UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION TO CONSOLIDATE GRANTED;
RESPONDENT'S MOTION FOR PARTIAL SUMMARY RELIEF GRANTED;
APPELLANT'S MOTION FOR SUMMARY RELIEF GRANTED-IN-PART:
March 30, 2018

CBCA 5506, 5715, 5849

JBG/FEDERAL CENTER, L.L.C.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent in CBCA 5506, 5849

and

DEPARTMENT OF TRANSPORTATION,

Respondent in CBCA 5715.

Vincent Mark J. Policy of Greenstein DeLorme & Luchs, P.C., Washington, DC, counsel for Appellant.

Lesley Busch Uhr and Bradley Boettcher, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent in CBCA 5506, 5849.

Lynn M. Deavers and Michael A. Smith, Office of the General Counsel, Department of Transportation, Washington, DC, counsel for Respondent in CBCA 5715.

Before Board Judges **DRUMMOND**, **SULLIVAN**, and **CHADWICK**.

SULLIVAN, Board Judge.

JBG/Federal Center, L.L.C. (JBG), leases to the General Services Administration (GSA) the buildings that house the headquarters of the Department of Transportation (DOT). Under the lease, JBG provides 145 parking spaces for government vehicles. Pursuant to a follow-on agreement between JBG and DOT, DOT restricts the use of the remainder of the parking spaces on the property to its employees and contractors and pays JBG directly for the use of these spaces. For the first eight years of the lease, GSA reimbursed JBG for the entire real estate tax bill assessed against the property, including the parking garage. Beginning in 2015, GSA withheld a portion of its tax reimbursement based upon a lease provision that limits GSA's payment obligation to only the taxes assessed against the 145 parking spaces included in the lease.

In September 2016, in response to JBG's claim for the amount withheld, GSA demanded repayment of taxes it alleges it improperly paid since the inception of the lease. On October 3, 2016, JBG timely appealed this decision and the Board docketed the appeal as CBCA 5506. In response to GSA's demand, JBG asserted a claim for the amount sought by GSA against DOT under the follow-on contract. On April 24, 2017, JBG timely appealed the decision denying this claim and the Board docketed the appeal as CBCA 5715. Subsequently, JBG claimed repayment of additional amounts from GSA based upon its interpretation of the lease. On September 12, 2017, JBG appealed GSA's denial of its second claim and the Board docketed this appeal as CBCA 5849 and consolidated it with CBCA 5506.

We decide three motions herein. First, we grant JBG's motion to consolidate CBCA 5506 and 5715, finding that there are common issues of fact and law. Second, we grant GSA's motion for partial summary relief, holding that the plain language of the lease limits the reimbursement of real estate taxes. Third, we grant in part JBG's motion for summary relief, holding that GSA's claim for repayment of taxes paid before September 2010 is barred by the statute of limitations.

Background

I. GSA's Lease and Applicable Provisions

In February 2002, GSA, on behalf of DOT, awarded to JBG a contract for the construction and lease of two buildings and an underground parking garage on lot 802 in square 770 at 1200 New Jersey Avenue, S.E., Washington, D.C. Appeal File, Exhibit 2 at

13, 38, 317.[1] In 2004, the parties executed an amended and restated lease for real property (lease). *Id*. at 1, 13. The lease commenced in October 2006, for an initial term of fifteen years. Exhibit 5 at 2, 3.

Pursuant to the lease, JBG was to "furnish to the Government, as part of the rental consideration . . . 145 reserved parking spaces in the parking structures to be constructed by Lessor as part of the Facility." Exhibit 2 at 2. The lease defined "Facility" as:

> [T]he collective reference to the Site, the Leased Premises (including but not limited to, all Fit-Out), all portions of the Buildings, all parking areas on the Site, all landscaping, site roadways, pedestrian passageways and other portions of the Site, together with utilities (to the extent not owned by any public utility company), mechanical systems, fixtures and equipment located on the Site (only if capitalized).

Id. at 21. "Leased Premises" was defined in the lease as "the meaning set forth in Section 2.1," which in turn described the property as "the entire rentable and occupiable area (the 'Premises' or the 'Leased Premises') of the Building(s) to be constructed in accordance with the terms and conditions of this Lease." *Id*. at 25, 38

Tax Reimbursement Provisions. Lease section 2.6.1, as amended by SLA no. 5, provided that, "[f]rom the Lease Commencement Date, throughout the Lease Term, the Government will reimburse Lessor as additional Rent 100% of the real estate taxes (excluding any notary fees, penalties, or interest on a late payment by the Lessor) applicable to the Leased Premises." Exhibit 5 at 4. Under this provision, JBG was permitted to claim reimbursement of payments it made in lieu of taxes that were assessed by the District of Columbia to fund neighborhood improvements:

> (I) any payments due to the District of Columbia pursuant to a Payment in Lieu of Taxes ("PILOT") agreement[2] between Lessor and the District of Columbia,

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[1] All exhibits are found in the CBCA 5506 appeal file, unless otherwise noted. The original lessor was JBG/SEFC Venture, L.L.C. The parties executed supplemental lease agreement (SLA) no. 2, to reflect JBG/Federal Center, L.L.C. as the succeeding lessor. Exhibit 5.

