UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 21, 2021

CBCA 6809

S & DF PROPERTIES, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Steve Forti, Managing Member of S & DF Properties, LLC, El Paso, TX, appearing for Appellant.

Jay Bernstein, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **HYATT**, and **ZISCHKAU**.

BEARDSLEY, Board Judge.

Appellant, S & DF Properties, LLC (S&DF), appealed a General Services Administration (GSA) contracting officer's final decision, denying S&DF's request for GSA's portion of the difference between using the 2013 ($16,038) or 2016 ($19,325) real estate tax assessment as the tax base for leased office and related space. S&DF contends that the parties negotiated for the real estate tax base to be based on the 2013 tax assessment. GSA disagrees and asserts that the real estate tax base for this lease is the unadjusted real estate taxes for the first twelve-month period following full assessment of the property, which in this case would be the 2016 tax assessment. This appeal has been submitted on the record without a hearing pursuant to CBCA Rule 19 (48 CFR 6101.19 (2019)).

Background

This appeal arises from a lease between S&DF and GSA for 4440 square feet of office and related space in El Paso, Texas. The parties executed the lease on August 7, 2013. Lease section 2.07, "Real Estate Tax Adjustment," provides for adjustments in the rent to account for "increases or decreases in Real Estate Taxes for the Property after the establishment of the Real Estate Tax Base." Lease section 2.07.B defines the "Real Estate Tax Base" as follows:

> Real Estate Tax Base is the unadjusted Real Estate Taxes for the first full Tax Year following the commencement of the Lease term. If the Real Estate Taxes for that Tax Year are not based upon a Full Assessment of the Property, then the Real Estate Tax Base shall be the Unadjusted Real Estate Taxes for the Property for the first full Tax Year for which the Real Estate Taxes are based upon a Full Assessment. Such first full Tax Year may be hereinafter referred to as the Tax Base Year. Alternatively, the Real Estate Tax Base may be an amount negotiated by the parties that reflects an agreed upon base for a Fully Assessed value of the Property.
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> The Property is deemed to be Fully Assessed (and Real Estate Taxes are deemed to be based on a Full Assessment) only when a Taxing Authority has, for the purpose of determining the Lessor's liability for Real Estate Taxes, determined a value for the Property taking into account the value of all improvements contemplated for the Property pursuant to the Lease, and issued to the Lessor a tax bill or other notice of levy wherein the Real Estate Taxes for the full Tax Year are based upon such Full Assessment. At no time prior to issuance of such a bill or notice shall the Property be deemed Fully Assessed.

Lease section 2.07.C provides that "[a]fter the Property is Fully Assessed," GSA is responsible to pay its share of any increases, and to receive its share of any decreases, in the property's real estate taxes, which is determined by "multiplying the Government's Percentage of Occupancy by the difference between the current year Unadjusted Real Estate Taxes and the Real Estate Tax Base." Lease section 1.13 established GSA's percentage of occupancy at 46.25%. Lease amendment no. 1 increased the percentage of occupancy to 50%, or 4800 square feet.

The lease does not contain any term or provision identifying a specific tax year or specific dollar amount to be used as the real estate tax base. Instead, section 1.14, "REAL ESTATE TAX BASE (JUN 2012)," was crossed out and the words "INTENTIONALLY

DELETED" were written in. This section typically designates the dollar amount of the real estate tax base for the purpose of determining the real estate tax adjustment for a lease.

Steve Forti, managing member of S&DF, testified via deposition that in 2013, when S&DF signed the lease, it was his understanding that the parties had agreed that 2012 was the tax base year for the purpose of adjusting the real estate taxes for the property. Mr. Forti based his understanding on the fact that he wrote "2012" on item 28, "Real Estate Taxes," on GSA Form 1217 and that the figures included in Form 1217 reflected the 2012 taxes. GSA Form 1217 was not attached to or made a part of the lease. Lease general clause 7, "Integrated Agreement," reads, "Except as expressly attached to and made a part of the Lease, neither the Request for Proposals nor any pre-award communications by either party shall be incorporated in the Lease." Mr. Forti does not specifically recall discussing the tax base year or amount with anyone at GSA, nor does he recall that GSA's broker, Ms. Rena Johnson Grimes, or GSA's lease contracting officer, Ms. Lindsay Killian, represented to him that the tax base year would be 2012. Mr. Forti believed that "[t]hat's the purpose of the [1217] form, I believe, to arrive at that and start the tax at a particular amount and year, along with everything else on that form, the operating costs and everything. It's the starting point for the rent that they'd have to revert back to for any type of adjustment. I did understand it that way." Mr. Forti stated further that "[t]here was not much negotiation on any of that form, much less the taxes" because he understood that there was no need for negotiation since Form 1217's purpose was to "arrive at a tax base, an operating tax base for future adjustments."

Ms. Killian was the lease contracting officer for this lease from 2013 to 2016. She testified by affidavit that prior to executing the 2013 lease, GSA and S&DF "did not negotiate an agreed upon base for a fully assessed value of the property." Ms. Grimes, as an analyst/associate at Jones Lasalle Lang Americas, Inc. (JLL), provided various broker services to GSA from 2013 to 2016, "including reviewing the proposals submitted by S&DF Properties, LLC ('S&DF'), identifying deficiencies in S&DF's proposal, requesting clarifications from S&DF, and negotiating the rental terms that were incorporated into the Lease entered into by GSA and S&DF." Ms. Grimes testified, also by affidavit, that "[a]t no time did I negotiate with S&DF, or otherwise agree to, the establishment of a tax base amount or a tax base year for the purpose of the Real Estate Tax Adjustment Clause of the Lease, nor am I aware of any such agreement being made by any authorized GSA representative."

In 2015, Mr. Forti sent an email to GSA asking to renegotiate the rent because S&DF was going to lose money under the current lease terms. Mr. Forti stated in his email dated January 7, 2015,

> As I have previously discussed with you, the initial estimates for annual cost [sic] (across the board) were based on the vague and ambiguous Form 1217 (see attached) provided and required by GSA "as part of rental consideration" in the lease; and shell costs were never factored into the low base Shell Rent of $6.67 (2.08 for taxes) in the lease given the amount was unknown/unspecified and shell requirements already existed in the building.
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> . . . .
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> All I am asking for is a reasonable/adequate adjustment to the Shell Rent and to operating costs based on current more accurate and realistic estimates I have obtained and now established shell costs.

GSA asked S&DF to fill out a new Form 1217. In item 28 of "Section II - Estimated Annual Cost of Ownership Exclusive of Capital Charges," of Form 1217, Mr. Forti wrote "2013" in the blank space after the words "28. Real Estate Taxes." In that same item, he wrote "$16038" in the column titled "Lessor's Annual Cost for: Entire Building" and "$8019" in the column titled "Lessor's Annual Cost for: Gov't-Leased Area." Mr. Forti testified that the $16,038 was meant to reflect the taxes that were assessed for 2013 on the property and the $8019 reflected GSA's fifty percent share based on its occupancy of the building. In a February 9 email, Mr. Forti stated, "[t]he base Shell rent shall be $13.92 per RSF [rentable square footage] plus $1.67 per RSF for real estate taxes for a total of $15.59 per RSF." GSA countered with a shell rent of $9.67 for a ten year lease with an operating rate of $6, but Ms. Killian did not mention taxes. Mr. Forti responded that, "[b]ased on Shell costs (including A/E fees) that have now been determined and current/revised estimates recently obtained, the amounts in your offer will not cover/support the unanticipated costs (operating and Shell) of the modified contract/project." He went on to say that the shell rent must be "$13.92 per RSF plus $1.67 per RSF for real estate taxes for a total of $15.59 per RSF." Ms. Killian responded that "your low Shell base is $6.67 which includes $2.08 for taxes, but you are also restating taxes further when you stated that you need $13.92 plus $1.67 for taxes." Mr. Forti attempted to clarify his position by stating that the $15.67 total included $6.67 in base shell rent, $2.30 in "taxes ($1.67) and insurance," and $6.70 in other costs. On February 19, 2015, Mr. Forti emailed Ms. Killian to say that he was "willing to take a loss and split the unanticipated costs, which would lower the Shell rent from $15.67 to $12.67." He did not mention the taxes. Mr. Forti testified in his deposition that if they had asked him how he arrived at $1.67 for taxes, he would have said that "it [was] based on 2013 taxes." Mr. Forti testified further that he did not recall any discussions with anyone from GSA or JLL about the proposed new tax base year.

Mr. Forti testified that the parties understood that 2013 was the revised tax base year as a result of the figures he included on Form 1217. He understood that "[e]verything is

going to be adjusted off this ticket [Form 1217] was the way that they explained it to me." To Mr. Forti, the purpose of Form 1217 was "to arrive at the base year costs for all operating costs and taxes and insurance." Mr. Forti believed that "the tax base year is put on this form [1217] to make it clear that's the tax base year. . . . It's just to clarify things." By its terms, Form 1217 contains the lessor's "best estimates as to the annual costs of services, utilities and ownership." Form 1217's instructions state, "Items 28 through 32 will be useful in the Government's determination of the fair market value of the space to be rented." Item 28 instructions require lessor to "[i]nclude all applicable real estate taxes imposed upon the property."

Ms. Killian testified that "Mr. Forti submitted proposals to GSA which were reviewed by GSA, discussed with Mr. Forti, and negotiated by the parties. Establishment of a tax base for the purpose of the Real Estate Tax Adjustment Clause of the Lease was never a topic of discussion between GSA and Mr. Forti, nor was it a subject of any of the negotiations that [she] conducted with Mr. Forti." She further testified that she "never agreed with S&DF that, for the purposes of the Real Estate Tax Adjustment clause, the applicable tax base year would be 2013 or any other year, nor am I aware of any such agreement being made at any time by any authorized GSA representative." She also stated that "it was always my understanding and expectation that, per Section 2.07 of the Lease, the tax base year would be the first full tax year following the commencement of the Lease term and a full assessment of the value of the property by the taxing authorities." S&DF also contended that by incorporating the numbers on Form 1217 into lease amendment no. 3, GSA accepted and established 2013 as the new tax base year.

The shell rent in the August 7, 2013, lease was $8.75 per RSF ($6.67 for rent and $2.08 for taxes). Lease amendment no. 3 increased the shell rent from $8.75 per RSF to $12.67 per RSF for an annual rent of $60,816. Lease amendment no. 3 did not mention the tax year or dollar amount to be used to establish the real estate tax base or calculate the real estate tax adjustment. Lease amendment no. 3 also authorized S&DF to proceed with construction of tenant improvements. Lease amendment no. 4, dated October 2015, stated that tenant improvements had been substantially completed, affirmed that GSA accepted the leased space on October 8, 2015, and designated the commencement date of the rent as October 8, 2015. Lease amendment no. 4 stated:

> The Government shall pay the Lessor annual rent as follows:
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> From October 8, 2015 through October 7, 2025, the total annual rental shall be $111,652.15 at the rate of $9,304.34 paid monthly in arrears. The total annual rent consists of annual Shell Rent of $60,816.00, annual Operating Costs of $34,800.00, Tenant Improvement Costs of $14,922.82, Building Specific

> Amortized Capital (BSAC) of $1,113.33, plus annual Operating Cost Adjustments.

The amendment stated twice that "All other terms and conditions of this lease shall remain in full force and effect." There was no mention of the real estate tax base by year or otherwise.

In 2018 and 2019, GSA paid S&DF the difference in the 2016 tax assessment and the real estate taxes assessed on the property.[1] In her final decision, the contracting officer noted that "nowhere in the lease is there any evidence that the year 2013 was the negotiated Real Estate Tax Base," and she rejected S&DF's claim. On March 6, 2020, S&DF timely filed an appeal with the Board challenging the contracting officer's final decision. S&DF contends that as part of lease amendment no. 3, the parties negotiated that the real estate tax base would be based on the 2013 tax assessment. GSA contends that the parties never negotiated the real estate tax base, and per the terms of the lease, the 2016 tax assessment constitutes the real estate tax base.

Discussion

I. The Record and Standard of Review

Pursuant to CBCA Rule 19, the written record, upon which the Board will render its decision, consists of the notice of appeal, answer, appeal file, supplemental appeal files, Mr. Steve Forti's deposition transcript, affidavits of Ms. Lindsay Killian, Ms. Dee Graham, and Ms. Rena Johnson Grimes, and the parties' briefs. "Based on the parties' submissions, the Board is authorized to make findings of fact, even if such findings require 'credibility determinations on a cold [paper] record, without the benefit of questioning the persons involved,' and can decide issues of law based on those factual findings." *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 17-1 BCA ¶ 36,863 (quoting *Bryant Co.*, GSBCA 6299, 83-1 BCA ¶ 16,487). "'While [the Board] can make inferences from th[e] evidence and either accept or deny the probative value of documents, statements or other extrinsic evidence, in order for us to find for a party, that party's evidence must establish,' by a preponderance of the evidence, 'that it is entitled to relief.'" *Id.* (quoting *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913 (quoting *Schoenfeld Associates, Inc.*, VABCA 2104, et al., 87-1 BCA ¶ 19,648)). In determining the reliability of conclusory statements in affidavits and deposition testimony,

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[1] In 2017, GSA did not pay S&DF the $230 difference in the 2016 real estate tax base amount and the assessed taxes because S&DF failed to submit the proper invoice and evidence of payment within the period mandated by the lease.

> we look at whether there is other corroborative evidence supporting the statement, whether the other facts and circumstances surrounding the allegations make the allegations more believable than not, and to what extent the parties' version of the events and conclusions differ or can be reconciled. In weighing these elements, however, the moving party's position must be more reliable than its adversary in order for us to find in its favor.

1-A Construction & Fire, LLP (quoting *Schoenfeld*).

Because Mr. Forti is representing S&DF in this appeal, we construe S&DF's "pleadings liberally, holding [S&DF] to less stringent standards than formal pleadings prepared by an attorney." *House of Joy Transitional Programs v. Social Security Administration*, CBCA 2535, 12-1 BCA ¶ 34,991 (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972); and *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514). "But this more lenient standard for interpreting pleadings does not change a pro se litigant's burden of proof or our weighing of the factual record." *Id.*

II. The Lease and the Real Estate Tax Base

The issue in this appeal for the Board to decide is whether the 2013 tax assessment or the 2016 tax assessment constitutes the real estate tax base under the lease. The lease's Tax Adjustment clause defines the real estate tax base as either (1) the unadjusted real estate taxes for the first twelve-month period following full assessment of the property, or (2) an amount negotiated by the parties "that reflects an agreed upon base for a Fully Assessed value of the Property." The lease, however, does not identify a negotiated amount. In fact, the lease section in which such a negotiated tax base would appear was deleted. Neither lease amendment no. 3 nor no. 4 reinserted this section of the lease or identified a negotiated tax base. Thus, without a negotiated amount identified in the lease, the Tax Adjustment clause defines the base year taxes as the real estate taxes for the first twelve-month period following full assessment, or here, the 2016 tax assessment. *See ASP Denver, LLC v. General Services Administration*, CBCA 2618, et al., 15-1 BCA ¶ 35,850 (2014)(interpreting the same clause); *Sixth & E Associates v. General Services Administration*, CBCA 1149, 09-2 BCA ¶ 34,179.

S&DF contends that the parties negotiated and agreed to the real estate tax base in 2015 "via emails and GSA Form 1217." Because these emails and Form 1217 were not expressly attached to or made a part of the lease, however, these pre-award communications were not incorporated into the lease and are extrinsic to the lease terms. "When the plain language of the contract is unambiguous, the Board does not need to look to extrinsic evidence to interpret its provisions." *1201 Eye St., N.W. Associates v. General Services Administration*, CBCA 5150, 17-1 BCA ¶ 36,592 (2016) (citing *TEG-Paradigm*

Environmental, Inc. v. United States, 465 F.3d 1329, 1338 (Fed. Cir. 2006)); see *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002) ("When the contract language is unambiguous on its face, our inquiry ends, and the plain language of the contract controls."). The parties did not include a negotiated real estate tax base in the lease or lease amendments. Mr. Forti's "unexpressed intents, understandings, and interpretations are not relevant to the interpretation of this lease." *See Sixth & E Associates*.

S&DF contends that GSA "wrongly deleted" section 1.14, "Real Estate Tax Base (JUN 2012)." S&DF, however, offers no evidence to support this bald assertion, and the fact that S&DF did not rectify this alleged error in the lease amendments gives no credence to this allegation. Lease amendments no. 3 and no. 4 did not reinsert the section, and neither amendment identified a negotiated amount or year for the base taxes.

S&DF contends that GSA failed in its duty to advise S&DF that the information recorded by S&DF on Form 1217 "would not be considered for the Real Estate Adjustment Clause." S&DF, however, mischaracterizes the purpose and effect of Form 1217. Form 1217's purpose was not to "negotiate the Lessor's 'base rate' for both Real Estate Taxes and Operating Costs in determining fair market value rent" as asserted by S&DF. Instead, Form 1217's purpose was to assist "the Government in determining the fair market value of the space to be rented." Moreover, Form 1217, by its terms, consists of nothing but the lessor's best estimates and, therefore, does not represent negotiated amounts. *Sixth & E Associates* (rejecting the submission of real estate tax estimates on Form 1217 as evidence that the parties negotiated the tax base amount); *see also TST Tallahassee, LLC v. Department of Veteran Affairs*, CBCA 1576, 11-1 BCA ¶ 34,672 (finding "no reason to believe the tax figure on the [Form] 1217 was anything more than an estimate of one of the many costs the lessor might incur in owning the property"). GSA had no duty to clarify the lease provisions since the lease provisions were clear and did not incorporate Form 1217. "Suffice it to say that one is chargeable with knowledge of the provisions of the contract one signs and may not subsequently plead ignorance of its provisions to escape its legal consequences." *Florida General Electronics, Inc.*, ASBCA 22137, et al., 79-2 BCA ¶ 14,148.

S&DF offers no evidence that the proposals and counterproposals exchanged by the parties in 2015 by email constituted the negotiation of a real estate tax base based on the 2013 tax assessment. These emails fail to reference or discuss the establishment of a real estate tax base. GSA's broker and lease contracting officer have each disclaimed in a sworn affidavit any such intent to negotiate or any understanding that the parties had negotiated a tax base rate in either 2013 or 2015. Even Mr. Forti testified that he did not recall discussing the real estate base tax with GSA representatives.

S&DF bore the burden to inform GSA of its intent to negotiate a base tax rate. *ASP Denver*. S&DF failed to meet this burden and inform GSA. There is no evidence that GSA

was aware of and understood that S&DF wanted to establish a fixed negotiated base tax rate under the lease "in lieu of using the more common practice of deriving a base year tax rate based upon an assessment rendered in conjunction with the first year of tenant occupancy." *See ASP Denver* (finding no such evidence); *Cunningham-Spencer, Inc.*, GSBCA 10548, 91-1 BCA ¶ 23,341 (1990). To the contrary, the deletion of section 1.4.1 is the best evidence that the parties did not mutually intend, either at the outset or in 2015, to negotiate a base tax rate under the lease. Moreover, GSA never acknowledged a negotiated rate or 2013 as the tax base year, and there is no evidence that the parties ever discussed this issue.

We also reject S&DF's contention that GSA's acceptance in lease amendments no. 3 and no. 4 of rental rates that included the 2013 tax rate as proposed by S&DF on Form 1217 and in its emails constituted negotiation of a real estate base year tax rate. *See ASP Denver* (rejecting a lessor's claim that its submittal to GSA of proposed rental rates which included anticipated real estate taxes, and GSA's acceptance of the proposed rates, constituted the parties' negotiation of a tax base year). Neither Form 1217 nor S&DF's emails indicate that GSA had agreed to a real estate tax base year or amount. There was no negotiation of a real estate base tax rate, and absent this, under the Tax Adjustment clause, the base tax year for this lease is the "first twelve month period coincident with full assessment," or 2016.

Decision

GSA's use of the 2016 tax assessment as the real estate tax base, and its determination of the real estate tax adjustments based on the 2016 tax assessment, is consistent with the terms of the lease. For the foregoing reasons, S&DF's appeal is **DENIED**.

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

We concur:

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge