UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: September 28, 2017

CBCA 5696

AVALON PLAZA LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Joseph Ghadir, Managing Member of Avalon Plaza LLC, Los Angeles, CA, appearing for Appellant.

Jordan K. Baker, Office of Regional Counsel, General Services Administration, San Francisco, CA, counsel for Respondent.

Before Board Judges **SOMERS**, **SHERIDAN**, and **RUSSELL**.

SHERIDAN, Board Judge.

Avalon Plaza LLC (Avalon or lessor) has appealed a contracting officer's (CO) final decision which was issued by the General Services Administration (GSA or lessee). Avalon asserts that it is entitled to recover additional compensation of $43,944.98 for air conditioning the approximately 200 square foot data communications room (DCR or computer room) during the fifteen years of its lease with GSA.

The lease in issue required Avalon to maintain the DCR at a temperature range of between sixty-eight and eighty degrees Fahrenheit. This is a standard GSA leasing provision that ensures electronic components in server rooms do not overheat. The issue under consideration in this matter is whether GSA owes Avalon additional compensation for constantly maintaining the DCR temperature between sixty-eight and eighty degrees Fahrenheit for the lease period. The appellant argues that the lease failed to include

compensation for the cost of operating the air conditioning (A/C) unit in the DCR. We find that the plain language of the lease includes the cost of operating the A/C unit for the DCR in the base rental consideration and no additional compensation is owed to Avalon.

The appeal was submitted for decision on the written record pursuant to Board Rule 19 (48 CFR 6101.19 (2015)). The record consists of the complaint, answer, appeal file, an affidavit, and the briefs of the parties.

Statement of Facts

GSA and Avalon entered into lease LCA00052 on May 31, 2000, for a total of 15,710 square feet of space at 12701 Avalon Boulevard, Los Angeles, California. Exhibit 1.[1] The lease tenant was the Social Security Administration (SSA). *Id*. The lease had a term of ten years firm with an option to extend for another five years.

According to Joseph Ghadir, Avalon's managing member, Royal Cochran was the GSA contracting officer who executed the lease and:

> Mr. Cochran failed to inform [Avalon] that the lessor is allowed to charge and to be compensated for those expenses such as the overtime (24 hours less than the 8 normal operation hours) usage of air conditioning in the DCR room which were not included in the monthly rental payments.

Affidavit of Joseph Ghadir (July 11, 2017) ¶ 2.

Paragraph 6 of the Standard Form 2 portion of the lease requires the lessor to furnish "as part of the rental consideration" all "utilities . . . 'with the sole exception that the Government, will pay to the extent specifically identified herein as payable to the Government." Exhibit 1 at 0002.

Paragraph 7 of the Standard Form 2 portion of the lease incorporated "[a]ll terms, conditions, and obligations of the Government and Lessor as set forth in SFO [solicitation for offer] 9CA0777 (35 pages); Agency's special requirements (15 pages), GSA Form 3517 (26 pages), GSA Form 3518 (4 pages); Sheet Nos. 1 and 2, containing Paragraphs 9 through 18, and Exhibit A, floor plan." Exhibit 1, at 0002.

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

GSA was responsible for the cost of overtime utilities pursuant to paragraph 15 of the Standard Form 2 portion of the lease, which read:

> Pursuant to Paragraph 7.3, "Overtime Usage", upon request by the GSA Field Office Manager, the Lessor shall provide heating, ventilation, and air conditioning (HVAC) at any time beyond normal service hours (7:00 a.m. – 6:00 p.m., Monday through Friday, except federal holidays) at an hourly rate of $20.00 per hour. The Lessor must submit a properly authorized and certified invoice quarterly to the GSA Field Office Manager.

Exhibit 1 at 0003.[2]

Paragraph 6.7 of the SFO portion of the lease, "Heating and Air Conditioning (JAN 1997)", established the basic obligations with regard to heating, ventilation, and air conditioning (HVAC) of the leased space as a whole:

> (a) Temperatures shall conform to local commercial equivalent temperature levels and operating practices in order to maximize tenant satisfaction. These temperatures must be maintained throughout the leased premises and service areas, regardless of outside temperatures, during the hours of operating specified in the lease.
>
> (b) During non-working hours, heating temperatures shall be set no higher than 55° F[arenheit] and air conditioning will not be provided except as necessary to return space temperatures to a suitable level for the beginning of working hours.

Exhibit 1 at 0032.

Paragraph 7 addresses "SERVICES, UTILITIES, MAINTENANCE," and in pertinent part provides:

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[2] Paragraph 15 was later amended by Supplemental Lease Agreement 6, increasing the overtime rate to $31.00 per hour. Exhibit 1 at 0093.

7.1 SERVICES, UTILITIES, MAINTENANCE
Services, utilities , and maintenance shall be provided by the Lessor as part of the rental consideration. . . .

7.2 NORMAL HOURS
Services, utilities, and maintenance will be provided daily, extending from 7:00 a.m. to 6:00 p.m. except Saturdays, Sundays, and Federal Holidays."

7.3 OVERTIME USAGE (JAN 1997)
(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 the necessary services and utilities such as elevator, 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 Buildings Manager. When ordered, services shall be provided at the hourly rate established in the contract . . . .

. . . .

7.4 UTILITIES
The Lessor shall ensure that utilities necessary for operation are provided and all associated costs are included as part of the established rental rate.

7.5 UTILITIES: SEPARATE FROM RENTAL (JAN 1997)
(a) The Offeror must specify which utilities, if any, are excluded from the rental consideration. If any such utilities are excluded, the Offeror must obtain a statement from a registered professional engineer stating that all heating, ventilation, air conditioning, plumbing, and other energy intensive building systems can operate under the control conditions stated in this SFO . . . .

(b) The Lessor shall provide separate meters for utilities to be paid for by the Government. The Lessor shall furnish in writing to the Contracting Officer, prior to occupancy by the Government, a record of the meter numbers and verification that the meters measure Government usage only . . . .

Exhibit 1 at 0035.

Paragraph 16(B), under the "SOCIAL SECURITY ADMINISTRATION SPECIAL SPACE REQUIREMENTS" portion of the lease, provided special requirements related to the DCR, including the room's HVAC:

> 16. DATA COMMUNICATIONS ROOM (DCR)
>
> An approximate 200 square foot DCR (...minimum of 200 square feet) with painted ceiling-high walls and vinyl tile on the floor must be provided. The entry door should be of solid wood core or metal sheathed with hinges inside the room . . . .
>
> . . . .
>
> B. Heating, Ventilating, and Air-conditioning system (HVAC) Requirements
>
> HVAC must be maintained at a temperature range of between 68 and 80 degrees Fahrenheit. The HVAC system must be capable of maintaining plus or minus 2 degrees of the thermostat setting. Relative humidity will be maintained between 10 and 90 percent. The room shall be separately zoned and have its own separate thermostatic control inside the room. The HVAC system shall be designed to supply, on the average, 6 complete air changes per hour with a minimum of 20 percent fresh air. The air conditioning unit for the DCR is to be maintained/serviced at no cost to SSA.

Exhibit 1 at 0047.

The lease contained no provisions providing for an hourly utility rate specific to the DCR. Avalon provided HVAC for the DCR without incident from January 11, 2001, to shortly before September 2014, when it first raised the electrical bill with Debra Williams, a GSA lease administration specialist and contracting officer's technical representative (COTR) who Mr. Ghadir describes as being "in charge of maintenance" for the leased space. According to Mr. Ghadir, COTR Williams told him that the cost of running the air conditioning in the DCR was normally not included in the rental amount of the lease. Ghadir Affidavit ¶ 4.

In September 2014, Mr. Ghadir began corresponding with Clara Lee, GSA's lease contracting officer (LCO), via email messages about the concern Mr. Ghadir had regarding the high HVAC costs for the DCR. Mr. Ghadir and LCO Lee discussed amending the lease to add the following clause:

> 24-HOUR HVAC REQUIREMENT (APR 2011)
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> The hourly overtime HVAC rate specified above shall not apply to any portion of the Premises that is required to have heating and cooling 24 hours per day. If 24-hour HVAC is required by the Government for any designated rooms or areas of the Premises, such services shall be provided by the Lessor at an annual rate of $X.XX per ABOA [American National Standards Institute/Building Owners and Managers Association (ANSI/BOMA) Office Area] [square feet] of the area receiving the 24-hour HVAC. Notwithstanding the foregoing, Lessor shall provide this service at no additional cost to the Government if the Lessor provides this service to other tenants in the Building at no additional charge.

Exhibit 3. LCO Lee asked Mr. Ghadir to send Avalon's offered rate and the supporting documents that it used to calculate the rate. Exhibit 4.

On September 5, 2014, Mr. Ghadir provided LCO Lee with a rate of $164.41 per month, together with Avalon's method of calculating the rate. Exhibit 6. Using Avalon's methodology, GSA owed it $26,963.24, based on a lease start of February 2001 (164 months x $164.41 = $26,963.24). *Id*. Another calculation Avalon provided stated: "[B]ased on overtime consumption of 16 hours per day, the cost of electricity should be: 16 hours x $.0226KWH = $2.6652/day x 365 days = $972.77 per year." *Id*.

Another LCO, Veronica Gonzalez, informed Mr. Ghadir on September 30, 2014, that GSA was still reviewing Avalon's proposal for reasonableness. Exhibit 7. LCO Gonzalez wrote that the proposed rate would need to be memorialized via a supplemental lease agreement and that "since the lease did not address anything previously, [GSA] cannot pay you retroactively. In addition, per the lease, (Paragraph 16 B of Special Requirement) last sentence, it is the lessors [sic] responsibility to maintain/service the unit used in this space." *Id*. On November 19, 2014, LCO Gonzalez reaffirmed her position that GSA would not retroactively pay for an increase "since it was not discussed until September 5, 2014." Exhibit 8.

Avalon did not pursue the proposed supplemental agreement, and the lease expired on January 11, 2016. Around the same time, Avalon entered into a new lease with GSA, lease LCA03420, at the same location. Exhibits 9, 17. The new lease contained a higher utility rate of $65 per hour for the entire space and a HIGHER OVERTIME HVAC USAGE (JUN 2012) clause that read:

> A. If there is to be a change for heating or cooling outside of the Building's normal hours, such services shall be provided at the hourly rate set forth elsewhere in the Lease. Overtime usage services may be ordered by the Government's authorized representative only.
>
> B. When the cost of service is $3,000 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 $3,000 shall be placed using GSA Form 300, Order for Supplies or Services, or other approved service requisition procurement document. An invoice conforming to the requirement of this Lease shall be submitted to the official placing the order for certification and payment.

Exhibit 17.[3]

On December 5, 2016, Mr. Ghadir submitted a claim seeking $43,944.98 based on GSA's failure to pay for overtime utility usage for the DCR from January 11, 2001, through January 11, 2016. Exhibit 9.

Another LCO, Brandy Ocker, issued a contracting officer's final decision denying Avalon's claim on March 9, 2017. Exhibit 25. LCO Ocker wrote:

> Paragraph 16(B) of the "Special Requirements" requires that the "HVAC must be maintained at a temperature range between 68 and 80 degrees Fahrenheit." This is a lease requirement that is covered by the rent, and there are no special provisions requiring the Government to provide additional compensation for the Data Communication Room (DCR). Therefore, as stated, your claim is denied.

Id.

Avalon timely appealed the contracting officer's final decision to the CBCA, where it was docketed as CBCA 5696.

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[3] Neither party submitted a copy of the new lease; however, correspondence indicates that a new lease was executed.

Discussion

The central issue in this appeal is whether the lease terms required GSA to pay Avalon extra compensation for HVAC in the DCR. Avalon's argument seems to revolve around a purported duty of the GSA contracting officer to inform Avalon that in some leases GSA pays a separate rate for certain rooms using excessive electricity, such as computer rooms. Avalon posits that GSA's failure to include a right to extra compensation for HVAC in the DCR entitles Avalon to recover the $43,944.98 it claims it would have garnered had the right been included in the lease. Avalon also seems to aver in its notice of appeal that paragraph 16(B) of the "Special Requirements" clause does not apply to the issue before us. GSA asserts Avalon is not entitled to extra payment because consistently maintaining the DCR between 68 and 80 degrees was required under the base lease. GSA also argues that Avalon failed to submit properly authorized and certified quarterly invoices for the costs it now seeks as required under the lease and the Board lacks jurisdiction over claims that arose before December 5, 2010.

This Board, and one of its predecessor boards, the General Services Board of Contract Appeals (GSBCA), have grappled with issues and clauses similar to these in several other cases. The facts and lease clauses in *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) are substantially identical to the clauses in the appeal before us. In *Rincon*, the GSBCA concluded that the applicable lease provisions, when read as a whole, clearly required the continuous cooling of the computer room as part of the basic rental consideration. *Id*.

The *Rincon* panel found that a contract must be interpreted "as a whole in a manner which gives reasonable meaning to all its parts and avoids conflict or surplusage of its provisions." 96-1 BCA at 140,408 (citing *Granite Construction Co. v. United States*, 962 F.2d 998, 1003 (Fed. Cir. 1992); *B.D. Click Co. v. United States*, 614 F. 2d 748, 753 (Ct. Cl. 1980)). Similar to the facts here, a *Rincon* lease provision had a specific requirement for continuous air conditioning of the building's computer room. The HVAC provision further stated the room should be individually zoned and maintained 24 hours a day, 7 days a week. 96-1 BCA at 140,408-09. When interpreting the meaning of the provision in light of the general HVAC provision, the GSBCA noted:

> We do not view the specific requirement for continuous cooling of the computer room as being in conflict with the more general provisions regarding cooling which appear in clauses 62 and 72. Rather, in an effort to harmonize these contract provisions among themselves, we interpret the latter two clauses as applying to the general office area while that dealing with the cooling of the

> computer room is, on its face, limited to that area alone. As to payment provisions covering the cost of running the cooling equipment in the computer room, we see no reason why the provisions of paragraph six of Standard Form 2 do not apply. Under that provision, lessor is required to furnish all utilities as part of the rental consideration.

96-1 BCA at 140,409.

Although Avalon makes several statements asserting its entitlement to extra compensation, it provides no compelling facts or legal theory to actually support entitlement. There is no evidence that the GSA contracting officer erred in not including a clause that allowed Avalon to separately bill for the DCR's HVAC. Applying the precedent articulated in *Rincon*, as well as the clear terms of this lease, Avalon is responsible for providing HVAC for the DCR 24-hours a day as part of its basic rental consideration.

In so far as GSA argues that the Board lacks jurisdiction over the part of Avalon's claim that arose before December 5, 2010, we noted in *Systems Management and Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976 at 175,787-88, that our controlling authority, the Federal Circuit, has held that the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), does not establish a jurisdictional bar for claims that have not been submitted within six years of claim accrual.[4] Having found the claim lacks

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[4] The CDA provides that "[e]ach claim by a contract against the Federal Government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A); *see* 48 CFR 33.206(a). We concluded in *Systems Management* that:

> The transformation of the CDA's six-year statute of limitations from jurisdictional to non-jurisdictional changes how we must approach a motion to dismiss a case for failure to meet that deadline. No longer can the Government, through a motion to dismiss, challenge the factual allegations that the contractor has made in its complaint and require the contractor to prove jurisdictional facts by a preponderance of the evidence. Instead, the CDA's six-year statute of limitations is now an affirmative defense that the Government must plead in its answer to the appellant's complaint.

15-1 BCA at 175,788 (citing *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315 (Fed. Cir. 2014)).

merit, we need not go into an extensive analysis of whether a portion of the claim is time barred.

Decision

CBCA 5696 is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

BEVERLY M. RUSSELL
Board Judge