UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

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GRANTED: September 25, 2017

CBCA 4734

BELLE ISLE INVESTMENT COMPANY LIMITED PARTNERSHIP,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

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

Elyssa Tanenbaum, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

SOMERS, Board Judge.

Belle Isle Investment Company Limited Partnership (Belle Isle, lessor) appeals from a contracting officer's decision denying its claim for additional payments under a lease entered into with the General Services Administration (GSA) for a property located in Columbus, Ohio. The parties submitted cross-motions for summary relief, which we denied. *Belle Isle Investment Co. v. General Services Administration*, CBCA 4734, 16-1 BCA ¶ 36,416. On December 6 and 7, 2016, we held a hearing on the merits in Chicago, Illinois. The record includes the pleadings, appeal file, supplemental appeal files, hearing transcripts, and post-hearing briefs.

Based upon the plain language of the terms of the lease and the lease extension agreement between the parties, we grant the appeal.

Statement of Facts

I. The Initial Lease Agreement

On September 18, 1998, GSA and Belle Isle entered into lease no. GS-05B-16252 for office, storage, and parking spaces. The original lease required GSA to pay the lessor "annual rent of $379,810.40 at the rate of $31,650.87 per month at a rate of $17.20 per net rentable square foot (rsf), in arrears." The lease set an operating cost base for services of $87,003.08 or $3.94 per net rentable square foot (operating cost base). The operating cost base of $87,003.08 was included within the annual rent of $379,810.40 in the first year. Every year after the first year, the operating cost base was to be adjusted by a formula provided in the lease in paragraph 3.6, entitled "Operating Costs, GSAR 552.270-23 (JUN 1985)":

> (a) Beginning with the second year of the lease and each year after, GSA 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.
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> (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 for the month prior to the lease commencement date with the index figure published for the month which begins each successive 12-month period . . . . Payment will be made with the monthly installment of fixed rent. Rental adjustments will be effective on the anniversary date of the lease. Payment of the adjusted rental rate will become due on the first workday of the second month following the publication of the Cost of Living Index for the month prior to the lease commencement date.

The lease also detailed how to calculate tax escalations, stating, in paragraph 12 of attachment A, that "[t]ax [e]scalation will be paid via a lump-sum to the Lessor for its share of the increases in real estate taxes paid for the calendar year in which this lease

commences." Supplemental lease agreement one established the lease term from April 1, 1999, to March 31, 2014 (original term).

Every year from 2000 until 2014, GSA paid an annual rent of $379,810.40 in monthly rent payments. Testimony at the hearing established that beginning in the second year of the lease, GSA paid an "operating cost adjustment" or "adjusted rent" in addition to the annual rent. GSA computed each year's adjustment with reference to the consumer price index (CPI).[1] Although the parties quibble about the precise numbers GSA derived for each year's adjustment, they agree that essentially, the agency calculated the difference between the initial CPI and the current year CPI, and paid that difference to Belle Isle as the operating cost adjustment.

GSA described these total annual rent payments beginning in the second year of the lease as being made up of four components: "shell or base rent, operating cost base, operating cost adjustment, and real estate tax base." By the end of March 31, 2014, the total amount of adjustments to the operating cost base due to changes in the CPI was $3,051.16 per month or $36,613.92 annually.

II. The Lease Extension

The parties began negotiations to renew the lease in November 2012. In August, 2013, when negotiations appeared stalled, GSA issued a request for lease proposals. Belle Isle submitted the only proposal in response.

Indeed, Belle Isle submitted several proposals to GSA, all of which GSA rejected. Finally, with the tenant in holdover status, on September 10, 2014, the parties held a teleconference. As a result of that teleconference, GSA and Belle Isle agreed to a three-year extension of the lease, with an annual rent of $22/rsf until September 30, 2014, and $24/rsf for the remainder of the lease extension.

The GSA contracting officer sent a draft lease amendment to Belle Isle by email on September 14, 2014. The contracting officer's transmittal email message states in part: "Please see attached draft LA no. 3 for extension of GSA Lease No. GS-05B-16252 at the term and rates agreed to during our conference call on Wednesday, Sept. 10. Please let me know if this looks correct and I will forward a final version for execution."

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[1] Although the lease refers to the "Cost of Living Index," the correct term as used by the Department of Labor is the Computer Price Index or CPI.

The lease amendment stated:

WHEREAS, the parties hereto desire to amend the above Lease;

NOW THEREFORE, these parties for the considerations hereinafter mentioned covenant and agree that the said Lease is amended, effective 04/01/2014, as follows:

Lease Agreement No. 3 is issued to extend the current lease term three (3) - years; eighteen (18) months firm term and to increase the base rent.

Thereafter, Paragraphs 2, 3, and 4 of Standard Form 2 of Lease GS-05B-16252, are deleted in their entirety and substituted in lieu thereof,[2]

2. TO HAVE AND TO HOLD the said premises with their appurtenances for the term beginning on April 01, 1999, through March 31, 2017 subject to termination rights as may be hereinafter set forth.

3. The Government shall pay the Lessor annual rent, in arrears, according to the following schedule:

Term	Annual Rate	Monthly Rate	Rate/rsf
04/01/2014 - 09/30/2014	$485,804.00	$40,483.67	$22.00
10/01/2014 - 03/31/2017	$529,968.00	$44,164.00	$24.00

This Lease Amendment contains two (2) pages.

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

The lessor signed the amendment on September 15, 2014, and GSA signed on September 29, 2014. After the parties executed the lease amendment, GSA calculated the annual increase in operating costs by adding the annual increase in operating costs to the previous year's annual rent. In doing so, however, GSA only paid Belle Isle the increase in cost adjustments between 2013 and 2014, rather than between 1999 and 2014.

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[2] The deleted paragraphs 2, 3, and 4, which generally set forth the lease term, annual payment, and termination rights, do not provide anything relevant to the current issue.

When, on October 15, 2014, GSA notified Belle Isle of the amount of rent being processed by GSA as payment due, Belle Isle's representative, Mr. McCarty, immediately disputed the amount. On October 16, 2014, Mr. McCarty emailed the contracting officer, stating in part: "Our recent exchange of emails makes it clear that your recollection and understanding of the agreement reached in the September 10 teleconference and my recollection and understanding of the agreement reached in the September 10 teleconference are different. Nevertheless, it is much more important that the terms of the Lease Amendment No. 3 and Lease No. GS-05B-16252 be applied."

A GSA realty specialist sent an email message to Belle Isle with a table reconciling the payments that had been made with the payments that GSA calculated as being due under the lease extension. Upon review of GSA's email message, Belle Isle responded, stating:

> According to the Lease, the previous annual base rent was $31,650.87, which is at the annual rate of $17.20/SF. Lease Amendment No. 3 changed the annual rent from $17.20/SF to $22.00/SF for the six months from April through September, which is $485,804/year and $40,483.67/month. And Belle Isle Investment Company is due the difference between $40,483.67, and $31,650.87, which is $8832.80/month [times] six months = $52,996.80.
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> The monthly Rent Paid in your calculation . . . includes $3,051.16 in accumulated CPI adjustments to April 1, 2014, and an additional adjustment for the change in CPI from April 1, 2013 to April 1, 2014 is due, as well. The Lessor is due the difference in base rent, and GSA does not get credit for the CPI adjustment, which is not part of base rent.

GSA responded stating that Belle Isle "has received operating costs adjustments throughout the full term of the lease as part of the annual rent GSA paid."

III. Belle Isle's Claim

On October 31, 2014, Belle Isle filed a claim with the contracting officer for $71,769.85, representing the operating cost adjustments owed for the approximately two and a half years of the extension pursuant to the terms of the lease and lease extension. The

contracting officer denied the claim on February 3, 2015, and Belle Isle timely appealed to the Board. Belle Isle now seeks $85,432.48 for the unpaid operating cost adjustments.[3]

Discussion

I. Plain Language of the Contract

Belle Isle claims that GSA breached the lease by failing to pay "adjusted rent." Belle Isle posits that the "adjusted rent" must include the annual rent plus the adjusted operating costs for each month of the extended lease. GSA disagrees, alleging that the parties had increased the base annual rent to account for the cumulative operating costs and that a new base rate for operating costs was established. Although the parties agree that operating cost adjustments would continue to be calculated and paid in the same manner as was done in the original lease, they disagree as to the base rate to be used in those calculations.

We look to the language of the lease to resolve this dispute. The starting point for contract interpretation is "the plain language of the agreement." *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). In interpreting a contract, "the document must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts." *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). The meaning of the contract is determined by "an objective reading of the language of the contract, not by one party's characterization of the instrument." *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002); *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001). When the contract language is unambiguous, the plain language controls and the Board does not need to look to extrinsic evidence. *TEG-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006); *see Craft Machine Works, Inc. v. United States*, 926 F.2d 1110, 1113 (Fed. Cir. 1991).

We find that the plain language of the lease is clear. The agreement does not state that the annual rates applicable in 2014-2017 include all prior adjustments to lease operating costs, or specify a new operating cost basis. However, paragraphs 3.6 and 3.7 dictate how adjustments are to be made. There is no deviation identified in lease amendment three (LA3). Paragraph 3.7 of the lease sets the base rate for an adjusted rent, and it provides for

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[3] In its claim to the contracting officer, Belle Isle had computed the amount due only through March 31, 2014. In its notice of appeal to the Board, Belle Isle increased the claim to include the amount due up to the date that GSA vacated the premises, October 31, 2016.

adjusted rent to be paid beginning with the second year of the lease, and each year thereafter. Paragraph 3.6 outlines the calculation to determine the operating cost adjustments–multiply the base operating cost by the difference in the CPI between 1999 and the current year. These operating cost adjustments, or the adjusted rent, are then paid in addition to the annual rent each year.

By keeping all other terms and conditions of the lease in full force and effect, LA3 makes no change in the other components of total annual rent, such as the adjusted rent, the operating cost base, or the real estate tax payment. As parol evidence in support of the plain language, the GSA contracting officer who drafted the lease extension stated that "nothing else with the lease changed, which is why we added all of the terms and conditions of the lease shall remain in force and effect."[4] 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 extension, nothing was to change in the method of calculating the adjusted rent. Thus, the lessor is entitled to receive the annual rent, plus the adjustments calculated from the lease's inception. The conflict arose when GSA calculated the change in the operating cost adjustments from the previous year and added it to the total annual rent paid in the previous year. When GSA calculated the total annual rent for the lease extension, it calculated the change in operating cost adjustments by adding it to the new annual rent as laid out in the lease extension. As a result, GSA paid Belle Isle only for the difference in operating cost adjustments between 2013 and 2014. This calculation does not comply with the plain language of the lease, which requires that GSA pay the operating cost increases from the first year of the lease.

GSA references two of our previous decisions as it attempts to distinguish the current case. The agency argues that in both *1201 Eye Street, N.W. Associates, LLC v. General Services Administration*, CBCA 5150, 17-1 BCA ¶ 36,592 (2016), and *1441 L Associates, LLC v. General Services Administration*, CBCA 3860, 17-1 BCA ¶ 36,673, the leases contained language requiring the Government to pay operating costs *in addition to* the annual rent. GSA argues that because the lease here does not contain any language characterizing operating costs as a payment additional to annual rent, it is simply a component of the annual rent. GSA's own characterization of the components of annual rent belies its argument, however. Both of the contracting officers who were assigned to the Belle Isle lease

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[4] Despite assertions during the summary relief stage that a party would establish that the written agreement failed to reflect the actual terms agreed upon during negotiations, the record provides no factual basis to look beyond the written terms.

explained that in their understanding of the rent, the total rent payment beginning in the second year of the lease was made up of four components: "shell or base rent, operating cost base, operating cost adjustment, real estate tax base." GSA seems to understand, and we find, that adjusted rent is a component of total annual rent, but a separate number from annual rent, regardless of whether the lease contains language stating that adjusted rent is to be paid in addition to annual rent. Furthermore, the language explaining the operating cost adjustment calculation is the same as the language found in the *1201 Eye St., N.W. Associates, LLC* and the *1441 L Associates, LLC* leases.

GSA also argues that the language of the lease is unambiguous in that the term "annual rent" includes the operating cost adjustments, and cites to *Saul Subsidiary II Limited Partnership v. Barram*, 189 F.3d 1324 (Fed. Cir. 1999), in support. *Saul* involved a similar lease where GSA was required to pay an adjusted rental amount for operating costs. 189 F.3d at 1327. The court held that the term "annual rent" was inclusive of those adjusted rental amounts. However, in *Saul*, the court referred to "annual rent" as the total rent payment that GSA was to make each year, including a "fixed rent" that covered use of the space, and the adjusted rent. By contrast, here, GSA was not committed to pay a "fixed rent," but rather, the annual rent and adjusted rent beginning with the second year of the lease; no exception was made for year sixteen or for accumulated operating costs.