[2] Pursuant to the Payments in Lieu of Taxes (PILOT) Act of 2004, the District of Columbia established a program whereby payments made pursuant to a PILOT agreement would be pledged in connection with the bonds authorized under the PILOT Act or to facilitate the development of projects that are deemed to contribute to the health, education,

> provided that such payments shall not exceed the real estate taxes applicable to the Leased Premises that the Government would have paid absent a PILOT agreement, based on assessments conducted in accordance with Chapter 8 of Title 47 of the District of Columbia Code and (II) assessments, taxes, fees or the like ("Bid Assessments") imposed on the Facility by a Business Improvement District in which the Facility is located ("BID") through the BID directly or through the District of Columbia.

Id. Section 2.6.1 further provided that the Government would reimburse JBG for real estate taxes on no more than 145 leased spaces in the parking garage:

> No portion of the Government's tax payments shall reflect tax assessments attributable (i) to any Site Improvements not directly benefitting the Government, or (ii) to parking areas or structures, except for the 145 parking spaces directly leased by the Government.

Exhibit 2 at 67. This limitation was not altered by SLA no. 5. Exhibit 5 at 4.

When seeking reimbursement, JBG was to submit "a proper invoice, . . . a calculation demonstrating Lessor's entitlement to the amount claimed, and evidence of payment by Lessor of real estate taxes related to the Facility and/or Site within which the Leased Premises is located." Exhibit 2 at 67. JBG also was required to provide to the contracting officer copies of "all notices that may affect the valuation of the Facility and/or the Site upon which the Facility is located, as well as all notices of tax credits (or refunds or abatements), all tax bills, and all paid tax receipts." *Id*. If JBG received any tax credits, refunds, or abatements, the Government retained the right to receive "100% of the tax credit attributable to the Government's occupancy of the Leased Premises." *Id.* at 67-68.

Parking Requirements. JBG was obligated to construct a parking lot with the number of spaces required by District of Columbia zoning requirements, but no less than 936 total spaces, and to "provide, without additional charge to the Government, [145] reserved and

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safety, or welfare of, or the creation or preservation of jobs for residents of the District, or for the economic development of the District. Exhibit 6 at 2. On February 1, 2007, pursuant to the PILOT agreement, the District granted JBG an exemption from real property taxes in exchange for which JBG would make PILOT payments for the property that is the subject of the lease. GSA is not a party to the agreement between the District of Columbia and JBG but it did authorize reimbursement of the PILOT payments instead of real estate taxes pursuant to the terms of the lease. Exhibit 5 at 4.

unstacked parking spaces." Exhibit 2 at 83. JBG was to make the remaining 791 spaces available to "the Government and the Government's agents, employees and contractors on a daily or month-to-month basis for use by Government employees and contractors." *Id*.[3] In exchange, JBG could collect from government employees or contractors a monthly or daily fee not to exceed $130 per month and not to increase more than 2% per year. The lease further provided, "At no time during the Lease Term shall the monthly or daily parking rates charged Tenant or its employees or contractors exceed the prevailing market rates in the immediate vicinity." *Id*.

The lease permitted the Government to impose additional security restrictions upon the use of the parking garage:

> The Government will have the right to impose security restrictions on use of and access to the garage during the term of its occupancy. Consistent with the security requirements described in Section 8.7, no parking of third party vehicles will be allowed in the garage during the term of the Government's lease (other than vehicles of government agency employees which have been approved by Department of Transportation and/or other applicable Government security screening procedures) . . . .

Exhibit 2 at 83. Section 8.2.2.2, titled "Parking Requirements," reiterated the requirement that JBG provide "a minimum of 145 'unstacked' automobile parking spaces reserved for exclusive use by the Government." *Id*. at 175. JBG could provide "stacked" parking spaces for the other spaces not reserved for the Government's use. *Id*. Finally, the parking entrances and exits were to be "Government controlled and meet all DOT security requirements." *Id*. at 176.

II. Parking Management Services Agreement

In December 2007, DOT and JBG executed a fixed price commercial items parking management services agreement (PMSA) for the use of the parking garage. Exhibit 132 at 29. This further agreement was executed pursuant to the parking security provisions of the lease because DOT wanted to restrict access to the parking lot to DOT employees only, rather

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[3] The lease does not define "employee" or "government employee," but it does define "Government" as the United States of America. Exhibit 2 at 1, 22.

than all federal employees as permitted by the lease. Appellant's Statement of Genuine Issues, Exhibit 6 at 6.[4]

Pursuant to the PMSA, JBG provided a minimum of 1060 parking spaces, with cars parked in a stacked or tandem manner, for vehicles with a DOT parking permit. Exhibit 132 at 22. Although not explicitly stated in the PMSA, it appears that DOT issued these parking permits, eliminating the need for JBG to issue permits or daily tickets and collect parking fees from individuals. These 1060 spaces were in addition to the 145 spaces that JBG provided under the lease. *Id*. JBG also provided parking lot attendants who parked the cars in a stacked manner. *Id*. at 23. For the use of these spaces and parking attendant services, DOT paid JBG $116,667 per month ($110.06 per space per month). *Id*. at 1.[5] The PMSA contained the Commercial Items clause, FAR 52.212-4, which provides in part that "[t]he contract price includes all applicable Federal, State, and local taxes and duties." *Id*. at 12.

In an opening bid for the negotiation that led to the PMSA, in December 2006, JBG offered the garage spaces to DOT for a yearly price of $1.25 million, assuming that DOT provided all maintenance, facility operators, and security for the garage. Appellant's Statement of Genuine Issues, Exhibit 6 at 3.

Also as part of the negotiations, DOT hired a former GSA appraiser to perform a parking study to determine the "monthly garage rent to be paid by DOT union members" in the building. Appellant's Statement of Genuine Issues, Exhibit 5F. Prior to issuing the study, the appraiser asked the GSA contracting officer whether GSA paid the real estate taxes and utilities for the garage as part of the lease, noting that if the Government were paying these costs he would make an adjustment for them. *Id*., Exhibit 5D. The contracting officer responded that the Government was paying the real estate taxes and utilities for the parking garage:

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[4] GSA and DOT also executed an occupancy agreement, which provided that "all of the parking spaces in the facilities will be made available to DOT on a priority basis for allocation pursuant to the terms of the lease agreement," despite the lease provision that only requires that the spaces be made available to "Government employees." Appellant's Statement of Genuine Issues, Exhibit 17 at 6. This agreement further provided that GSA would pass on all real estate tax expenses through the rent bill to DOT, but GSA would not assess its fee on those costs. *Id*.

[5] The extended line item cost was $466,668, which would be the cost for four months. The base year of the agreement was nine months. This discrepancy is unexplained in the record.

> [T]he Government is responsible for paying 100% of the real estate taxes for the building. Also, we are required to pay 100% of the utilities for the Government leased space which is basically everything except the Starbucks (retail) and the parking that is not under lease. The lessor has indicated that it is not possible to separately meter the parking garage. We were looking at negotiating a credit for the electric costs for the portion of the garage not under the base lease. However, if we end up leasing the whole garage we should receive a credit in the amount of the garage rent to take in to account the fact that we are paying the electricity for the entire garage.

Id., Exhibit 5E.[6] Based upon this information, the appraiser determined a monthly rate per parking space ($97.80 per space) that did not include the costs for real estate taxes or electricity attributable to the garage because GSA was paying those expenses through the lease.[7] *Id*., Exhibit 5F. DOT acknowledged, after review of the appraisal, that GSA was paying real estate taxes on the entire parking garage. *Id*., Exhibit 5H at 1-2.

In September 2010, DOT and JBG executed a new PMSA (PMSA 2010) for the parking garage for a period of performance from October 1, 2010, through September 30, 2015. Exhibit 20 at 1-2. For the same number of spaces and parking attendant services, the annual price was $1.448 million (approximately $114 per month per space). *Id*.[8]

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[6] The original contracting officer reiterated the Government's responsibility for 100% of the real estate taxes again in 2010, in an email to his successor. Appellant's Statement of Genuine Issues, Exhibit 6 at 8. GSA has offered a declaration from the original contracting officer in which he states that he "mistakenly described the terms of the lease regarding the taxes related to the parking garage. My understanding of the Lease is that GSA would pay for 100% of real estate taxes for the Lease Premises, which did not include the additional parking areas." Declaration of Joel Berelson (undated) ¶ 2. The declaration is silent as to this 2010 assertion and the fact that GSA paid 100% of the real estate taxes on lot 802 and then lot 809 from 2007 through 2015.

[7] The appraiser also noted that the rate did not include the District of Columbia parking tax that a private operator would have to pay and pass on in a monthly rate because the Federal Government does not pay that tax. Appellant's Statement of Genuine Issues, Exhibit 5F at 2.

[8] The record also contains an unsigned, undated document titled, "DOT HQ Parking Garage Parking Management Transition Plan," which provides for JBG to assume responsibility for parking management services on October 15, 2015, including the collection of fees to be calculated in accordance with section 4.1.2 of the lease. CBCA 5715, Exhibit

III. Reimbursement of Real Estate Taxes

In April 2007, JBG submitted its first request to GSA for reimbursement of real estate taxes for October 20, 2006, to March 31, 2007. Exhibit 9 at 4. JBG attached the property tax bill issued by the District of Columbia for lot 802. *Id*.

GSA has provided with its reply an exchange of emails between the GSA project executive and the GSA contracting officer from March 2007, regarding JBG's first real estate tax reimbursement request. GSA's Reply Brief at Prod 400-02.[9] In the exchange, the project executive stated that JBG should split the tax bill to reflect what portions it was responsible for:

> I think that we need to respond by asking JBG to split the bill into 2 pieces, that which JBG is responsible for and that which the Government is responsible for. Since the lease did not start until 10/19/2006, JBG is responsible for [real estate] taxes prior to that point in time. They have funds in the project budget to cover this. Also, as we discussed this morning, we don't pay taxes on the parking revenue which is not part of the lease. To the degree that parking revenue is assumed in the tax calculation it must be allocated to JBG. I used a 4% figure to represent this in my attached spreadsheet.

Id. There is no evidence in the record regarding whether this message was communicated to JBG. Despite this exchange, GSA paid the full amount JBG sought for October 20, 2006, through March 31, 2007. Exhibit 9 at 1.

In May 2007, the District of Columbia divided lot 802 into three tax lots, lots 807, 808, and 809. Exhibit 37 at 1, 3. The leased premises, including the entirety of the parking garage, occupied lot 809. GSA's Statement of Uncontested Facts, ¶ 5.

In October 2007, GSA issued SLA no. 8 for the payment of the real estate taxes for the second half of 2007. Exhibit 10 at 1. On the first page of the SLA, GSA stated that the SLA was "[i]ssued to reflect reimbursement for real estate taxes in accordance with Paragraph 2.6 of the Lease Agreement." *Id*. GSA noted that its occupancy was 100% and

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113 at 1, 6-7. This agreement also restates and relies upon the portions of the lease of the building regarding parking and security. *Id*. at 1-5.

[9] The pages attached to GSA's reply brief are only paginated with the bates numbers from its production in discovery.

attached to the SLA the tax bill for lot 809, which showed the entire amount GSA reimbursed. *Id*. at 1, 5. Biannually thereafter until June 2015, JBG sought and GSA paid the full amount of the taxes levied by the District of Columbia on lot 809. Exhibits 13, 14, 16, 17, 19, 21, 25, 26, 29, 31, 35, 38, 43, 50, 54; GSA's Statement of Uncontested Facts ¶¶ 11, 12.

In 2011, GSA obtained from the District of Columbia Office of Tax and Revenue the income and expense reports for the property that JBG had submitted to that office for the property. Exhibits 22, 23. JBG reported the annual income it had received from the office and retail rentals and parking garage. *See, e.g.*, Exhibit 23 at 2. These reports do not identify the real estate tax assessed based upon this revenue or identify the portion of the real estate tax assessment attributable to the parking garage. *Id*.

In March 2014, DOT received a report from outside counsel and a real estate consulting company that it hired to conduct a real estate tax analysis to determine whether DOT had overpaid real estate taxes for the parking garage. Exhibit 37. In the report, the consultants concluded that DOT had overpaid for tax years 2009-2012, and partially for 2013:

> (i) PILOT payments of $2,152,720.93 because the value of the garage was included in the value of the office building taxed to DOT, (ii) rents or parking fees of $1,051,710.03 because the 145 parking spaces included under the Lease were also charged to DOT under the Parking Contract, and (iii) taxes of $299,400.50 for the 145 parking spaces because under the income and expense reports the income from the 145 parking spaces was double counted under the Lease and the Parking Contract.

Id. at 3. The total of the three amounts is $3,503,831.46. *Id*.

In June 2014, the GSA contracting officer advised JBG by letter that JBG's allocation of 100% of taxes levied on lot 809 from the inception of the lease was improper. Exhibit 44 at 1. To correct the perceived overcharges, the contracting officer requested that JBG submit a statement of correction and proper accounting for all prior tax billings within sixty calendar days. *Id*. at 2.

JBG responded that same month, disputing GSA's contention that it had incorrectly calculated the real estate taxes owed under the lease. Exhibit 46. JBG stated that it was owed 100% of the real estate taxes on the leased premises, including parking facilities, and that real estate taxes were only to be excluded for those portions of the facility that did not directly benefit the Government. Because the Government had "leased" the entirety of the

parking garage, through the lease and the PMSA with DOT, JBG sought reimbursement of all of the real estate taxes. JBG also stated that it was not charging for real estate taxes under the PMSA. Exhibit 46 at 3.

In August 2014, GSA's contracting officer responded to JBG's letter, stated GSA's interpretation of section 2.6.1, and renewed its request that JBG submit a statement of correction and proper accounting for all prior year tax billings. Exhibit 47 at 2. The contracting officer also requested that JBG submit a proposal for repayment to the Government of the overbilled amount by September 15, 2014, and stated that failure to do so would cause the Government to take offsets against future rents until the appropriate amount is paid back. *Id*.

IV. JBG's Claims Under the Lease

In March 2015, JBG invoiced GSA for the second half of the 2015 tax year, April 1 to September 30, 2015, in the amount of $5,910,987.04. Exhibit 55 at 2. In September 2015, JBG invoiced GSA for the first half 2016 BID taxes for October 1, 2015, to March 1, 2016, in the amount of $49,847.12. *Id*. GSA did not pay either invoice by the due date of November 29, 2015. *Id*.

JBG filed a certified claim with GSA's contracting officer on January 15, 2016, seeking the amount of $5,910,987.04 for the second half 2015 real property taxes and $49,847.12 for the first half 2016 BID taxes, plus interest. On March 1, 2016, GSA issued administrative action no. 57 and paid JBG $5,454,658.84, for the second half 2015 tax year, a reduction of $456,328.20 from the amount JBG had sought. Exhibit 56 at 1.

JBG supplemented its claim on March 25, 2016, asserting its entitlement to reimbursement of 100% of the real estate taxes, BID taxes, and PILOT payments on lot 809 since the inception of the lease, and the amount of $456,328.20 withheld by GSA for the second half 2015 tax year plus interest. Exhibit 59 at 14. JBG contended that GSA's position, based upon one sentence of section 2.6.1, ignored the agreements between the parties since the lease was signed in 2002, including DOT's need to limit access to the parking garage for security reasons and GSA's reimbursement of property taxes in full since 2007. JBG also asserted that GSA's demand for repayment would be barred by the six-year statute of limitations.

On May 23, 2016, GSA issued administrative action no. 59 and paid JBG $5,849,618.22 for the first half 2016 tax year, a reduction of $234,860.89 from the amount JBG had sought. Exhibit 60. On September 7, 2016, GSA's contracting officer issued a decision denying JBG's claim and:

> mak[ing] a demand for a corrected detailed calculation for all prior year billings [2007-2015] to the Government, consistent with the terms of the Lease . . . . Lessor shall respond with its detailed accounting, no later than 30 calendar days after the date of issuance of this Decision . . . . Failure by Lessor to provide a proper accounting of the tax years at issue will result in withholds from the Service Agreement Rent of $3,506,456.03.

Exhibit 62 at 1. JBG timely appealed, and the Board docketed the appeal as CBCA 5506.

On April 20, 2017, JBG filed another certified claim with GSA, asserting that, if GSA's interpretation of the tax provision is upheld by the Board, JBG is entitled to a refund of (1) $66,751.60, the portion of any real estate tax refunds paid to GSA over the course of the lease, attributable to the parking garage, and (2) $1,661,419 for the Government's financing savings share attributable to the real estate tax payments for the parking garage. CBCA 5849, Exhibit 144 at 2-3.[10] The GSA contracting officer denied the claim, and JBG timely appealed on September 12, 2017. The Board docketed the new appeal as CBCA 5849 and consolidated it with CBCA 5506.

V. JBG's Claim Under the Parking Management Services Agreement

On February 9, 2017, JBG submitted a certified claim to DOT's contracting officer for the (1) $3,506,456.03 demanded by GSA, (2) $456,328 withheld by GSA from the second half of 2015 tax year, (3) $234,860.80 withheld by GSA for the first half of the 2016 tax year, (4) $222,669.42 withheld by GSA for the second half of the 2016 tax year, and (5) the sum certain amount of real estate taxes withheld by GSA for the remainder of the lease. CBCA 5715, Exhibit 7 at 4. JBG asserted that, if it is determined that GSA has overpaid for real estate taxes under the lease, JBG is entitled to receive those same amounts under the PMSA because of DOT's breach of the duty of good faith and fair dealing and superior knowledge in the negotiation of the PMSA. *Id*. at 3-4. The DOT contracting officer denied JBG's claim, stating that, pursuant to clause (k) in the PMSA, JBG should have accounted for the real estate taxes attributable to the parking garage, and, "[i]f JBG did not consider

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[10] GSA originally sought dismissal of counts five and eight of JBG's complaint in CBCA 5506 for lack of jurisdiction because JBG had not included these allegations in its original claim to the contracting officer. GSA's Motion for Partial Summary Relief and Partial Dismissal (GSA's Brief) at 7-8. GSA acknowledged that the submission of the claim that is now before the Board in CBCA 5849 renders this portion of its motion moot. Transcript at 6.

those taxes when determining its parking services costs that is JBG's error, not DOT's." CBCA 5715, Exhibit 8 at 2.

JBG timely appealed the DOT contracting officer's decision on April 24, 2017, and the Board docketed the appeal as CBCA 5715. On June 1, 2017, JBG filed a motion to consolidate CBCA 5715 with CBCA 5506. The Board held oral argument on the pending motions on December 4, 2017.

Discussion

I. The Appeals Are Properly Consolidated

JBG seeks consolidation of its appeals from the GSA and DOT contracting officers' decisions because the appeals present the same issue—whether JBG may receive reimbursement of all of the real estate taxes paid on the property, including those assessed on the parking garage. Appellant's Motion to Consolidate at 2. GSA and DOT oppose consolidation, arguing that the contracts are entirely separate and the appeals involve the decisions of two different contracting officers at two different agencies. GSA and DOT further assert that they will be prejudiced by consolidation because they will have to expend resources to be involved in the litigation of claims not related to their respective contracts.

Under Board Rule 2(d), "[w]hen cases involving common questions of law or fact are filed, the Board may: (1) [o]rder the cases consolidated; or (2) [m]ake such other orders concerning the proceedings as are needed to avoid unnecessary costs or delay." Rule 2(d) (48 CFR 6101.2(d) (2016)). The Board "has considerable discretion to consolidate cases for discovery and for trial." *In Re EMC Corp.*, 677 F.3d 1351, 1360 (Fed Cir. 2012); *see, e.g.*, *A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,202 (consolidating appeals involving two separate contracts).

Here, the Board finds that the appeals share common issues of fact and law. The appeals involve the same claim—JBG's entitlement to reimbursement of real estate taxes for the parking garage. As the tenant agency, DOT has a direct interest in the outcome of the litigation between GSA and JBG because it reimburses GSA for any real estate taxes paid to JBG for the property and, presumably, would receive any refund of overpayments. Given this position, the Board would think that DOT would favor consolidation. Instead, it appears that the parties would like the Board to consider their respective agreements in isolation. But the PMSA follows from the lease and DOT's position as the tenant agency under the lease must be considered when evaluating the parties' intentions with regard to the real estate tax and parking provisions of the lease.

The agencies' concerns about spending resources in litigation of a consolidated case are not sufficient to prevent consolidation. It appears from our review of the record in considering the motions for summary relief that the Board will need to consider the same evidence in both appeals. To "secure the just, informal, expeditious, and inexpensive resolution" of this case, the Board finds consolidation appropriate. Rule 1(c).

II. The Plain Language of the Lease Precludes Payment of Real Estate Taxes

GSA moves for partial summary relief, urging the Board to find as a matter of law that the plain language of the lease precludes payment of real estate taxes assessed on the parking structure, except for the 145 spaces included in the lease. GSA's Brief at 3.

The Board "must interpret the contract in a manner that gives meaning to all of its provisions and makes sense." *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). "[I]f the 'provisions are clear and unambiguous, they must be given their plain and ordinary meaning'" and the Board "may not resort to extrinsic evidence to interpret them." *Id*. (citations omitted). "An interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous." *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004).

The relevant lease provisions are clear. JBG was obligated to build a parking structure that contained the number of spaces required by District of Columbia zoning laws. JBG was to provide 145 of these spaces to the Government as part of the consideration under the lease and make the remaining spaces available for government employees to use on a daily or monthly basis. JBG was allowed to sell permits for the use of these spaces at prices not to exceed the amounts set forth in the lease. GSA and DOT reserved the right to impose further security restrictions on access to the garage. GSA would reimburse JBG for the real estate taxes assessed against the 145 spaces, but not for any other real estate taxes assessed on the parking garage.

JBG offers numerous reasons why the Board should reject GSA's interpretation. JBG argues that section 2.6.1 is ambiguous because the real estate tax provisions were amended with SLA no. 5 to provide that GSA would pay 100% of the real estate taxes on the leased premises, which, according to JBG, include the parking garage. Appellant's Opposition to GSA's Brief (Appellant's Response Brief) at 28-29. However, SLA no. 5 did not alter the provision at issue. "Where specific and general terms in a contract are in conflict, those which relate to a particular matter control over the more general language." *Hills Materials Co. v. Rice*, 982 F.2d 514, 517 (Fed. Cir. 1992) (citing *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 980 (Ct. Cl. 1965)). To the extent these provisions conflict, the

more specific provision about not paying taxes assessed against the parking garage controls the more general provision regarding the leased premises.

JBG argues that GSA construes the provision too narrowly and reads out other portions of the parties' agreement in the lease. With the execution of the PMSA, wherein DOT occupies the entire garage and sells the permits, JBG asserts it has been deprived of the ability to recoup the real estate tax costs. Appellant's Response Brief at 18. The Board rejects GSA's argument that the lease and PMSA are wholly separate contracts. The PMSA and the lease are to be construed together because the PMSA follows from and relies upon the parking and security provisions of the lease. However, the lease and the PMSA can be read in harmony and still give meaning to the disputed provision. It is the parties' failure or decision not to include the cost of the real estate taxes in the PMSA price, not the execution of the agreement itself, that limits JBG's recoupment of these taxes.

JBG also asserts that the Government's control of the entire parking garage through operation of the lease and the PMSA creates a conflict within the provision itself, which references site improvements that benefit the Government. Since the Government enjoys the benefit of the entire parking garage through the PMSA, JBG asserts that the rest of the provision cannot be read to limit the tax payments. Appellant's Response Brief at 26. This argument would be a good reason why the lease should have been amended following the determination that DOT wanted to restrict access to the garage. But the parties did not amend the lease, and the Board cannot interpret the lease as if they had.[11]

JBG seeks to introduce extrinsic evidence that the price in the PMSA was negotiated based upon the premise that GSA would pay the entirety of the real estate taxes under the lease. Appellant's Response Brief at 23-24. While this evidence is relevant to JBG's claim under the PMSA, the Board cannot resort to such evidence in interpreting the provision of the lease that is clear on its face. *McAbee Construction*, 97 F.3d at 1435.

JBG argues that GSA altered this provision through its issuance of numerous supplemental lease agreements with the payment of the real estate taxes. Appellant's Response Brief at 20-21. JBG focuses upon the language in the SLAs issued between 2007 and 2013, which stated the reimbursement was "in accordance with Paragraph 2.6 [tax

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[11] GSA asserts that JBG had "numerous opportunities" to amend the lease to address this issue, GSA's Brief at 5, but none of these opportunities arose after DOT decided that it wanted to restrict further access to the parking garage. Transcript at 40-41. Similarly, JBG was asked why the lease was not amended to address this issue; JBG responded that "GSA declined" to amend it. *Id*. at 65-66.

reimbursement provisions] of the lease." *See, e.g.*, Exhibit 35 at 1. We do not countenance GSA's broad assertion that SLAs are administrative actions only and do not modify the lease contract, an assertion belied by SLA no. 5, which on its face modified the lease. Exhibit 5; *Woodies Holdings, LLC v. United States*, 115 Fed. Cl. 204, 212 (2014). However, none of the SLAs issued for tax reimbursement payments changed the terms of the provision at issue. Again, we are left with the plain language of that provision.

JBG also urges the Board to consider GSA's payment of the full amount of the real estate taxes for eight years as a course of performance that should inform the Board's interpretation of the provision at issue. Appellant's Response Brief at 21. "Contemporaneous interpretation, during performance and before the contract becomes the subject of controversy, is of great, if not controlling weight, in determining the intended responsibilities." *John Jennings, Jr.*, GSBCA 7520, 87-2 BCA ¶ 19,824, at 100,303 (citations omitted). Pre-dispute conduct can be considered, however, only if a provision is ambiguous. *P.J. Dick, Inc. v. General Services Administration*, GSBCA 12151, 96-1 BCA ¶ 27,955, at 139,641; *Equitable Life Assurance Society of the United States*, GSBCA 8909, 90-3 BCA ¶ 23,130, at 116,130. Here, the provision is not ambiguous. Therefore, while the reasons for GSA's payment of the full amount of the property tax for eight years remain unexplained, that conduct cannot be relied upon to interpret this provision in a manner contrary to its plain language.[12]

We grant GSA's motion for partial summary relief, but leave for future proceedings the determination of the amounts owed by the parties for real estate tax assessments.

III. GSA's Claim Is Barred in Part by the Statute of Limitations

JBG also moves for summary relief, asserting that GSA's claim for repayment is barred by the statute of limitations because it first arose in 2007 with the first reimbursement of real estate taxes in excess of the amount permitted by the lease. Appellant's Motion for Summary Relief (Appellant's Brief) at 6.

Under the Contracts Disputes Act (CDA), "[e]ach claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within 6 years after accrual of the claim." 41 U.S.C. § 7103(a)(4) (2012); *see* 48 CFR 33.206(a) ("Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period."). These

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[12] The Board expects that GSA's conduct may be explained as part of further proceedings to determine any amounts owed to JBG under the PMSA.

time limits are equally applicable to claims by the Government against a contractor. *See Fluor Corp.*, ASBCA 57852, 14-1 BCA ¶ 35,472, at 173,930 (2013). "A party's failure to submit a claim within six years of accrual is an affirmative defense to the claim." *Thinkglobal, Inc. v. Department of Commerce,* CBCA 4410, 16-1 BCA ¶ 36,489, at 177,793. JBG pled statute of limitations as a defense to GSA's claim. Appellant's Amended Complaint at 22. JBG bears the burden of proving that GSA's claim is untimely. *Thinkglobal, Inc.*, 16-1 BCA at 177,793.

A claim accrues on "the date when all events, that fix the alleged liability on either the Government or the contractor and permit assertion of the claim, were known or should have been known." 48 CFR 33.201. "[O]nce a party is on notice that it has a potential claim, the limitations period begins to run." *Thinkglobal*, *Inc*., 16-1 BCA at 177,793 (quoting *Cardinal Maintenance Service, Inc.*, ASBCA 56885, 11-1 BCA ¶ 34,616, at 170,610 (2010)). "Claim accrual does not depend on the degree of detail provided. . . . It is enough that the [G]overnment knows, or has reason to know, that some costs have been incurred, even if the amount is not finalized or a fuller analysis will follow." *Raytheon Co., Space & Airborne Systems*, ASBCA 57801, et al., 13 BCA ¶ 35,319, at 173,377.

GSA's claim accrued in 2007, when it reimbursed JBG for 100% of the real estate taxes for the property, despite the lease provision that provided real estate tax reimbursements would not include parking spaces over the 145 spaces included in the lease. GSA should have known of the accrual of its claim based upon JBG's reimbursement requests, which included the property tax bills for the property, lot 802 and then lot 809. GSA knew that lot 809 included the parking garage. The amount of the bill matched the amount JBG sought as reimbursement. GSA knew or should have known that its reimbursement of the full amount of the property tax bills was in excess of the requirements of the plain language of this provision. Its claim arose when it reimbursed JBG the full amount despite this provision.

GSA argues that its claim is not barred because GSA first knew of the claim when it received the income reports that JBG submitted to the District of Columbia tax assessment office. Prior to this point, GSA asserts, it "had only the documents JBG had previously submitted, which did not include a breakdown of the components of the tax assessments or any specific language that might alert GSA to the possibility that the requests included the entire parking garage." GSA's Opposition To Appellant's Motion for Summary Relief (GSA's Response Brief) at 3-4. As the Board has already found, GSA's contention is belied by JBG's submissions, which included the real estate tax bill for lot 809 and GSA's acknowledgment that this lot included the parking garage. Moreover, the income reports do not show how these reports could have informed GSA of its claim because they do not include the amounts of the tax assessments. While these reports may have informed GSA's

determination as to how much JBG was overcharging it for the real estate tax, the fact that JBG sought and GSA paid 100% of the taxes owing on the property is what gives rise to GSA's claim. The evidence of this overpayment is the real estate bills themselves.

GSA asserts, in the alternative, that its claim survives under the continuing claims doctrine. GSA's Response Brief at 6. We agree in part. This doctrine applies when a claim is "inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages." *Brown Park Estates–Fairfield Development Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997). If "compensation [is] due and payable periodically, a claim [arises] each time the government allegedly [fails] to pay the proper amount." *Id*. (citing *Burich v. United States*, 366 F.2d 984, 986 (Ct. Cl. 1966)). Contrary to the cases cited by JBG, GSA's claim runs anew from each of its overpayments. *See Friedman v. United States*, 310 F.2d 381, 385 (Ct. Cl. 1962); *Fluor Corp*., 14-1 BCA at 173,930. Thus, GSA's claim for amounts paid since September 2010 survives the statute of limitations.

Decision

JBG's motion for consolidation is **GRANTED**. GSA's motion for partial summary relief is **GRANTED**. JBG's motion for summary relief is **GRANTED-IN-PART**. The Board will issue a separate order on further proceedings in these consolidated appeals.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge