UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED:
December 7, 2017

CBCA 5269, 5659

NOAA MARYLAND, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Diana Parks Curran and Hadeel N. Masseoud of Curran Legal Services Group, Inc., Johns Creek, GA, counsel for Appellant.

James F. H. Scott, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **KULLBERG**, and **RUSSELL**.

RUSSELL, Board Judge.

Under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101 – 7109 (2012), appellant, NOAA Maryland, LLC, timely appealed the denial of its claim under a lease with the General Services Administration (GSA or Government). In its appeal, appellant seeks reimbursement of charges levied by Prince George's County, Maryland. The charges at issue were designated for stormwater management ("Stormwater Tax"), transit ("Transit Tax"), watershed protection and restoration ("Clean Water Fee") and education ("Supplemental Education Tax"). Appellant has moved for summary relief arguing that these charges are reimbursable "real estate taxes" under its lease with GSA. GSA disputes this characterization.

Based on the record before us, we cannot find that appellant is entitled to judgment as a matter of law. The record is not sufficiently developed to answer the question whether the charges are reimbursable. Therefore, we deny appellant's motion.

Background

I. The Lease

In September 2005, GSA executed a lease with appellant's predecessor in interest, Maryland Enterprise, LLC, to rent a building located in Prince George's County for a thirteen-year term. Appeal File, Exhibit 1 at 1.[1] The lease was assigned to appellant in December 2011. Exhibit 19. In addition to annual rent, the Government agreed to pay operating expenses and real estate taxes as prescribed by the lease's Tax Adjustment clause during the lease term. Exhibit 1 at 1.

The Tax Adjustment clause describing the real estate taxes subject to reimbursement states:

> Real estate taxes . . . 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.

Exhibit 1 at 24. The Tax Adjustment clause defines base year taxes as "an amount negotiated by the parties that reflects an agreed upon base for a fully assessed value of the property." *Id*. The clause also provides that the Government's obligation for any tax increase (or reimbursement for any tax decrease) shall be based on the ratio of the square footage occupied by the Government to the total rentable square feet. *Id*.

In the original lease, the negotiated real estate tax base for escalation purposes was $711,900. Exhibit 1 at 2. In January 2014, the parties executed a supplemental lease agreement establishing a new tax base of $1,387,574.20. Exhibit 2. The supplemental lease agreement expressly noted that "[a]ll other terms and conditions of the [original] [l]ease shall remain in full force and effect." *Id*.

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[1] All exhibits are found in the appeal file, unless otherwise noted.

II. The Disputed Charges

The charges at issue are described in the county's code or records as summarized below. Notably, these charges are itemized on the county's tax bill separate from imposed real estate taxes.

A. Stormwater Tax

In 1987, Prince George's County created a stormwater management district that includes all the land within the county except the city of Bowie. Prince George's County, Md., Code § 10-262(a). The county imposes "a direct ad valorem tax" on all property assessed for tax purposes within the district to pay for stormwater management operations and activities. *Id*. § 10-263(a). The tax also pays for costs associated with bonds issued by the county and the Washington Suburban Sanitary Commission. *Id*. All receipts and revenues from the tax are paid into the county's Stormwater Management District Fund. *Id*. § 10-264(b).

B. Transit Tax

The Washington Suburban Transit District includes the counties of Prince George's and Montgomery in Maryland. Prince George's County, Md., Washington Suburban Transit District Municipal Code, § 3. The district is authorized to enter into contracts or agreements with the Washington Metropolitan Area Transit Authority in exchange for the district contributing sums for the construction or acquisition of transit facilities, for debt service requirements, and for meeting expenses and obligations incurred in the operation of transit facilities. *Id*. § 12(a). These contributions are funded by a tax levied against all assessable property within the district by the councils of Prince George's and Montgomery County. *Id*. § 14(a). The Washington Suburban Transit Commission (WSTC), created in 1965, is the agency that provides planning and oversight for mass transit services for the two counties. *Id*. §§ 4, 14(a)(1). The WSTC also determines the amounts necessary to be raised by the counties for a given year based on the valuation of assessable property within the counties. *Id*. § 14(a)(1). The county councils levy and collect the transit tax in the same way as county taxes. *Id*. The transit tax has the same priority rights, bears the same interest and penalties, and in every respect is treated the same as county taxes, but is earmarked for transit. *Id*.

C. Clean Water Fee

On July 24, 2013, the Prince George's County Council adopted a resolution concerning a "Clean Water Act Fee." Prince George's County, Md., CR-059-2013 (July 24, 2013). The resolution established a schedule of fees to be collected as part of the county's

Watershed Protection and Restoration Program. *Id*. Fees are to be deposited into the county's Local Watershed Protection and Restoration Fund. Prince George's County, Md., Code § 10-302(b)(1). The fund is used to support various stormwater management activities and projects, *id*. § 10-303(a), and money in the fund cannot revert or be transferred to the general fund. *Id*. § 10-303(c). The specific fee is determined based on the impervious surface area existing on a property and the zoning classification of the property, and it includes an administrative charge. Prince George's County, Md., CR-059-2013.

D. Supplemental Education Charge

The county's website explains the purpose of the education charge.[2] It was imposed by the county for the first time for tax year July 2015 to June 2016, and was designated exclusively for the county's school system.

III. The Claims and the Appeals

A. CBCA 5269

In January 2016, appellant filed a certified claim with GSA requesting a contracting officer's final decision on its claim for county charges assessed against the leased building. Specifically, appellant sought reimbursement of $167,979.76 for stormwater taxes and $80,879.44 for transit taxes for the tax periods 2012 – 2015, arguing that the taxes were reimbursable under the Tax Adjustment clause of the parties' lease as "real estate taxes." Exhibit 5. Appellant contended that both the stormwater and transportation taxes were reimbursable ad valorem real estate taxes because (1) they were assessed on all real property in the county, (2) they were based on the value of the leased property, (3) they were not one-time charges, and (4) they were not imposed on a limited group of taxpayers who exclusively benefitted from the services funded by the taxes. *Id*. According to appellant, a tax that has these features is properly categorized as a reimbursable real estate tax under the parties' lease.

In its claim, appellant also requested that GSA provide a basis for denying reimbursement of $32,017.32 for the supplemental education charge and $1615.25 for a clean water fee imposed by the county for the tax period of July 2015 to June 2016. Exhibit 5. Appellant asserted that these charges were assessed and collected like other real estate taxes by the county. *Id*.

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[2] *See* https://www.princegeorgescountymd.gov/faq.aspx?TID=58.

In April 2016, appellant filed an appeal pursuant to paragraph 33.211(g) of the Federal Acquisition Regulation (48 CFR 33.211(g) (2015)) which allows a party to bring a case before the Board if the contracting officer has not issued a decision within the time period prescribed by the CDA. The appeal was docketed as CBCA 5269.

On May 3, 2016, the Board ordered the agency to issue a contracting officer's final decision on appellant's claim for reimbursement of the transit, stormwater, clean water, and supplemental education charges. The agency did so later that same month, denying the claim.

B. CBCA 5659

In October 2016, appellant filed a certified claim with GSA requesting a contracting officer's final decision on its request for reimbursement for taxes assessed on the leased building for the tax year July 2016 to June 2017. The specific amounts sought were $46,543.66 for the stormwater tax, $34,476.79 for the supplemental education charge, and $1615.25 for the clean water fee. In March 2017, appellant filed an appeal pursuant to 48 CFR 33.211(g), arguing that GSA had not issued a contracting officer's decision within the period prescribed by the CDA. The appeal was docketed as CBCA 5659, and subsequently consolidated with CBCA 5269.

IV. County's Response to NOAA Maryland's Inquiry on Disputed Charges

In May 2017, appellant submitted an inquiry to Prince George's County asking whether the charges in question are deposited into a general municipal fund to cover general county expenses or if they are deposited into separate funds for specified purposes. Exhibit 34. Appellant specifically wanted to know whether the county considered the charges special assessments. *Id*. In its response, the county stated that the education tax is collected for the Prince George's County Board of Education, the stormwater/water quality taxes go directly to a fund dedicated to addressing flood control and protection needs and maintenance of the countywide storm drain systems, and the transportation tax goes to the WSTC to fund transportation projects in Prince George's and Montgomery counties. *Id*. The county added that these charges are considered taxes, not special assessments. *Id*.

V. Appellant's Motion

Appellant has moved for summary relief asserting that there are no material facts in dispute and the issue presented is a matter of legal interpretation. In support of its motion, appellant argues that a plain reading of the lease, applicable local law, and statements and publications by the local taxing authority support its position that the charges at issue are

reimbursable real estate taxes. Appellant also contends that GSA has established a course of dealing of reimbursing appellant for certain tax increases under the terms of the initial lease effectuated by the parties in 2005, and the supplemental lease agreement effectuated by the parties in 2014. Appellant alternatively argues that the lease provision carving out or excluding taxes that are non-reimbursable ("carve-out" provision) is ambiguous and should be construed against GSA.

GSA opposes appellant's motion, arguing that the agency is only responsible for reimbursing appellant for ordinary real estate taxes funding general governmental services, not other assessments imposed by the county.

Discussion

I. Standard of Review

Appellant has filed a dispositive motion asking that the Board find that appellant is entitled to reimbursement from GSA for the disputed charges. Board Rule 8(g) allows the Board to provide summary relief if there are no "uncontested material facts," and the movant is entitled to judgment as a matter of law. 48 CFR 6101.8(g) (2008); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary relief in a party's favor is appropriate only if the party provides evidence of uncontested facts sufficient to show entitlement to judgment as a matter of law, even if the non-moving party fails to present opposing evidence. *Broomall Industries, Inc. v. Data Design Logic Systems, Inc.*, 786 F.2d 401, 405 (Fed. Cir. 1986).

When considering a motion for summary relief, evidence and all factual inferences must be viewed in the light most favorable to the non-moving party. *Litton Industrial Products, Inc. v. Solid State Systems Corp*., 755 F.2d 158, 163 (Fed. Cir. 1985). "[A] party seeking summary [relief] always bears the initial responsibility of informing the [Board] of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp*., 477 U.S. at 323. The non-moving party can defeat a motion for summary relief by showing that a contested material fact exists; however, the non-moving party cannot simply rely on the parties' pleadings but must support its argument with evidence such as affidavits, depositions, answers to interrogatories, admissions, and other admissible documents under Board Rule 8. *SBBI, Inc. v. International Boundary & Water Commission*, CBCA 4994, 17-1 BCA ¶ 36,722, at 178,813; 48 CFR 6101.8(g)(3); *see also Crown Operations International, Ltd. v. Solutia, Inc*., 289 F.3d 1367, 1375 (Fed. Cir. 2002) (opposing party must present actual evidence of a genuine issue of material fact rather than relying on mere allegations).

The parties agree that their dispute is one of contract interpretation. When reviewing an appeal involving disputed interpretations, the Board will ascertain the intention of the parties under the contract. *See Alvin Ltd. v. United States Postal Service*, 816 F.2d 1562, 1565 (Fed. Cir. 1987) ("In the case of contracts, the avowed purpose and primary function of the court is the ascertainment of the intention of the parties.") (citing 4 Samuel Williston, A Treatise on the Law of Contracts § 601 (3d ed. 1961)). "The parties' intent must be gathered from the instrument as a whole," *Kenneth Reed Construction Corp. v. United States*, 475 F.2d 583, 586 (1973), from the perspective of "a reasonably intelligent person acquainted with the contemporary circumstances." *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (1971). "Generally, the plain language of a contract [or instrument] controls, and only language which is reasonably susceptible to more than one meaning may be considered ambiguous." *Thermal Electronic, Inc. v. United States*, 25 Cl. Ct. 671, 673 (1992) (citing *Neal & Co. v. United States*, 19 Cl. Ct. 463, 471 & n. 4 (1990), *aff'd*, 945 F.2d 385 (Fed. Cir. 1991)). However, "[t]he mere fact that the parties are asserting different interpretations is not sufficient to constitute an ambiguity." *Thermal Electric, Inc*., 25 Cl. Ct. at 673.

Here, we must determine whether the lease addresses whether the disputed charges are real estate taxes. If they are, they are reimbursable under the lease.

II. The Current Record Does Not Show Whether the Disputed Charges Are Reimbursable

A. The Tax Adjustment Clause

Appellant claims that the lease's Tax Adjustment clause speaks to how to categorize the charges in question. As defined under the clause, real estate taxes are those that are assessed against the building without benefit to the property for the purpose of funding general government services. Exhibit 1 at 24. However, the definition is qualified and excludes, "*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." *Id*. (emphasis added).

Appellant argues that the charges are reimbursable under the lease because of how they are assessed – namely, like real estate taxes "used for traditional governmental services." However, even accepting appellant's characterization of the charges, under the carve-out provision, GSA is not obligated to reimburse appellant for "any other present or future taxes" outside of real estate taxes as defined in the provision. Appellant has not shown that the carve-out provision excludes the charges at issue.

Additionally, appellant has not conclusively demonstrated that the disputed charges are reimbursable. Generally, we may not draw on evidence extrinsic to the contract when interpreting its provisions absent an ambiguity. The Board may, however, rely on such evidence "for the limited purpose of shedding light on the parties' objective intent by clarifying the circumstances affecting a contract or the meaning of terms found within the four corners of the contract itself." *Applied Companies v. United States*, 37 Fed. Cl. 749, 759 (1997), *aff'd*, 144 F.3d 1470 (Fed. Cir. 1998); *see also Reliable Contracting Group, LLC v. Department of Veterans Affairs*, 779 F.3d 1329, 1332 (Fed. Cir. 2015) ("Generally, evidence of contemporaneous beliefs about the contract is particularly probative of the meaning of a contract."); *Blinderman Construction Co. v. United States*, 695 F.2d 552, 558 (Fed. Cir. 1982) ("It is a familiar principle of contract law that the parties' contemporaneous construction of an agreement, before it has become the subject of a dispute, is entitled to great weight in its interpretation."); *see also CH2M-WG Idaho, LLC v. Department of Energy*, CBCA 3876, 17-1 BCA ¶ 36,849, at 179,563 ("[T]he conduct of the parties prior to the dispute is especially strong evidence of [a] contract's true meaning."); *ACE-Federal Reporters, Inc. v. General Services Administration*, GSBCA 13507-REM, 02-2 BCA ¶ 31,913, at 157,659 ("While extrinsic evidence is ordinarily admitted to shed light on ambiguous contract provisions, it may also be used to explain and interpret, but not contradict, an integrated contract."). Here, appellant's evidence is not meaningfully probative of the parties' intent as to reimbursement of the disputed charges. Although appellant includes in the record an email from the county asserting that the disputed taxes are not "special assessments" but taxes, the document is not conclusively probative. Under the Tax Adjustment clause, reimbursable real estate taxes are those assessed against a building or land, without regard to benefit to the property, for the purpose of funding general government services. The definition excludes any other taxes or governmental charges that are assessed against a building or land. Accordingly, the disputed charges, although identified as taxes by the county, might still be non-reimbursable items under the Tax Adjustment clause.[3]

[3] However, the language of the Prince George's County municipal code describing the transit tax does appear to suggest that this tax might be construed as within the scope of a reimbursable real estate tax. The tax is not only levied and collected as county taxes are levied and collected, but under the county code, is to be treated in every respect as a county tax. Prince George's County, Md., Washington Suburban Transit District Municipal Code, § 14(a)(1). We will defer making a determination on appellant's entitlement to reimbursement until after the parties have had an opportunity to put forth a more substantial record.

B. Parties' Course of Dealing

In further support of its position, appellant argues that the parties' course of dealing supports reimbursement of the charges under the lease. To the extent relevant, we consider GSA's performance under the lease before this dispute arose. *Alvin, Ltd.*, 816 F.2d at 1566. Indeed, how the parties performed under the lease before the dispute would likely reveal more than the "dry language" of the lease itself. *See Macke Co. v. United States*, 467 F.2d 1323, 1325 (1972). Here, however, appellant did not show that GSA had previously paid the disputed charges. Appellant merely showed that GSA paid tax increases under the Escalation clause of the original lease and the supplemental lease agreement executed in January 2014. The mere fact that GSA paid increased real estate taxes does not demonstrate a course of dealing regarding the disputed charges. Additionally, the supplemental lease agreement simply established a new tax base, but all other terms from the original lease remained the same. As such, the document does not show a course of dealing whereby GSA knowingly reimbursed appellant for the county charges in dispute.

C. Contemporaneous Intent of Parties

Appellant also presents no evidence that the charges were a direct substitute for, or successor to, the real estate tax scheme existing when the lease was effectuated. Specifically, the current record does not show that GSA had at some point during the lease period paid the disputed charges but is now refusing to do so. In *Alvin, Ltd.*, the Federal Circuit held that the Postal Service was obligated to pay certain successor charges that were formerly encompassed in general real estate taxes regardless of how the successor charges were categorized. 816 F.2d at 1567. Examining the expectations and intent of the parties when the lease was effectuated, the Federal Circuit concluded that the Postal Service's payment of the successor charges would reflect the parties' original bargain. *Id*.; *see also S.S. Silberblatt, Inc. v. United States*, 888 F.2d 829 (Fed. Cir. 1989) (affirming Postal Service's decision that certain new tax assessments were not direct substitutes for prior general real estate tax scheme, and thus, not reimbursable). From the current record in these appeals, including language from the county's municipal code, we cannot determine whether GSA's reimbursement of the disputed charges would similarly uphold the parties' original bargain under the lease at issue.

D. "Carve-Out" Provision

We also disagree with appellant's argument that the carve-out provision of the Tax Adjustment clause is ambiguous. Appellant asserts that, under the Tax Adjustment clause, reimbursable real estate taxes can be construed as both present and future taxes, yet the carve-out language of the clause states that such taxes are non-reimbursable. Appellant

claims that this inconsistency makes the carve-out provision ambiguous. On the contrary, we find no ambiguity. The carve-out provision states that GSA is not responsible for "*any other* present or future taxes or governmental charges" that are not real estate taxes. We consider the plain meaning of this phrase. Our reading is that the phrase reflects the parties' intent that GSA is responsible for real estate taxes, not other taxes imposed by the county.[4]

Finally, even granting an ambiguity exists, on the present record, the doctrine of contra proferentum does not apply. "It is well settled that where a contractor seeks recovery based upon [its] interpretation of an ambiguous contract, [it] must show that [it] relied on this interpretation in submitting [its] bid." *Lear Siegler Management Services Corp. v. United States*, 867 F.2d 600, 603 (Fed. Cir. 1989) (quoting *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986)). Appellant does not argue that it, or its predecessor, relied upon its current interpretation of the Tax Adjustment clause in submitting the proposal for the lease. Thus, at this point, appellant has not presented evidence meeting the reliance requirement consistent with the doctrine of contra proferentum.

Decision

Appellant has not shown that, at the time that the lease was effectuated, the disputed charges were real estate taxes that the parties agreed would be paid by the Government, such that it is entitled to prevail as a matter of law. Therefore, its motion is **DENIED**.

BEVERLY M. RUSSELL
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

H. CHUCK KULLBERG
Board Judge

[4] Because we do not find the "carve-out" provision ambiguous, the clean water fee effectuated in 2013 and supplemental education tax imposed for the first time during the 2015 - 2016 tax year might reasonably be construed as taxes not subject to reimbursement by GSA as they post-date, by a number of years, effectuation of the original lease, and there is no evidence in the record, at least at this time, that GSA has agreed to pay them.