UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS ORDER WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON AUGUST 9, 2018

MOTION FOR SUMMARY RELIEF GRANTED IN PART: August 6, 2018

CBCA 5605

PIEDMONT-INDEPENDENCE SQUARE, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Reginald M. Jones, Alexa A. Santora, and Doug P. Hibshman of Fox Rothschild LLP, Washington, DC, counsel for Appellant.

Jay Bernstein, Kristi Singleton, and Joseph W. Cooch, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **KULLBERG**, and **SULLIVAN**.

SULLIVAN, Board Judge.

The General Services Administration (GSA) seeks summary relief on three issues in this appeal filed by Piedmont-Independence Square, LLC (Piedmont), arising from Piedmont's claim for costs incurred in its work to refurbish space leased to GSA for the headquarters of the National Aeronautics and Space Administration (NASA). One, GSA contends that Piedmont cannot recover as damages the lost rental income it claims as the result of delays caused by GSA. Two, GSA asserts that Piedmont's claims for costs of disposing of partitions and building an additional egress stairway are barred by accord and

satisfaction. Three, GSA argues that Piedmont's claim for repayment of GSA's offset are untimely because Piedmont failed to appeal GSA's claim for those costs within the required ninety days. We grant GSA's motion on issues one and three, but deny it on issue two.

Background

I. Lease and Its Relevant Terms

In February 2011, GSA and Piedmont entered into a new lease for NASA's headquarters. NASA had occupied the space previously, so Piedmont agreed, as part of the lease, to modernize the space prior to the beginning of the new lease period. Exhibit 1 at 3.[1] On a floor-by-floor basis, employees were moved temporarily into space owned by Piedmont while the floor on which they worked was renovated. The lease defined this space as "swing space" and was to be provided by Piedmont at its sole cost. *Id*.

The parties agreed to a schedule for the renovation and that each party would be responsible for costs arising from delays for which they were responsible:

> Exhibit B [renovation schedule] shall be superior to any and all other construction schedule references elsewhere in the Lease. If Lessor and Government mutually agree to written revisions to Exhibit B then Exhibit B as so revised shall serve as the final construction schedule. The Government shall be responsible for all costs (including, without limitation, any additional costs associated with the Swing Space) associated with any Government delays which result in any delay in occupancy of all or any portion of the premises and the Lessor shall be responsible for all costs (including, without limitation, additional costs associated with the Swing Space) associated with any Lessor delays which result in any delay in occupancy of all or any portion of the premises.

Exhibit 1 at 4. As GSA accepted each floor as substantially complete, GSA would begin paying rent at the new lease rate for that floor. *Id*. at 1. Prior to completion of the renovation for the floor, GSA was to pay rent for the floor at the rate set forth in the prior lease. *Id*. When the renovation of the entire building was substantially complete, the parties were to establish a composite commencement date:

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

> After substantial completion and acceptance of all the increments (i.e. the entire premises), a composite weighted average commencement date for the entire premises (the "Composite Commencement Date") shall be computed (for the purposes of determining annual escalations and the firm lease term) by taking into account the applicable commencement date of each increment and what percentage, in terms of rentable square footage, that such increment bears to the entire premises.

Id. The lease term was fifteen years from the composite commencement date. *Id*. The annual rent to be paid monthly in arrears was $26.6 million. *Id*.

II. Substantial Completion and the Start of the Lease

The modernization work was scheduled to be substantially complete prior to the actual substantial completion date, August 27, 2014. Appellant's Statement of Uncontested Facts ¶ 13; Exhibit 40 at 3.[2] According to Piedmont's claim, GSA changed Piedmont's schedule and directed Piedmont to perform the modernization work on the fifth floor at the end of the project, which resulted in delays to the completion date. Exhibit 47 at 8.

As required by the terms of the lease, in April 2015, the parties executed supplemental lease agreement (SLA) 12, in which the parties agreed that August 4, 2013, was the composite commencement date. Exhibit 16 at GSA0376. The lease term began on this date. *Id*.

In SLA 12, the parties also listed issues to be resolved between the parties:

> By accepting the entire building as substantially complete effective as of the above Composite Completion Date, except for the items specified below, the Government acknowledges that all lease requirements have been fulfilled, on the date of execution of this LA [lease amendment].
>
> The parties each acknowledge the fact that there remain some outstanding disagreements related to the interpretation and intent of the language pertaining to the items listed below.

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[2] The parties differ in their submissions as to the scheduled substantial completion date, but that date is not material to the Board's resolution of the motion.

