UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 4, 2022

CBCA 7065

FINMARC MANAGEMENT, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Gordon Griffin and Hillary J. Freund of Holland & Knight LLP, Washington, DC, counsel for Appellant.

Jay Bernstein and Michael P. Klein, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **GOODMAN**, **DRUMMOND**, and **KULLBERG**.

KULLBERG, Board Judge.

Appellant, Finmarc Management, Inc. (FMI), claims the costs, $1,198,862.12, of removing tenant improvements in a property leased by the General Services Administration (GSA). FMI seeks the costs related to tenant improvements to the leased property which included raised flooring and related wiring and equipment that a different lessor installed during a previous lease. Only entitlement is at issue.

The parties have elected, pursuant to Rule 19 (48 CFR 6101.19 (2021)), to submit their respective cases on the record without a hearing. On April 1, 2022, the parties submitted a joint stipulation of undisputed material facts (Board Exhibit 1). Subsequently, the Board set a schedule for submission of briefs and reply briefs. For the reasons stated below, the Board denies the appeal.

Background

In May 1988, GSA entered into lease number GS-11B-80222 (preceding lease) with Ceridian Corporation (Ceridian) for office and data center space in a building located in Rockville, Maryland (Rockville property). Board Exhibit 1 at 1. Under the terms of the preceding lease, the lessor made tenant improvements according to government plans. Those improvements "includ[ed] . . . all of the equipment at issue in this appeal." *Id.* Those improvements remained at the end of the preceding lease. *Id.* The equipment and improvements included raised flooring for the data center and related wiring and equipment. The record does not include a copy of the preceding lease.

The preceding lease expired on July 15, 2005. On July 18, 2005, GSA executed lease number GS-11B-LMD01855 (current lease) with Marsol Fortune Terrace, LLC c/o Finmarc Management, Inc. for the same space that GSA had leased under the preceding lease. Board Exhibit 1 at 2. The current lease contained an Alterations clause, which stated the following:

> The Government shall have the right during the existence of this lease to make alterations, attach fixtures, and erect structures or signs in or upon the premises hereby leased, which fixtures, additions or structures so placed in, on, upon, or attached to the said premises shall be and remain the property of the Government and may be removed or otherwise disposed of by the Government. If the lease contemplates that the Government is the sole occupant of the building, for purposes of this clause, the leased premises include the land on which the building is sited and the building itself. Otherwise, the Government shall have the right to tie into or make any physical connection with any structure located on the property as is reasonably necessary for appropriate utilization of the leased space.

Respondent's Exhibit 5 at 61 (clause 19). The record does not include any documentary evidence as to when Marsol purchased the Rockville property or the terms of that purchase.

The current lease term ran from July 16, 2005, to July 15, 2015. *Id.* GSA accepted the Rockville property under the current lease in an "as-is" condition, which included tenant improvements from the preceding lease and only a small allowance for tenant improvements under the current lease. Board Exhibit 1 at 2. Through a series of amendments to the lease, the lease period was extended to September 30, 2019. *Id.*

On January 11, 2017, the agency occupying the leased space informed GSA that it intended to vacate the premises and would remove equipment and furnishings but that it would leave the raised flooring and the related wiring and equipment. Board Exhibit 1 at 2. Various exchanges of emails and correspondence ensued in which GSA and FMI

discussed whether the tenant was responsible for removing any of the previously installed improvements. *Id*. at 3-4. Upon the departure of the tenant on October 10, 2019, tenant improvements installed during the preceding lease that remained included the raised flooring and related wiring and equipment. *Id*. at 4.

On August 14, 2020, FMI submitted to the contracting officer (CO) its claim in the amount of $1,416,915.70. Respondent's Exhibit 47 at 2. The claim consisted of four items: (1) unpaid utilities, $214,081.62; (2) prompt payment interest on the utilities, $3971.96; (3) holdover rent, $909,394.56, due to the Government's failure to remove the raised flooring and related equipment; and (4) cost of removal of the raised flooring and related equipment, $289,467.56. *Id*. The CO's final decision (COFD) granted the first and second parts of FMI's claim and denied the third and fourth parts of its claim. Respondent's Exhibit 66. The COFD noted the following:

> Because the raised floors, installed cabling, and built-in filing cabinet system are fixtures, the Alterations Clause of the lease applies, and they can be abandoned in place even if they were installed as Alterations after the Government accepted the space. As noted above, the Alterations Clause explicitly provides the Government the option to either remove or dispose of fixtures. This is exactly the same as any other tenant improvement paid for by the Government and installed by the lessor.

Id. FMI filed a timely appeal for the denied portion of its claim in the amount of $1,198,862.12.[1]

Discussion

The parties elected to have the Board decide this appeal under Rule 19. It is well established that when a party elects to proceed without a hearing, it "acts at its peril . . . where it fails to provide the Board sufficient factual information." *Sefco Constructors*, VABCA 2747, et al., 93-1 BCA ¶ 25,458, at 126,802 (1992). At issue in this appeal is whether the record shows that GSA was obligated to remove the raised floors and related wiring and equipment that were installed under the preceding lease. FMI argues that the raised flooring and related wiring and equipment were government property that GSA was obligated to remove. GSA contends that those tenant improvements were installed under the preceding lease, and the current lease imposed no such requirement.

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[1] FMI's notice of appeal, which was dated March 10, 2021, claimed the amount $1,127,448.14.

FMI's claim relates to tenant improvements that were made during the preceding lease. However, FMI was not a party to that lease. FMI can only assert the rights of Ceridian, the lessor under the preceding lease, if those rights were assigned. In the absence of a valid assignment, FMI has no standing to bring a claim related to the preceding lease. *See Summit Commerce Pointe, LLC v. General Services Administration*, CBCA 2652, et al., 13 BCA ¶ 35,370, at 173,570. The preceding lease is not in the record. The Board has no way of determining what, if any, obligations GSA had under that lease with regard to tenant improvements. In any case, FMI has not shown that it had any right to bring a claim regarding the preceding lease between Ceridian and GSA.

FMI errs in its assertion that GSA had an obligation under the current lease to remove the raised floors and other equipment related to the operation of the data center. Clause 19, the Alterations clause of the lease, stated that fixtures "may be removed or otherwise disposed of." Such language, which used the word "may," was permissive as opposed to mandatory, regarding the removal of fixtures. That clause would only be relevant to tenant improvements installed under the current lease. As discussed above, the previous lessor installed the raised flooring and related wiring and equipment, and the current lease is silent as to any obligation to remove those improvements.

The Board also does not find any implied duty under the current lease that would obligate GSA to remove the raised flooring and related wiring and equipment. The Board has recognized the following:

> "[E]very lease contains a provision, implied if not expressed, that a tenant will not commit waste by damaging the property, and therefore, will, when it vacates leased space, return the space to the landlord in the same condition in which it received that space, reasonable wear and tear excepted." *A&B Limited Partnership v. General Services Administration*, GSBCA 15208, 04-1 BCA ¶ 32,439, at 160,504-05 (2003) (citing *United States v. Bostwick*, 94 U.S. 53, 65-66 (1876)). Thus, respondent had an obligation to repair the tenant improvements to the extent that any damage exceeded reasonable wear and tear, even though the payment for the tenant improvements was included in the rent.

Commerce Plaza Office Partners, LLC v. Department of Veterans Affairs, CBCA 5220, et al., 17-1 BCA ¶ 36,803, at 179,381. FMI's claim does not seek repairs for damage beyond normal wear and tear but, rather, the removal of tenant improvements. FMI includes with its brief photographs of the Rockville property after the end of the lease. However, the Board finds that even if those photographs, which are not in the appeal file, were deemed admissible in the record, they do not show damage that exceeded normal wear and tear. Moreover, FMI is seeking the cost of removing tenant improvements, and nothing in the

record provides any evidence as to the extent of damage or the cost of repairing such damage. Finally, FMI contends that the Rockville property in its current state is not suitable for leasing, but FMI offers no support for that assertion.

Citing the Latin phrase and rule of construction, "*expressio unius est exclusio alterius*," FMI argues that because the current lease only provided for the transfer of title of supplemental air conditioning equipment to FMI, the Board should find that the raised floors and related wiring and equipment were government property that GSA was obligated to remove. Appellant's Brief at 28. FMI improperly relies on "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary 701 (10th ed. 2014). Such a rule is to be applied with "great caution" and not to reach a meaning that is "absurd or unreasonable" or "involve[s] a contradiction or injustice." Sutherland Statutory Construction § 47:25 (7th ed. 2021). Furthermore, it is only to be applied "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). FMI's use of that rule of construction is unreasonable and contrary to its purpose because it attempts to use a reference to a totally unrelated type of equipment, supplemental air conditioning, to reach a selective result that requires GSA to remove the raised floors and related wiring and equipment. FMI offers no evidence to support the meaning it wishes to give the current lease.

Decision

The appeal is **DENIED**.

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

We concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge