two extra steps to its annual calculation of the amounts owed, but arrived at the correct total annual rent figure. After calculating the operating cost adjustment for the year, GSA subtracted an amount that it labeled “previous escalation paid,” which was the operating adjustment for the previous year, from the current year’s adjustment. The resulting amount was labeled “annual increase in operating cost due lessor.” This amount was then added to the total annual rent amount calculated for the

previous year to derive the new annual rent for the current year.⁴ GSA witnesses testified that these extra steps were necessary to ensure that 1201 Eye Street was not paid twice for these escalated amounts. Transcript, Vol. 2 at 137, 235, 324. But, the Board observes, that problem could have also been addressed by simply adding the operating cost adjustment to the base annual rent, rather than to the prior year's total rent amount.

The Board does not find in the lease any requirement for GSA to undertake these additional steps, but, as shown in the excerpt of the SLA for 2005, the net result of these two extra steps is the same as adding the operating cost adjustment for the year to the base rent for the year to derive the new total annual rent:

Base (CPI-W-U.S. City Avg)	2002	176.10
Corresponding Index	2005	191.00
Base Operating Cost Per Lease		\$1,326,720.00
% Increase in CPI-W		0.084611016
Annual Increase in Operating Cost		\$112,255.13
Less Previous Escalation Paid ⁵		\$66,298.33
Annual Increase in Operating Cost Due Lessor		\$45,956.80

. . . the annual rent is increased by \$45,956.80. The new annual rent is \$8,322,175.13⁶ payable at the rate of \$693,514.59 per month.

⁴ This step in the calculation is not specifically shown on the SLA, but can be determined by subtracting the annual increase in operating cost due lessor from the new annual rent amount and comparing the resulting amount to the previous year's annual rent calculation.

⁵ GSA's label for this amount is not accurate. Rather than the "previous amount paid," this amount is the operating cost adjustment calculated for the previous year, 2004. Exhibit 4.

⁶ This new annual rent amount is the sum of the annual increase in operating cost due lessor and the previous year's annual rent ($\$8,322,175.13 = \$45,956.80 + \$8,276,218.33$). Exhibits 4, 5. It is also the sum of the base rent amount and the calculated operating cost adjustment for the year ($\$8,209,920 + \$112,255.13 = \$8,322,175.13$).

Exhibit 5 (SLA 18, effective July 16, 2005).

During the term of the lease, the annual rent payments calculated by GSA matched those amounts that paragraphs 3 and 3.5 required be paid to 1201 Eye Street:

Year	Annual Rent	Calculated Increase in Operating Costs	Annual Rent Plus Calculated Increase (Total Annual Rent)	Rent Paid By GSA
2002-03	\$8,209,920.00	\$0.00	\$8,209,920.00	\$8,209,920.00
2003-04	\$8,209,920.00	\$26,368.65	\$8,236,288.65	\$8,236,288.65 Exhibit 3
2004-05	\$8,209,920.00	\$66,298.33	\$8,276,218.33	\$8,276,218.33 Exhibit 4
2005-06	\$8,209,920.00	\$112,255.13	\$8,322,175.13	\$8,322,175.13 Exhibit 5
2006-07	\$8,785,920.00	\$174,033.12	\$8,959,953.12	\$8,959,953.12 ⁷ Exhibits 6, 83
2007-08	\$8,785,920.00	\$207,935.67	\$8,993,855.67	\$8,993,855.67 Exhibits 7, 83
2008-09	\$8,785,920.00	\$302,862.83	\$9,088,782.83	\$9,088,782.83 Exhibits 9, 83
2009-10	\$9,361,920.00	\$259,392.22	\$9,621,312.22	\$9,621,312.22 Exhibit 10

⁷ In lease year 2006, GSA failed to increase the base annual rent amount in its calculations as required in paragraph 3 of the lease, which resulted in the incorrect calculation of total rent payments for three years. Exhibit 85. To address the rent deficiency, GSA made a one-time lump sum payment. Exhibit 83. GSA also issued an SLA reflecting the correction to the total annual rent amounts for all three years. Exhibit 83. When the annual rent increased again in 2009, GSA included the correct amounts in its calculation of the monthly rent. The chart above reflects the corrected annual rent amounts paid by GSA. See Exhibits 83, 85.

2010-11	\$9,361,920.00	\$284,766.40	\$9,646,686.40	\$9,646,686.40 Exhibit 11
2011-12	\$9,361,920.00	\$350,974.32	\$9,712,894.32	\$9,712,894.32 Exhibit 12

III. Terms of the Lease Extension

After the lease expired on July 15, 2012, GSA entered a period of holdover for two years while NPS determined whether and where it wanted to move its personnel. Transcript, Vol. 2, at 84-86. After NPS determined that it would move its personnel to the main Department of the Interior building and that completing renovations there would require five years, NPS asked GSA to negotiate an extension to the existing lease. *Id.* at 85-86.

Both parties presented evidence and testimony regarding the negotiations that led to the lease extension. 1201 Eye Street provided two unsolicited offers to GSA, in which 1201 Eye Street stated that “[o]perating expense adjustments shall continue as provided in the current lease” and “the extension . . . shall not alter or amend the standards, terms and conditions of Lease Number GSA-11B-01482 with terms outside of this unsolicited offer.” Exhibit 13 at 2, 3; Exhibit 14. Once NPS requested that GSA execute a lease extension, the GSA contracting officer forwarded a draft of the lease extension to 1201 Eye Street that stated in part:

All other terms and conditions of the lease shall remain in force and effect.

....

The new annual rent shall continue to be adjusted for operating cost escalations as provided in the Lease using the same operating cost base established during the initial term of the Lease (i.e., CPI increases are due July 16, 2012, July 16, 2013, July 16, 2014, July 16, 2015, and July 16, 2016).

Exhibit 56 at 1, 2.

On April 15, 2014, the parties executed a five-year lease extension:

1. Extension Period: The term of the lease is for a period of five (5) years firm, subject to Paragraph 4 below, beginning as of July 16, 2012 and ending on July 15, 2017 (the “Extension Term”).

Exhibit 15 at 2. The parties negotiated new annual rent amounts based on a revised square footage and a new rental rate per square foot, as listed in paragraph 3 of the lease extension:

3. Annual Rent: The annual rent during the Extension Term will be \$42.60 per [Building Owners and Managers Association (BOMA) Rentable Square Foot (BRSF)]/\$48.76 per [American National Standards Institute (ANSI) BOMA Office Area Square Foot (ABOASF)] for the first twelve (12) months of the Extension Term (July 16, 2012 - July 15, 2013). The annual rent amount during such one year period is \$9,361,350.00 ($\$42.60/\text{BRSF} \times 219,750 \text{ BRSF}$).

Effective as of July 16, 2013, the annual rental rate will increase to \$49.83 per BRSF/\$57.03 per ABOASF for the remainder of the Extension Term. The annual rent will increase from \$9,361,350.00 to \$10,950,142.50, subject to Paragraph 4 below.

Date	To	# of Months	Annual Rate	SF	Total Rent
7/16/2012	7/15/2013	12	\$42.60	219,750	\$9,361,350.00
7/16/2013	7/15/2014	12	\$49.83	219,750	\$10,950,142.50
7/16/2014	3/31/2015	8.5	\$49.83	219,750	\$7,756,350.94
4/1/2015	7/15/2017	27.5	\$49.83	174,274	\$19,901,001.59
Total Rent:					\$47,968,845.03

Id. The parties also agreed that “[t]he new annual rent shall continue to be adjusted for operating cost escalations as provided in the Lease using the same operating cost base established during the initial term of the Lease (i.e., CPI increases are due July 16, 2012, July 16, 2013, July 16, 2014, July 16, 2015, and July 16, 2016).” *Id.* The lease agreement provided that “the Government [would] pay a single lump sum payment in the total amount of any deficiency between rental payments made prior to the date of this Amendment for any

portion of the Extension Term.” *Id.* Finally, the agreement provided that “[a]ll other terms and conditions of the lease shall remain in force and effect.” *Id.* at 1.

IV. Calculation of Operating Cost Adjustments During the Lease Extension

Based upon the terms of the lease extension agreement, witnesses for both parties testified that they understood that the operating cost adjustments for the lease extension period were to be calculated and paid in the same way that they were in the original lease term. Transcript, Vol. 1 at 112; *Id.*, Vol. 2 at 94. Despite this apparent agreement, GSA changed the manner in which it calculated the annual rent, which led to the current dispute.

During the lease extension, GSA continued to make monthly rent payments in a single sum for both the base rent and the operating cost adjustments. Transcript, Vol. 1 at 174. GSA also paid the tax adjustments annually in a single, separate payment. *Id.* at 16. GSA continued to calculate the new annual rent payments on the SLAs provided to 1201 Eye Street. *See, e.g.*, Exhibit 17.

The first steps in the total rent calculations remained the same. GSA continued to calculate the change in the cost of living index from the base year and multiplied that figure by the base operating cost to determine the operating cost adjustment for the year. GSA also calculated the difference between the current and prior year’s adjustment, still labeled as “previous escalation paid,” to determine the “annual increase in operating cost due lessor.”

However, for the first year of the lease extension, rather than adding this annual increase to the total annual rent paid in the previous year as GSA had done during the original lease to capture the previous operating cost adjustments, GSA added this amount to the base annual rent amount agreed to in the extension between the parties. Exhibit 16. Because the base rent amount did not contain the previous cost adjustments, GSA calculated a total rent amount that paid only the increase in operating cost adjustments from the prior year (2011), instead of the operating cost adjustment increase from the base year (2002).

In the second year of the lease extension, GSA compounded the error by adding the annual increase in operating cost due the lessor to the prior year’s annual rent, rather than the annual rent amount to which the parties had agreed for that year. Exhibit 17. The amount of \$34,023.10 was added to \$9,383,062.70, the total rent paid in 2012, to derive the new annual rent of \$9,417,085.80 for 2013. In the third year of the lease extension, GSA added the annual increase to the base annual rent amount set forth in the lease extension. Exhibit 19. Again, as the result of this method of calculation, GSA only paid 1201 Eye Street the increase in cost adjustments between 2013 and 2014 rather than from 2002 to 2014.

V. 1201 Eye Street's Claim

On July 17, 2015, 1201 Eye Street submitted its certified claim to the contracting officer, seeking the correct amount of operating cost adjustments pursuant to the terms of the lease and lease extension. 1201 Eye Street sought \$1,326,687.42, as the amount owed for the first three years of the lease extension. The contracting officer denied 1201 Eye Street's claim on October 15, 2015, and 1201 Eye Street filed its timely appeal.⁸

At the hearing, 1201 Eye Street's senior property accountant testified as to the calculation and amount of these damages. 1201 Eye Street calculated that it should have received \$32,217,132.69, in rent and operating cost adjustments in the first three years. 1201 Eye Street received only \$30,890,445.27. The difference between these two amounts is \$1,326,687.42. The senior property accountant also testified as to amounts paid by GSA from July 2002 to September 2016, based upon calculations placed into evidence. Exhibit 85.

⁸ Prior to the submission of 1201 Eye Street's claim, the parties engaged in negotiations to resolve the issue. 1201 Eye Street included in the appeal file documents which purported to show GSA's agreement with its interpretation of the terms of lease and lease extension regarding the calculation of operating cost adjustments. GSA sought to exclude one document, Exhibit 69, arguing that it was protected by the attorney-client privilege. The Board found that, although the document is protected by the attorney-client privilege, GSA waived the privilege when it failed to take reasonable steps to prevent its disclosure or rectify its error once it was discovered. Nevertheless, the Board ultimately excluded the document under Federal Rule of Evidence (FRE) 408, which precludes the introduction of evidence of "conduct or a statement made during compromise negotiations about the claim" offered as evidence of the validity or amount of a disputed claim. Exhibit 69 was an email chain that described statements made during the negotiations between the parties. Despite the Board's ruling to exclude this exhibit on the basis of FRE 408 at the beginning of the hearing, counsel for both parties proceeded to elicit testimony regarding these negotiations without objection.

Discussion

I. The Plain Language of the Lease and the Lease Extension Require Payment of the Amounts 1201 Eye Street Seeks

The issue to be decided in this appeal is the amount of the operating cost adjustments to which 1201 Eye Street was entitled during the first three years of the lease extension.⁹ As noted above, the parties agree that the lease agreement provided that operating cost adjustments would continue to be calculated and paid in the same manner as was done during the lease. The parties disagree as to how these amounts were to be calculated. The answer to this disagreement is found in the plain language of the original lease, specifically paragraph 3.5 of the solicitation for offers.

Resolving a contract interpretation problem begins with a reading of the plain language of the lease. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (“Contract interpretation begins with the plain language of the agreement.”); *A-Son’s Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,207. A contract must be construed so as to give “reasonable meaning to all parts of the contract.” *Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002). Moreover, “the language of a contract must be afforded the meaning derived from the contract by a reasonably intelligent person acquainted with the contemporary circumstances.” *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971). When the plain language of the contract is unambiguous, the Board does not need to look to extrinsic evidence to interpret its provisions. *TEG-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006); see *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002) (“When the contract language is unambiguous on its face, our inquiry ends, and the plain language of the contract controls.”).

⁹ In its notice of appeal and complaint, 1201 Eye Street seeks to recover its operating cost adjustments for the entire period of the lease extension. The Board only has jurisdiction to award the amount owed for the first three years because this period was the period set forth in its claim to the contracting officer. *Strawberry Hill, LLC v. General Services Administration*, CBCA 5149, 16-1 BCA ¶ 36,561. Given that the terms of the lease extension remain the same during the remaining term of the lease extension, the Board presumes that the parties can determine between themselves the additional amount owed to 1201 Eye Street for operating cost adjustments for later years, if and when 1201 Eye Street submits a claim or request for equitable adjustment for those monies.

Here, the plain language of the lease explains the calculations required to compute the annual rent and the adjustments for operating costs. Paragraph 3 of the lease recites the annual rent amounts for the first ten years of the lease and provides that 1201 Eye Street shall also receive operating cost adjustments in addition to these amounts. Paragraph 3.5 dictates how these operating cost adjustments are to be calculated—the difference in the cost of living index between 2002 and the current year is to be multiplied by the base operating cost.

The language of the lease extension is equally clear. All terms of the lease remain in “force and effect.” The lease extension provides that adjustments will continue to be made to the annual rent for operating costs and tax payments “as provided in the lease.” Those adjustments were to be made “using the same operating cost base established during the initial term of the Lease.” The annual rent amounts for lease extension years 2012 through 2015 are clearly laid out in paragraph 3 of the extension. Although the annual rent amounts changed, there was no change in the calculation of the operating cost adjustments or the total annual rent.

Pursuant to the language of the lease and the lease extension, GSA was to continue to pay 1201 Eye Street operating cost adjustments based upon the change in the cost of living index calculated from 2002. Nothing in the lease extension agreement changed that obligation or method of calculation. GSA correctly asserts that it did not change its method of calculating the operating cost adjustment—GSA did continue to calculate the operating cost adjustment using the operating cost base amount and the base year of 2002. Transcript, Vol. 2 at 345. The mistake came when GSA undertook its additional steps in its calculation of the total annual rent due. During the original lease, GSA subtracted the prior year’s adjustment from the current year, but then added the resulting figure to the prior year’s total annual rent figure. Despite these extra steps, as explained above, 1201 Eye Street still received the base annual rent plus the operating cost adjustment.

However, when GSA calculated the total annual rent for the lease extension, it took only one additional step—it subtracted the prior years’ adjustment from the current year’s adjustment. It then added the resulting figure to the agreed-upon annual rent for 2012. As a result, GSA paid 1201 Eye Street only for the difference in operating cost adjustments between 2011 and 2012. This calculation does not comport with the plain language of paragraphs 3 and 3.5, which requires that GSA pay the operating cost increases from 2002.

GSA argues that 1201 Eye Street seeks to recover what it terms “accumulated operating costs” and that 1201 Eye Street should have clearly indicated its interest in receiving these sums when the parties negotiated the lease extension agreement. “Accumulated operating costs” are the sum of all the amounts that GSA labels as “previous

escalation paid”¹⁰ in each of the ten years of the lease. Transcript, Vol. 2 at 250. This amount was \$350,974.32 for the last year of the original lease. *Id.* If 1201 Eye Street wanted to include these amounts in the calculation of operating adjustments, GSA asserts, 1201 Eye Street should have included language addressing these costs in the lease extension. Contrary to GSA’s assertion, the terms of the lease agreement provide that 1201 Eye Street is to receive these amounts, and the terms of the lease extension agreement require that operating cost adjustments be calculated in the same manner as under the original lease. If GSA did not want to include the amounts that it identifies as “accumulated operating costs,” it needed to address that in the lease extension by changing the base year for the calculation of the change in the cost of living index.

GSA further argues that 1201 Eye Street had three methods available by which it could have ensured that these amounts would be included in the payments under the lease extension. First, 1201 Eye Street could have reset the base operating cost year and amount in the lease extension. Transcript, Vol. 2 at 343. Second, it could have added language in the lease extension ensuring that “accumulated operating costs” would be included. *Id.* at 343. Third, 1201 Eye Street could have added the “accumulated operating costs” to the annual rent amounts in the paragraph 3 table of the lease extension. *Id.* Again, GSA misunderstands that these amounts are included by virtue of the fact that the lease extension agreement provided that the operating cost adjustments would continue to be calculated in the same manner as set forth in the lease. This method included using the base year of 2002 and did not require 1201 Eye Street to identify “accumulated operating costs” as a separate amount. In fact, if GSA did not want to pay 1201 Eye Street these “accumulated amounts,” it should have reset the base year from which the operating cost adjustments were measured. Moreover, if 1201 Eye Street had included these amounts in the rent table without changes to the method of calculating the adjustment, 1201 Eye Street would have collected greater total rent payments.

II. GSA’s Interpretation Conflicts with the Extrinsic Evidence of the Prior Course of Dealing

GSA argues in the alternative that, if the Board does not find that its interpretation is supported by the plain language of the agreements, the lease extension agreement must be ambiguous and the Board should apply the doctrine of *contra proferentem* against 1201 Eye Street as the drafter of the language at issue. Respondent’s Pre-Hearing Brief at 9.

¹⁰ As explained in footnote 5, the description “previous escalation paid” is a misnomer because the amount is the operating cost adjustment for the previous year.

GSA also presented witness testimony regarding perceived ambiguities in the language of the lease extension.

When contract language is subject to more than one reasonable interpretation, the doctrine of *contra proferentem* may be applied to construe terms against the drafter. *Turner Construction Co. v. United States*, 367 F.3d 1319, 1321 (Fed. Cir. 2004). But, the Board should turn to the doctrine of *contra proferentem* as a “last resort,” only after “other approaches to contract interpretation have failed.” *Gardiner, Kamya & Associates v. Jackson*, 467 F.3d 1348, 1352 (Fed. Cir. 2006). Other approaches to contract interpretation include the examination of extrinsic evidence, and specifically the course of dealing of the parties. *TEG-Paradigm*, 465 F.3d at 1339; *see also McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1434 (Fed. Cir. 1996). Extrinsic evidence can also serve to confirm that the Board’s interpretation of the plain meaning of the contract was in fact the parties’ understanding. *A-Son’s Construction, Inc.*, 15-1 BCA at 176,208. Particularly useful is the prior dealings of the parties during the term of the original lease. *See Metropolitan Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006) (“When, as here, the contract language is ambiguous, the parties’ own course of performance is highly relevant to contract interpretation.”).

Assuming, arguendo, that there is an ambiguity in the terms of the lease and lease extension, the Board need not resort to the doctrine of *contra proferentem*. The testimony at hearing did not establish that 1201 Eye Street was the drafter of the language at issue in the appeal. While 1201 Eye Street submitted unsolicited offers to GSA during the holdover period, the language at issue in the appeal was found in the draft of the lease extension prepared by the contracting officer, not in the offers submitted by 1201 Eye Street. Moreover, GSA’s interpretation is not reasonable and conflicts with the prior conduct of the parties. During the original lease, GSA calculated the operating cost adjustments and total monthly rent as detailed above so that 1201 Eye Street received the full amount of the operating cost adjustment calculated from 2002. GSA changed the calculation during the term of the lease extension so that 1201 Eye Street did not receive this full amount.

Finally, GSA attempted to establish that the lease extension contains ambiguities as to how the operating cost adjustments are to be calculated. According to GSA, the rent table in paragraph 3 of the lease extension agreement creates an ambiguity with the column heading “total rent,” suggesting that the amounts listed are inclusive of annual rent and operating cost adjustments. Transcript, Vol. 2 at 272. Though the table heading may have been unclear, the language of the lease extension dispels any ambiguity because it lists the annual rent and provides that “the annual rent will continue to be adjusted for operating cost escalations.” The original lease contained the annual rent amounts in paragraph 3 and provided that they would be further adjusted. GSA also argues that the specific use of the

term lease extension as opposed to lease renewal creates an ambiguity because the term extension requires that the terms of the lease be reset, whereas in a renewal the terms would carry over. *Id.* at 9-10, 108, 309-12. Despite this professed understanding of GSA terminology, the terms of the lease clearly state that the calculation of operating cost adjustments is to remain the same.

Decision

The appeal is **GRANTED IN PART**. For the first three years of the lease extension, 1201 Eye Street is awarded \$1,326,687.42, with interest to run from July 17, 2015, pursuant to 41 U.S.C. § 7109. 1201 Eye Street's claim for the last two years of the lease extension is **DISMISSED FOR LACK OF JURISDICTION**.

MARIAN E. SULLIVAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JERI KAYLENE SOMERS
Board Judge