> The execution of this Amendment shall not be deemed to be a consent, modification, or waiver of any claim related to such issues and the Government and the Lessor each reserves all of its rights at law and in equity with respect to the same.
>
> List for the above:
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> 1. Installation of IT [information technology] equipment and related services
> 2. Building Perimeter Security requirements for Level IV
> 3. General Conditions
> 4. GC Fee
> 5. Delays
> 6. Price Book
> 7. Other issues between the parties related to an AV contract
> 8. Design costs for additional design work
>
> A subsequent LA shall be issued to memorialize any outstanding . . . items pertaining to base building improvements outlined in the Facility Engineering Assessment contained in Rider Number Two that remain to be completed by the Lessor, or to confirm completion of all such base building items.

Exhibit 16 at GSA0377-78.

III. Piedmont's Claim and Appeal

A. Request for Equitable Adjustment and GSA's Response

In February 2015, Piedmont submitted a request for equitable adjustment (REA) to the contracting officer, seeking more than $22 million. Among its costs, Piedmont sought $420,745, for providing monthly telecommunications service in the swing space. Exhibit 40 at 1. The REA does not appear to include costs for providing IT equipment, disposing of partitions, or constructing an additional egress stairway. *See* Exhibits 37-40. Piedmont did not certify the REA.

In August 2016, the contracting officer issued a "Contracting Officer's Final Decision [in] response to Piedmont's February 23, 2015, email and attachments (REA)." Exhibit 46 at 1. The contracting officer stated that Piedmont was owed $4,155,416.37. *Id*. at 16. This amount is the sum of all the additions and deductions noted throughout the decision. The

contracting officer included a deduction of $493,526.36, for IT equipment that GSA purchased for the swing space. Because the lease terms required Piedmont to provide this IT equipment, the contracting officer asserted that this amount was owed to GSA. *Id*. at 15-16. The contracting officer also denied that Piedmont was owed any amount for the monthly telecommunications service in the swing space, again asserting that the lease required Piedmont to provide this service.

The contracting officer acknowledged that Piedmont had not certified the amounts that it had requested in its REA. Exhibit 46 at 16. Despite this lack of a certification, the contracting officer reiterated that the decision was a final decision of the contracting officer and informed Piedmont of its appeal rights. *Id*.

In response to the contracting officer's decision, Piedmont sent a letter stating that it had not certified its REA, so the decision was not a contracting officer's final decision on its REA. Exhibit 52. GSA did not respond to Piedmont's letter, but did withhold the amount of the IT equipment costs assessed against Piedmont from payments owed to Piedmont.[3] Appellant's Statement of Uncontested Facts ¶¶ 28, 30.

B. Piedmont's Claim

Piedmont submitted a certified claim in October 2016, seeking approximately $18.3 million. Piedmont sought approximately $7.8 million for delays caused by GSA when it directed Piedmont to modernize floor 5 of the building at the end of the project, rather than in the sequence that Piedmont had planned.[4] Exhibit 47 at 8. As a result of this direction, Piedmont had to seek a revised permit from the District of Columbia and the "procurement of materials [became] a critical path issue." *Id*. Piedmont calculated 176 days of delay that resulted from these issues. *Id*. Piedmont calculated the costs claimed as the "pro rata share (176 days of 222 total days of delay) of the $9,858,811 delay costs (300E and Swing Space) set forth in Piedmont's original February 23, 2015 REA." *Id*. According to the REA, these costs include "delayed rental revenue at 300 E Street and 1201/1225 Eye Street (September 12, 2013 vs. August 27, 2014)." Exhibit 41 at 1.

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[3] The Board is unable to determine from the current record when GSA offset the payments to Piedmont for the IT equipment charges.

[4] Piedmont also sought approximately $575,000 in additional design costs caused by this change. Exhibit 47 at 8. GSA does not challenge the recoverability of these costs in its motion.

Piedmont sought $2.6 million for the costs to dispose of the old partitions and $90,790 for the costs of adding an additional egress stairway. Exhibit 47 at 9, 11-12. Piedmont also sought $493,926.36, the amount GSA had offset from payments on the contract for IT equipment costs. Piedmont asserted that GSA's demand for this amount constituted a change to the contract because the lease did not require Piedmont to provide IT equipment for the swing space. Exhibit 47 at 5-6.

In response to Piedmont's claim, the contracting officer sent two single-page letters, the first acknowledging receipt of Piedmont's claim and setting a deadline for the issuance of the final decision, and the second extending the deadline by approximately two weeks to January 31, 2017. Complaint, Exhibits B, C. Neither letter discussed the substance of Piedmont's appeal or mentioned GSA's assertion of a right to an offset for the IT equipment. Following receipt of the second letter, Piedmont filed its appeal on January 18, 2017, as a deemed denial appeal. *Id.* ¶ 9.[5]

Discussion

I. Piedmont May Not Recover As Damages the Rental Income Lost Due to GSA's Delays

Piedmont seeks as costs attributable to GSA's delays "lost rent impact costs and loss of lease revenue." Appellant's Brief at 8. Because of these delays, Piedmont asserted that the actual substantial completion and the composite completion dates were later than Piedmont would have otherwise achieved.[6] "[O]ver the life of the lease term Piedmont will actually receive approximately $7.6 million less in revenue because of the delayed Composite Commencement Date." Exhibit 54, ¶ 10. GSA seeks a ruling that the lost rent that Piedmont seeks as a delay cost is not recoverable as a cost of performance under the contract.

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[5] The Board possesses jurisdiction to consider this appeal on the basis of a deemed denial. Once the contracting officer sets the date by which a decision will issue, the contracting officer cannot reset the date to prevent the appeal based upon a deemed denial. *CTA I, LLC v. Department of Veterans Affairs*, CBCA 5800, 17-1 BCA ¶ 36,829, at 179,487.

[6] To its reply, GSA attached a declaration in which the contracting officer explains that the composite completion date would not have been earlier even with an earlier substantial completion date. Exhibit 56. The Board does not need to decide this issue for the purposes of this motion. The Board will consider this evidence when and if necessary to resolve Piedmont's other claims.

Lease revenue is not recoverable as a cost of delay on a government lease contract. *Coley Properties Corp. v. United States*, 593 F.2d 380, 385 (Ct. Cl. 1979); *JDL Castle Corp. v. General Services Administration*, CBCA 4741, et al., 16-1 BCA ¶ 36,249, at 176,857; *6000 Metro LLC v. General Services Administration*, GSBCA 15731, et al., 04-1 BCA ¶ 32,510, at 160,821; *Jay Altmayer v. General Services Administration*, GSBCA 12639, 95-1 BCA ¶ 27,515, at 137,123, *aff'd sub nom in relevant part*, 79 F.3d 1129 (Fed. Cir. 1996).[7] "[W]hen Government delay occasions later-than-anticipated commencement of rental payments, compensation may be made only for increases in costs of performance; loss of rental income, although an economic detriment, is not a cost of performance and therefore is not compensable for the delay." *Altmayer*, 95-1 BCA at 137,123. As in these cases, while the start of the lease was delayed, the lease contract provides that Piedmont will still receive the full payments due for the fifteen-year term of the lease.

Piedmont seeks to distinguish its claim from these precedents, arguing that these cases did not involve either lease contracts wherein the completion date and rental rate were determined retroactively or claims of delay due to a change in the sequence of performance. Appellant's Brief at 5-6. Piedmont fails to explain how those differences render the principle that lease revenue is not recoverable inapplicable. Piedmont also relies upon *301 Howard Street Associates v. General Services Administration*, GSBCA 10971, et al., 94-1 BCA ¶ 26,450, at 131,600, to argue that it may recover this lost revenue. As explained in *Altmayer*, because this aspect of the decision in *301 Howard* "is inconsistent with an express holding of our appellate authority, it is not good law." *Altmayer*, 95-1 BCA at 137,123.

Piedmont also argues that these precedents are not applicable because of the provision that makes GSA "responsible for all costs (including, without limitation, any additional costs associated with the Swing Space) associated with any Government delays which result in any delay in occupancy of all or any portion of the premises." Piedmont seeks to recover "lost rent impact costs and loss of lease revenue." Appellant's Brief at 8. Lost revenue is not an out-of-pocket expense incurred by Piedmont and, therefore, is not a cost to be paid as the result of the delay. *Coley Properties*, 593 F.2d at 385; *JDL Castle*, 16-1 BCA at 176,858. The fact that the clauses in these cases reference "performance costs" whereas the provision in this lease requires the payment of "all costs" attendant to GSA's delays does not alter the analysis.

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[7] Although the Federal Circuit reversed the Board's decision on the claim of home office overhead, it affirmed the Board's rejection of the contractor's lease rental payment delay claim. *Altmayer*, 79 F.3d at 1134.