II. Interpreting the Lease

GSA presents extrinsic evidence in an attempt to establish that the parties intended to capture the operating cost adjustments from the original lease term in the annual rent for the extension period. GSA contends that the parties' course of dealing, including the LA3 negotiations and GSA's CPI letters, shows a common understanding that "annual rent" included the original term adjustments.

Course of dealing is intended to establish a "common basis of understanding for interpreting [the parties'] expressions and other conduct." U.C.C. § 1–205 (1977). The negotiations prior to execution of LA3 did not establish a common basis of understanding for the parties. If each party is believed, each used a different method of calculating the total annual rent, and therefore each party had a different understanding of what including the original term adjustments in the extension rental rate would mean. GSA points to Belle Isle's multiple proposals and related correspondence as instances where Belle Isle confirmed that the annual rent would include the original term adjustments. Belle Isle disputes GSA's characterization, stating that it in fact had an entirely different intention. The different calculation method that each party used indicates that each had a different understanding of what including the original term adjustments in the extension rental rate would mean. Therefore, the negotiations cannot establish a course of dealing.

The communications, namely the CPI letters sent by GSA, also fail to establish a course of dealing. Most significantly, those communications predate the language in dispute – the stated new annual rent and lack of change to other terms of the contract. Moreover, there is no evidence that Belle Isle understood how GSA was calculating the annual rent payments during the original term or how this would impact payment after LA3. Although Belle Isle received the CPI letters sent by GSA, the letters did not explain how GSA was calculating the annual rent, and nothing evinces that Belle Isle understood the purpose of the letters. Therefore, GSA has not met its burden of showing that a course of dealing existed between the parties. In fact, the course of dealing reveals, consistent with the language of the contract, that GSA paid operating costs as adjusted from the base year of the lease. It is the period after the original lease term that is in dispute.

Alternatively, GSA posits that the Board should consider extrinsic evidence, such as the CPI letters, to find that GSA's interpretation of annual rent is correct. According to GSA, the Board may refer to extrinsic evidence when contract language is unclear. In general, however, extrinsic evidence is not used to add to or modify the terms of a fully integrated agreement. *McAbee Construction Inc. v. United States*, 97 F.3d 1431, 1434 (Fed. Cir 1996). An integration clause "conclusively establishes that the integration is total unless (a) the document is obviously incomplete or (b) the merger clause was included as a result of fraud or mistake or any other reason to set aside the contract." *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1329 (Fed. Cir.), *adhered to on denial of reh'g en banc*, 346 F.3d 1359 (Fed. Cir. 2003).

The lease agreement is not ambiguous, and the integration clause, which states that the terms and conditions contained in the lease "represent the total obligations of the Lessor and the Government," makes the lease complete. On its face, the lease presents no ambiguity in the meaning of annual rent or about how adjustments for operating costs are to be calculated. GSA cites to our decision on the cross-motions for summary relief in *Belle Isle Investment Co. v. General Services Administration*, CBCA 4734, 16-1 BCA ¶ 36,416, to argue that the Board already determined that the parties' previous statements are relevant, and that therefore the lease is ambiguous. In that decision, however, we merely held that the parties had different interpretations of the lease document, citing to previous statements by both parties to show the disparity. We did not hold that the previous statements would be admissible to counter the language of the lease. GSA had not shown legal support for its contract interpretation. Therefore, there is no ambiguity in the lease, and extrinsic evidence cannot be introduced.

Quantum

At the hearing, Belle Isle presented testimony to support its claim for the operating cost adjustment not yet paid by GSA. Specifically, Mr. McCarty, Belle Isle's representative, confirmed through testimony that the total amount due is $85,432.48 under Belle Isle's interpretation. GSA did not present any evidence to counter Belle Isle's calculation of damages.

Decision

The appeal is **GRANTED**. Belle Isle is awarded $85,432.48, with interest to run from October 31, 2014, pursuant to 41 U.S.C. § 7109 (2012).

JERI KAYLENE SOMERS
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JOSEPH A. VERGILIO
Board Judge