UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: September 20, 2011

CBCA 2075

KD1 DEVELOPMENT, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Douglas C. LaSota of Dickie, McCamey & Chilcote, P.C., Pittsburgh, PA, counsel for Appellant.

Lesley M. Busch, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **GILMORE**, **VERGILIO**, and **GOODMAN**.

VERGILIO, Board Judge.

On July 8, 2010 (incorrectly stated in earlier decision), the Board received from KD1 Development, Inc. (lessor) a notice of appeal disputing a contracting officer's decision concerning two of its leases, GS-03B-70059 and GS-03B-08368, with the General Services Administration (GSA or agency). The dispute focuses upon the total rental price under the first lease. The agency contends that the rental rate includes operating costs with a base rate that is adjusted annually after year one. The lessor maintains that it is entitled to the sum of the rental rate and the operating costs rate (annually adjusted after year one). In resolving cross-motions for summary relief, the Board held that the language of the lease supports the agency's interpretation, not that of the lessor, and that the agency could offset amounts due under the first lease against amounts payable under the second lease. *KD1 Development, Inc. v. General Services Administration*, CBCA 2075, 11-1 BCA ¶ 34,744. Factual disputes concerning the intent of the parties and ratification, which the Board could not resolve in the context of those motions for summary relief, are now resolved with a developed record.

The Board concludes that factually and legally, the written lease must be enforced. The record fails to demonstrate that the intent of the parties was to compensate the lessor for operating costs in addition to the rental rate. The lessor has not demonstrated persuasively its interpretation at the time of the negotiations and award, much less that the agency understood that it would pay the lessor the sum of the rental rate and operating costs rate. The support for the lessor's interpretation is testimony and affidavits of its president, without corroborating, contemporaneous documentation. The agency prepared contemporaneous documentation (including a lease negotiation memorandum and a certification of funds) that supports the interpretation consistent with the plain language of the lease. That is, the total lease rate and annual rent include operating costs, and the agreed upon operating costs base is to be used for pricing annual adjustments.

The actions of those within the agency in paying the sum of the rates in excess of seven years do not demonstrate an intent at the time of the agreement or constitute ratification of payments in contravention of the terms of the lease. Those involved in the award did not participate in the payments. Those making payments did not understand or intend to alter the terms of the lease. The passage of time and payments made do not make the lease audit-proof.

However, statute dictates that each claim by the Government against a contractor relating to a contract shall be submitted within six years after the accrual of the claim. Here, the agency seeks repayment of the duplicative operating costs portion of each monthly payment. Such a potential claim accrued with each payment. Therefore, the agency is limited in recovery to those claims accruing within the six-year period, beginning when the agency provided the lessor with notice of its claim. The agency may recover $216,762, which represents the payments for the double operating costs payments made within those six years. Therefore, the Board grants the appeal to the extent that the lessor disputes the agency's entitlement to recover for earlier overpayments.

Findings of Fact

Solicitation for the First Lease

1. In addition to providing instructions on how to submit an offer to the agency for office, lab, and related space to be used by the Department of Labor, Mine Safety and Health Administration, the solicitation states: "GSA will negotiate rental price for the initial

term, any renewal periods, and any other aspect of the offer as deemed necessary." Exhibit 21 at 19 (¶¶ 1.8, 1.9) (all exhibits are in the appeal file).

2. A Price Evaluation (Present Value) clause in the solicitation specifies that the total price per rentable square foot is to include the operating expense:

> (a) If annual CPI [Consumer Price Index] adjustments in operating expenses are included, Offerors are required to submit their offers with the total "gross" annual price per rentable square foot and a breakout of the "base" price per rentable square foot for services and utilities (operating expenses) to be provided by the Lessor. The "gross" price shall include the "base" price.
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> . . . .
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> (c) If the offer includes annual adjustments in operating expenses, the base price per occupiable square foot from which adjustments are made will be the base price for the term of the lease, including any option period.

Exhibit 21 at 19-20 (¶ 1.10). Regarding award, the solicitation specifies:

> After conclusion of negotiations, the Contracting Officer will require the Offeror selected for award to execute the proposed lease prepared by GSA which reflects the proposed agreement of the parties.
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> . . . .
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> The acceptance of the offer and award of the lease by the Government occurs upon notification of unconditional acceptance of the offer, execution of the lease by the Lessor, execution of the lease by the GSA Contracting Officer, and mailing or delivery of the fully executed lease to the successful offeror.

Exhibit 21 at 20 (¶ 1.11, Award).

3. The solicitation contains a specific clause on operating costs:

> **OPERATING COSTS, GSAR 552.270-33 (JUN 1985)**

(a) Beginning with the second year of the lease and each year after, the Government shall pay adjusted rent for changes in costs for cleaning services, supplies, materials, maintenance, trash removal, landscaping, water, sewer charges, heating, electricity, and certain administrative expenses attributable to occupancy. Applicable costs listed on GSA Form 1217, Lessor's Annual Cost Statement, when negotiated and agreed upon, will be used to determine the base rate for operating costs adjustment.

(b) The amount of adjustment will be determined by multiplying the base rate by the percent of change in the Cost of Living Index. . . . Payment will be made with the monthly installment of fixed rent. Rental adjustments will be effective on the anniversary date of the lease. Payment of the adjusted rental rate will become due on the first workday of the second month following the publication of the Cost of Living Index for the month prior to the lease commencement date.

. . . .

(e) The offer must clearly state whether the rental is firm throughout the term of the lease or if it is subject to annual adjustment of the operating costs as indicated above. If operating costs will be subject to adjustment, it should be specified on the GSA Form 1364, Proposal to Lease Space, contained elsewhere in this solicitation.

Exhibit 21 at 24 (¶ 3.5). A separate clause also addresses the operating costs base: "The base for the operating costs adjustment will be established during negotiations based upon occupiable square feet." Exhibit 21 at 24 (¶ 3.6).

Offers, Negotiations, and Award

4. In its initial proposal, the lessor indicated on the agency's form 1364 a total rate per square foot and total amount for the offered space; for the lease term and for alternates, the lessor quoted a price per square foot. The lessor also provided its operating costs on a separate form (form 1217). Exhibit 32 at 37-39. Discussions occurred regarding the lease price, the space, and the operating costs, as the agency sought a reconfigured space, different building construction, and more precision in the identified operating costs. Transcript at 27-28. In its second proposal, on form 1364, the lessor stated the occupiable square footage,

price per square foot, and the total amount per year for the lease term and for alternates. The lessor also revised its operating costs as indicated on a completed form 1217. Exhibit 32 at 27-30. The parties agreed upon the stated annual operating costs base of $36,100 for the 9100 net usable (occupiable) square feet of space, from which one derives a base rate of $3.97 per square foot. Transcript at 24. In its third revised offer, the lessor stated the occupiable square footage, price per square foot, and total amount per year for the lease term and for alternates. The submission references the earlier submission for unit costs or operating costs to which the parties had agreed. Exhibit 32 at 10-11; Transcript at 27-30. In its ultimate best and final offer, on the appropriate form, the lessor stated the occupiable square footage (9100 square feet), price per square foot ($17.47), and the total amount per year for the lease term ($159,000). Exhibit 1 at 1-2.

5. As stated in a letter dated June 16, 1997, the contracting officer accepted for award the lessor's final offer. Exhibit 21 at 98. A cover letter dated September 4, 1997, indicates that the contracting officer therewith provided a fully executed copy of the lease. Exhibit 21 at 160. Pursuant to the lease, the lessor became obligated to construct a building on a given site; upon acceptance of the leased premises by the Government the lease term would commence and continue for ten consecutive calendar years. Exhibit 2 at 4 (¶ 13). The lease contains a Disputes clause (Oct 1995) (48 CFR 52-233-1). Exhibit 2 at 47.

6. The lease contains provisions not found in the solicitation, here quoted in pertinent part:

> 3. The Government shall pay the Lessor annual rent of $ (SEE LEASE RIDER PARA[G]RAPH 13) at the rate of $ SEE LEASE RIDER PARAGRAPH 13) per month in arrears. Rent for a lesser period shall be prorated.
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> 6. The Lessor shall furnish to the Government as part of the rental consideration, the following:
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> > A. All services, maintenance, repairs, utilities, alterations and other considerations as set forth in the lease.
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> > B. The provisions of SFO [solicitation for offers] #MPA96182 are to be provided without modification.

> 11. For purposes of determining the base rate for future adjustments to the operating cost, the Government agrees that the base rate quoted on the "Lessor's Annual Cost Statement" (GSA Form 1217), dated **March 5, 1997**, at $ **3.97** per occupiable square foot, is acceptable.
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> 13. Upon acceptance of the leased premises by the Government, the same shall be measured and rental shall be paid, in accordance with Paragraph 3.7 of Solicitation MPA96182, "Occupiable Space" and Paragraph 22 of the General Clauses, GSA Form 3517, "Measurement for Payment" at the rate of $17.47 per occupiable square foot per year.

Exhibit 2 at 1-4 (¶¶ 3, 6, 11, 13). The referenced paragraph 3.7 defines occupiable space and specifies how such space is determined. Exhibit 2 at 7.

7. Throughout the submission and negotiation process, the lessor's president states that he did not include operating costs as part of the per square foot or total rental rate. Transcript at 15-16. The testimony does not indicate that he expressly discussed this aspect of pricing and payment with the agency negotiators or that anyone for the agency understood that the total price offered was other than a total inclusive of operating costs. Transcript at 29-30, 33-34. The lessor's president acknowledges that the contracting officer never told him that the rental and operating costs rates would be added for a total rental rate. Transcript at 48. In response to whether he was told by somebody else that the rates would be added together, he testified that, as to the costs in the lease, it "was interpreted to me by [the agency's negotiator] that these were separate costs when I asked her about it." Transcript at 48. In an affidavit, the president avers that in finalizing the terms of the lease:

> It was pointed out to me that the operating costs and the base rent as well as the Lease time period were addressed in the Lease rider. It was clear to me and them that the operating costs were $3.97/sq. ft. and the base rent was $17.47/sq. ft. which was set for the 10 year term.
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> 16. I subsequently executed the Lease and the Payments which were set up and made by the GSA as [the agency negotiator] had described to me prior to executing the Lease. Specifically, the base rent was $17.47/sq. ft. for a 10 year term. The operating costs that were subject to cost escalation were initially set at $3.97/sq. ft as provided for in Paragraph 11 to the rider of the Lease.
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> 17. The GSA paid its rent consistent with this understanding from the date of the occupancy in August 1998 through February 2006.

Exhibit 56 at 3 (¶¶ 15-17).

8. The lessor offers no contemporaneous documentation that buttresses its position regarding its interpretation or the agency's interpretation during the negotiation process.

9. In the course of this proceeding, the initial contracting officer (no longer with the agency) has indicated that she has no memory of the particulars of the negotiations; the realty specialist cannot be found. Board Memorandum of Conference (Dec. 16, 2010). However, contemporaneous documentation prepared during the negotiation process and finalization of the lease indicate that the agency understood that the first year of the lease would be priced at the lease rate as inclusive of operating costs. A price negotiation memorandum, dated May 5, 1997, and signed by both the realty specialist and contracting officer (the two agency individuals involved in the negotiation and award of the contract), details the rounds of offers, specifies the per square foot rate and base operating costs rate, and concludes with the cost per year and for the ten-year term of the lease. Exhibit 21 at 49, 57-58. The conclusion of the price negotiation memorandum states:

> Based on the above, it is determined to be in the best interest of the Government to award a lease for 9,100 sf to Mr. Kevin Doody/Doody Engineering, for a 10 year firm term lease. Rate is $17.47 per square foot or $158,977.00 per year. Aggregate cost of this fully serviced, 10 year lease, will be $1,589,770.00.

Exhibit 21 at 58. Prior to the award of the lease, these same two individuals had certified to the availability of funds for the first year in the amount of $158,977. Exhibit 21 at 112. There are other contemporaneous references to the $17.47 rate, and the annual rental and aggregate rates. Exhibits 28, 31.

10. Upon review of the record as a whole, including the testimony and affidavit of the lessor's president, the Board finds that the agency's understanding and intent at the time of award was that the base rental rate of $17.47 per square foot was inclusive of operating costs, and that the operating costs base of $3.97 would not be an additional component of payment. If the lessor held a contrary interpretation, such was not made clear to the agency during the negotiations nor at the time the lease was signed.

<u>Payments</u>

11. Acceptance of the premises and the ten-year lease term began on August 11, 1998, to continue through August 10, 2008. Exhibit 21 at 59. The agency made payments

for each month of occupancy. As explained in more detail below, from the beginning of rental payments through a check with a payment date of March 1, 2006, the agency paid the lessor the sum of the rental rate and the operating costs base with annual adjustments to the operating costs. These payments were supported by "lease digest actions" prepared internally by the agency; signatures are not by the contracting officer or negotiator involved in the negotiation and execution of the lease. *E.g.*, Exhibits 33-42.

12. In September 1998, the agency began payments to the lessor. An agency-generated lease digest action document details financial information:

annual rent: $195,104.00
operating rent: $36,127.00
base rent: $158,977.00
monthly rent: $16,258.67

The document states the total rentable square footage as 10,465; this figure was used to calculate the stated rate per square foot of $18.64. However, the operating rent of $36,127 corresponds to the 9100 square feet and rate of $3.97 per square foot found in the contract. The document, dated September 18, 1998, is signed by a contracting officer other than the contracting officer who negotiated and entered into the lease. Exhibit 21 at 59. In subsequent months, the Government made payments consistent with this approach, treating the base rent of $158,977 per year, and the annual operating rent of $36,127 subject to escalation, as separate items comprising the rental payment. Exhibit 21 at 59-66. The testimony elicited during the hearing indicates that the agency officials preparing and signing the payment-related materials did not intend to alter the terms and conditions of the lease.

13. With a letter dated March 16, 2006, to the lessor, a contracting officer (not the one involved in lease negotiations and award) provided an unsigned and undated supplemental lease agreement, with the explanation that it was to clarify the annual rent, among various items. Exhibit 6. The proposed amendment contains an effective date of August 11, 1998, and specifies an annual rent of $158,977 at the rate of $13,248.08 per month in arrears. Exhibit 7.

14. By letter dated April 5, 2006 the agency sought repayment of $272,969.26, because, "Our records indicate an overpayment has been made to your company erroneously." Exhibit 8. The lessor responded to the agency by letter dated April 26, 2006, explaining that no overpayment had been made:

> We entered into the lease agreement with the understanding that the operating costs were to be paid in addition to the base rent of the building. We recall

> originally (prior to lease signing) having discussions with the contracting officer, and it was our understanding and theirs (GSA), that the second sentence of paragraph 11 in the rider to lease GS-03B-7005[9] illustrated that the figure $3.97 for operating costs was in addition to the base rate. Specifically: "This figure represents the government's pro-rata share of operating costs". Subsequently, the lease was signed and executed and the payments were set-up and made, as all parties understood it.

Exhibit 9.

15. The lessor did not resolve its dispute during negotiations of the subsequent lease and thereafter. However, after March 2006, beginning with an April 3 payment, the agency's payments no longer treated the operating costs base as an additional item of payment; that is, payments were made consistent with the total rental rate (as inclusive of operating costs) plus the escalation to the operating costs base. Exhibit 33.

16. Consistent with the contracting officer's decision dated May 19, 2010, the agency has asserted a Government claim to recover $272,969.26 for overpayments made by the agency covering the period from August 11, 1998, through February 28, 2006. The lessor has asserted its own claim disputing the agency's interpretation of the lease and seeking to recover what it deems to be the unpaid operating costs for the remainder of the lease; the contracting officer denied the lessor's claim in the decision dated May 19, 2010. Exhibit 16.

Discussion

As explained in resolving the motions for summary relief, the plain language of the solicitation (Finding 2) and lease (Finding 6) supports the interpretation of the agency, not that of the lessor. No ambiguity exists in the written documents. The lease rate is a total (or gross) rate inclusive of operating costs. The operating costs base rate is identified to be used for adjustments after the first year of occupancy. However, the Board must determine if the lease language accurately reflects the intent of the parties at the time the contract was signed. The payments by the agency raise a factual question regarding the intent of the parties. "Is our reading of the plain meaning of this provision consistent with the intent of the parties at the time the contracts were executed, since contract interpretation is fundamentally a question of the contracting parties' intent?" *Stockton East Water District v. United States*, 583 F.3d 1344, 1362 (Fed. Cir. 2009); *Cities of Burbank, Glendale and Pasadena v. Bodman*, 464 F.3d 1280, 1284 (Fed. Cir. 2006).

Factually, the lessor has not demonstrated that the intent of both parties was to compensate the lessor the sum of the total rental rate and the operating costs base. Even if the lessor's president priced his offer and understood his submissions and the contract as entitling him to the operating costs base in addition to the total rental rate, such an interpretation in inconsistent with the language of the solicitation and contract. There is inadequate support to conclude that the agency shared that interpretation. The contemporaneous materials reveal that the agency interpreted the contract then as it does now.

The actions of subsequent contracting officers and other agency personnel in making and approving payments were not made with the understanding or intent of altering the terms and conditions of the lease. Accordingly, the lessor has not demonstrated that ratification occurred. *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339, 1346-47 (Fed. Cir. 2007) ("Ratification requires knowledge of material facts involving the unauthorized act and approval of the activity by one with authority.").

In conclusion, the Board determines that the lease rate of $17.47 per occupiable square foot per year is inclusive of operating costs; the lessor is entitled to payment of rental based upon that rate, with annual adjustments after the first year to the operating costs base of $3.97 per occupiable square foot per year. The agency's, not the lessor's, interpretation of the lease prevails.

<u>Limits of Recovery</u>

Statute dictates that each claim by the Government against a contractor relating to a contract shall be submitted within six years after the accrual of the claim. 41 U.S.C. § 605(a) (2006) (now codified at 41 U.S.C. § 7103(a)(4)). Because the statute lacks a definition of "claim," one looks to language of implementing regulations, the contract, and facts. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1576 (Fed. Cir. 1995). Here, the agency seeks repayment of the duplicative operating costs portion of each monthly payment. As a party to the lease, the agency should have known the plain meaning of its lease. Such a potential claim accrued with each payment. 48 CFR 33.201 (1997). Therefore, the agency is limited in recovery to those claims accruing within the six-year period, beginning when the agency provided the lessor with notice of its claim. The contracting officer's letter of March 16, 2006, provides the lessor with notice of the agency's interpretation of the contract to be applied from the occupany; the agency's payments subsequent to that letter reflect the agency's interpretation of the contract. Findings 13, 15. The letter of April 5, 2006, expressly seeks a sum certain, $272,969.26. Finding 14. Such agency actions constitute a claim pursuant to the Disputes clause of the lease, Finding 5. A claim is a written demand or assertion by one of the contracting parties, seeking as a matter of right, the payment of money in a sum certain, the interpretation of the contract, or other relief arising under or relating to the contract.

Because of the six-year limitation, the agency may recover $216,762, which represents the payments for the double operating costs payments made within those six years. Therefore, the Board grants the appeal to the extent that the lessor disputes the agency's entitlement to recover for earlier overpayments.

Decision

The Board **GRANTS IN PART** the appeal. The agency is entitled to recover $216,762, which represents duplicative operating costs paid for six years under the lease; but the agency may not recover duplicative operating costs for earlier accruing claims. The lessor does not prevail on its interpretation or on its claim to receive additional payments for the final months of the lease.

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JOSEPH A. VERGILIO
Board Judge

We concur:

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BERYL S. GILMORE
Board Judge

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ALLAN H. GOODMAN
Board Judge