Piedmont asserts that it is claiming "the rent differential between its current and future rent rates." Appellant's Brief at 7. According to Piedmont, if the lease had begun earlier, it would have ended earlier, allowing Piedmont "to turn over the property and achieve a higher rental rate at least 324 days sooner than it will be now." *Id*., at 8. This argument has two flaws. One is that the portion of its claim discussing calculation of its damages does not mention the loss of future higher rents. Instead, the claim is tied to the current annual value of the lease. Exhibits 40, 47. Two, Piedmont's claim is overly speculative as to rental rates Piedmont might have achieved if the lease term ended earlier than it will. *6000 Metro*, 04-1 BCA at 160,822 (citing *San Carlos Irrigation and Drainage District v. United States*, 111 F.3d 1557, 1562 (Fed. Cir. 1997)). Piedmont also cites to the discussion in *ITT Corp. v. United States*, 17 Cl. Ct. 199, 240 (1989), regarding whether simple or compound interest is owed to a patent holder as part of the reasonable and entire compensation to be paid by the Government for the infringement upon a patent. The case is wholly inapposite to whether Piedmont may recover lost rental income as damages for government delays.[8]

II. Piedmont's Claims for Costs of Partitions and Construction of Another Egress Stairway are not Barred by Accord and Satisfaction

Piedmont's claims for the costs of disposal of partitions and for construction of an egress stairway are not barred by accord and satisfaction. "An accord is an agreement by one party to supply or perform, and by the other party to accept, in settlement or satisfaction of an existing claim, something other that what originally was due." *National Housing Group, Inc. v. Department of Housing & Urban Development*, CBCA 340, et al., 09-1 BCA ¶ 34,043, at 168,374 (citing *C&H Commercial Contractors, Inc. v. United States*, 35 Fed. Cl. 246, 252 (1996)). "Satisfaction is the execution and/or performance of the agreement, the

[8] GSA argues in the alternative that GSA has paid in full all the rent payments allegedly lost by Piedmont, attributable to the period September 2013 through August 2014, with the execution of SLA 12. Respondent's Brief at 7. GSA asserts that, by agreeing to SLA 12, Piedmont waived or released its claim to these payments. Even if we were to construe SLA 12 as containing a release of claims, SLA 12 clearly identifies "delays" as an issue of continuing disagreement and discussion between the parties. *Turner Construction Co. v. General Services Administration*, GSBCA 15502, et al., 05-1 BCA ¶ 32,924, at 163,097 (an enforceable release "complete on its face reflects the contractor's unqualified acceptance and agreement with its terms."). Although we grant GSA's motion regarding Piedmont's claim for lost rental income, we address this alternative argument to clarify that Piedmont's other claims arising from GSA's purported delays survive the execution of SLA 12.

actual giving or taking of some agreed item or service." *Id.* "An accord and satisfaction binds the parties and precludes further payment for a claim that has been satisfied." *Id.* at 168,374-75 (citing *Spirit Leveling Contractors v. United States*, 19 Cl. Ct. 84, 92-93 (1989)). "Because accord and satisfaction is an affirmative defense, the party seeking to enforce it has the burden to prove all of the elements necessary to its invocation." *A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,184, at 176,539 (citing *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009); *O'Conner v. United States*, 60 Fed. Cl. 164, 168 (2004)).[9]

SLA 12 was required by the terms of the original lease to set the commencement date for the lease and reiterated the annual rent owed pursuant to the lease. In executing SLA 12, the parties did not resolve any existing disputes and there was no additional or new agreement regarding performance.

III. Piedmont's Claim to Recover the IT Equipment Cost Offset is Untimely

GSA contends that Piedmont's appeal of its claim for IT equipment offsets is untimely because Piedmont failed to appeal the August 2016 contracting officer's decision. The CDA requires that appeals to the Board from contracting officers' decisions be filed within ninety days of the contractor's receipt of that decision. 41 U.S.C. § 7104 (2012). The CDA further requires that "[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a decision by the contracting officer," *id.* § 7103(a)(3), and [t]he contracting officer's decision shall state the reasons for the decision reached and shall inform the contractor of the contractor's rights as provided in this chapter." *Id.*, § 7103(e). The Federal Acquisition Regulation (FAR) defines claim as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising or relating to the contract." 48 CFR 2.101 (2017).

A government claim exists "whenever the Government itself seeks an adjustment of the contract price." *Connor Bros. Construction Co.*, VABCA 3593, et al., 95-1 BCA ¶ 27,409, at 136,643 (1994). To be a valid claim, the contracting officer need only identify the basis for liability and a sum certain to which the Government believes itself entitled. *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990); *Sprint Communications Co. v. General Services Administration*, GSBCA 13182, 96-1 BCA

[9] GSA pled accord and satisfaction as an affirmative defense in its answer. Answer ¶ 163.

¶ 28,068, at 140,171. The Government can assert a claim in a final, appealable decision, even if the decision is not labeled as a final decision and does not contain a statement of the contractor's appeal rights. *Placeway*, 920 F.2d at 907; *Sprint Communications Co.*, 96-1 BCA at 140,171.

GSA asks us to decide whether the contracting officer's August 2016 decision was a decision that triggers the ninety-day statute of limitations. The decision bears the indicia of a decision. The contracting officer stated the reason why GSA believed Piedmont was responsible for providing IT equipment in the swing space and identified the amount GSA had incurred to procure this equipment itself, a sum certain amount. In addition, the contracting officer stated twice that the document was a final decision and notified Piedmont of its appeal rights.

The fact that the final decision was issued in response to Piedmont's uncertified REA does not alter the nature of the decision. The Government may assert a claim in a final decision in response to a contractor's demand for payment, even it the contractor's payment demand itself is not a claim. *Placeway*, 920 F.2d at 906-07. Although Piedmont could not appeal the portion of the contracting officer's decision addressing its uncertified REA, *Paul E. Leaman, Inc. v. United States*, 673 F.2d 352, 355 (Ct. Cl. 1982); *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3426, 13 BCA ¶ 35,371, at 173,572, the clock began for Piedmont to pursue an appeal of the agency's assertion of the right to an offset.

GSA's actions after it issued the decision do not vitiate the finality of the claim. Piedmont asserts that, in response to its reminder that its REA was uncertified, GSA should have affirmatively told Piedmont that it had asserted an affirmative claim. Given that GSA could properly assert a government claim in response to its REA and labeled its decision as a final decision, we see no obligation for GSA to reiterate to Piedmont that it had asserted a government claim.

Piedmont also asserts that the two letters sent by the contracting officer after receipt of Piedmont's claim in October 2016 evidence GSA's reconsideration of that decision. The deadline for filing an appeal can be tolled by the contracting officer's agreement to reconsider a decision. *Staff Inc.*, AGBCA 95-181-1, et al., 96-1 BCA ¶ 28,051, at 140,071 (1995). To determine that the contracting officer agreed to reconsider the decision, the Board must find "some timely affirmative conduct *by the contracting officer himself* — either express or implied — that indicates to the contractor a willingness to revisit the previously issued 'final' decision." *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 36,117, at 176,320. The test is an objective one that requires consideration as to whether a reasonable person would believe that the decision was being

reconsidered. *Id*. If Piedmont's claim had included only the demand for repayment of the IT equipment costs or the contracting officer had specifically mentioned the IT equipment costs claim in these letters, the letters might be evidence of reconsideration. Here, the contracting officer's letters are procedural in nature, regarding the deadlines for issuing a decision. As the only evidence cited by Piedmont, these letters do not establish that the contracting officer agreed to reconsider his decision on the Government's claim for the IT equipment offset.

Piedmont, citing *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1331 (Fed. Cir. 2010), argues that it followed jurisdictional procedure by submitting a claim for the costs backcharged by GSA. In *Maropakis*, the contractor sought to challenge the Government's claim for liquidated damages, asserting that it was entitled to time extensions under the contract that would eliminate the Government's claim. The Federal Circuit held that the trial court lacked jurisdiction to consider the contractor's claim for time extensions because it had not been presented as a claim to the contracting officer. "A contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, whether asserting the claim against the government as an affirmative claim or as a defense to a government action." *M. Maropakis*, 609 F.3d at 1331. Piedmont is disputing GSA's determination that Piedmont was responsible for providing IT equipment pursuant to the original terms of the lease regarding the swing space. *See National Fruit Product Co. v. Department of Agriculture*, CBCA 2445, 12-1 BCA ¶ 34,979, at 171,932 (no requirement to file predicate claim to challenge contracting officer's decision regarding money owed to the Government). Unlike the contractor in *Maropakis*, Piedmont's challenge to the Government's interpretation does not require any additional determination regarding the terms of the contract. GSA believed Piedmont was responsible for providing this equipment; Piedmont disagreed. This dispute was ready to be adjudicated at the time the contracting officer issued the August 2016 decision. Piedmont was not required to assert its own claim for the same amount before appealing the contracting officer's decision. If that were the rule, contractors could avoid the statutory mandate to appeal contracting officer's decisions on government claims within ninety days by filing their own claims regarding the same subject matter.

In deciding this motion, we reach no conclusions regarding the correctness of GSA's position regarding Piedmont's obligations to provide equipment and services in the swing space. We will consider this issue if Piedmont's other claims so require.

Decision

GSA's motion is **GRANTED IN PART**.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge