UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS-MOTIONS FOR SUMMARY RELIEF DENIED: June 30, 2016

CBCA 4734

BELLE ISLE INVESTMENT COMPANY LIMITED PARTNERSHIP,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Diana Parks Curran of Curran Legal Services Group, Inc., Johns Creek, GA, counsel for Appellant.

Elyssa Tanenbaum, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SOMERS**, and **VERGILIO.**

SOMERS, Board Judge.

On September 18, 1998, the General Services Administration (GSA) and Belle Isle Investment Company Limited Partnership (Belle Isle, lessor) entered into a lease agreement for a property located in Columbus, Ohio. Belle Isle appeals from a contracting officer's decision denying its claim for additional payments under the lease. Specifically, Belle Isle asserts that it is entitled to receive an operating costs adjustment for each year of a three-year lease extension, in addition to the base annual rent. GSA contends that when the parties agreed to extend the lease for three additional years, they increased the base rent for the lease extension to account for the cumulative operating cost adjustments that had been made up to that point in time, such that the operating costs adjustment would not occur until the second year of the lease extension. Both parties have moved for summary relief. For the

reasons set forth below, we find that genuine issues of material fact preclude the granting of summary relief, and, accordingly, deny both motions for summary relief.[1] The facts are derived from documents and uncontested assertions of the parties.

Statement of Facts

I. The Initial Lease Agreement

On September 18, 1998, GSA and Belle Isle entered into a lease for a specified amount of office, storage, and parking spaces. The original lease required GSA to pay the lessor "annual rent of $379,810.40 at the rate of $31,650.87 per month at a rate of $17.20 per net rentable square foot (rsf), in arrears."

Attachment A to the standard form 2 of the lease, paragraph 10, provided that:

> 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 are listed on GSA Form 1217. The agreed upon amount determined as the base rate for operating costs adjustment is $3.94 per net rentable square foot.
>
> . . . .
>
> (c) If the Government exercises an option to extend the lease term at the same rate as that of the original term, the option price will be based on the adjustment during the original term. Annual adjustments will continue.
>
> (d) 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.[2]

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[1] We also deny appellant's motion to strike respondent's reply to appellant's response to respondent's motion for summary relief and declaratory relief.

[2] Belle Isle's proposal, which included GSA Form 1364, indicated that the operating costs would be subject to adjustment.

Paragraph 3.7 of the solicitation for offers, entitled "Operating Costs Base (JUN 1994)," states:

> The base for the operating costs adjustment will be established during negotiations based upon occupiable square feet.

The lease set an operating cost base for services of $87,003.08 or $3.94 per net rentable square foot (operating cost base). The operating cost base of $87,003.08 was included within the annual rent of $379,810.40 in the first year.[3]

The lease expressly noted that the agreement could only be amended by written instrument executed between the parties. Attachment A to the lease provides:

> It is agreed by all parties hereto that all terms and conditions of this lease as expressly contained herein represent the total obligations of the Lessor and the Government. Any agreements, written or oral, between the Lessor and the Government subsequent to the execution of this lease are not applicable or binding. This agreement may be amended only by written instrument executed by the Lessor and the Government.

In addition, GSA Form 3517, which is included in the lease, provides at General Clause 8, entitled "552.270-38 - INTEGRATED AGREEMENT (AUG 1992)," that:

> This Lease, upon execution, contains the entire agreement of the parties and no prior written or oral agreement, express or implied, shall be admissible to contradict the provisions of the Lease.

The parties amended the lease by supplemental lease agreement 1, to set the lease term from April 1, 1999, to March 31, 2014 (original term).

Every year from 2000 until 2012, GSA adjusted the operating cost base to address changes in the consumer price index (CPI). GSA computed each year's adjustment by comparing the initial CPI (meaning, the CPI of the month before lease execution), the prior year CPI, and the current CPI. GSA next computed that year's CPI adjustment by comparing the percentage change from the current CPI to the prior year CPI. GSA next multiplied the operating cost base by the change in percentage to determine that year's adjustment. The

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[3] Thus, subtracting the operating cost base from the total annual rent results in a "base rent," meaning rent without operating costs, of $292,807.32.

lessor received that year's adjustment plus all prior years' adjustments. GSA's forms referred to the original annual rent plus the adjustments to date as the "Total Annual Rent."

GSA paid the lessor a total amount of adjusted rent of $3051.16 for the final month of the lease year ending on March 31, 2014.

II. The Lease Extension

The parties began negotiations to renew the lease in November 2012. When it did not appear that the negotiations would be successful, GSA issued a request for lease proposals in August 2013. Belle Isle submitted the only proposal in response.

In fact, Belle Isle submitted several proposals. Of Belle Isle's proposals, one, dated March 31, 2014, proposed a fifteen-year lease, with a total annual rent of $474,763.[4] Later, on June 26, 2014, Belle Isle proposed a three-year extension of the lease agreement, which increased the total annual rent to $529,968 ($24/rsf). By email message dated August 6, 2014, GSA rejected the proposals because the tenant "feels that $19.50 is too high for a long-term deal and won't accept the latest offer" and the tenant also "feels that $24/rsf on a lease extension is too high and won't accept that offer." Belle Isle's representative submitted more proposals to GSA, which GSA did not accept.

Finally, with the tenant still occupying space after the lease period had expired, on September 10, 2014, the parties held a teleconference. The parties dispute what occurred during that teleconference. In a declaration dated December 28, 2015, the contracting officer responsible for the negotiation of the lease amendment summarized the conversation at the meeting. She declared:

> On September 10, 2014, I attended a meeting with other GSA employees and Belle Isle representatives. During that meeting, the parties compared $18.86 (rent during the original term plus original term adjustments to the base operating cost) with "annual rental" rates for the extension. During that

[4] The March 31, 2014, proposal included a chart which indicated that the CPI expense adjustment for the succeeding lease would begin at 0, to be adjusted starting in year 2. The proposal noted that "[a]ctual operating expenses ($139,270) are greater than the Current Lease Form 1217 Operating Expense Base ($87,003) plus the CPI Expense Adjustment ($37,850) and more than half ($0.66/RSF) of the increase in the Total Annual Rent is recapture of unreimbursed operating expense increases."

> meeting the parties agreed that "annual rent" would be $22/RSF until September 10, 2014, and $24.00/RSF for the remainder of the Lease extension. At all times during the negotiation, I understood "annual rent" to mean a rental amount inclusive of the original term adjustments. GSA would not have executed LA3 [lease amendment 3] if it knew the agreed upon "annual rent" did not include original term adjustments.

The other contracting officer, responsible for administering the lease, testified through declaration as follows:

> On September 10, 2014, I attended a teleconference with other GSA employees and Belle Isle representatives. During that meeting, the parties discussed the lease extension. The parties discussed potential annual rental rates. I explained that the "annual rent" included the original term adjustments to the base operating cost. Specifically, I stated, "this is what your current operating cost is and we will make a new rent inclusive of this." During this meeting the parties agreed that "annual rent" would be $22.00/RSF until September 30, 2014, and $24.00/RSF for the remainder of the lease extension.

By contrast, Mr. Donald S. McCarty, who had been identified as the designated representative of Belle Isle pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, testified in a deposition about the same September 10, 2014, meeting:

> A: . . . My recollection is that I did not make a proposal. The conversation led to an agreement that the lease would be amended, that the rent would be $22 per square foot for the first six months through – from the expiration date, which was March 31, April through September 2014. And at that point it would increase to $24 per month, and it would be a three-year lease, 18 months firm, and that the operating expense and real estate tax basis would not be changed.
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> Q: Okay. Was there any discussion about what would happen to the escalations that had already occurred.
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> A. No. The understanding was that the operating expense base and the real estate tax base would not be changed. And if those things don't get changed, I mean – the lease, nothing else in the lease is changed, then you arrive at what I'm claiming in this controversy.
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> . . . .

> Q: Okay. So I understand everything that you just said. I just want the record to be clear if you did – if you answered my question about whether or not the operating costs escalations were – that already occurred were discussed.
>
> A: They were not discussed.

In any event, both parties agree that as a result of the September 10 meeting, GSA and Belle Isle agreed to a three-year extension of the lease, with an annual rent of $22.00/RSF until September 30, 2014, and $24.00/RSF for the remainder of the lease extension.

The GSA contracting officer sent a draft lease amendment to Belle Isle by email on September 14, 2014. The contracting officer's transmittal email message states in part: "Please see attached draft LA no. 3 for extension of GSA Lease No. GS-05B-16252 at the term and rates agreed to during our conference call on Wednesday, Sept. 10. Please let me know if this looks correct and I will forward a final version for execution."

The draft lease amendment stated:

> WHEREAS, the parties hereto desire to amend the above Lease;
>
> NOW THEREFORE, the parties for the considerations hereinafter mentioned covenant and agree that the said Lease is amended, effective 04/01/2014, as follows:
>
> Lease Agreement No. 3 is issued to extend the current lease term three (3) - years; eighteen (18) months firm term and to increase the base rent.
>
> Thereafter, Paragraphs 2, 3, and 4 of Standard Form 2 of Lease GS-05B-16252, are deleted in their entirety and substituted in lieu thereof,[5]
>
> 2. TO HAVE AND TO HOLD the said premises with their appurtenances for the term beginning on April 01, 1999, through March 31, 2017 subject to termination rights as may be hereinafter set forth.

[5] The deleted paragraphs 2, 3, and 4, which generally set forth the lease term, annual payment, and termination rights, do not provide anything relevant to the current issue.

3. The Government shall pay the Lessor annual rent, in arrears, according to the following schedule:

Term	Annual Rate	Monthly Rate	Rate/rsf
04/01/2014-09//30/2014	$485,804.00	$40,483.67	$22.00
10/01/2014 - 03/31/2017	$529,968.00	$44,164.00	$24.00

This Lease Amendment contains two (2) pages.

All other terms and conditions of the lease shall remain in force and effect.

The lessor signed the amendment on September 15, 2014, and GSA signed on September 29, 2014.

On October 15, 2014, after the parties executed the lease amendment, GSA notified Belle Isle of the amount of rent being processed by GSA as payment due. Belle Isle's representative, Mr. McCarty, immediately disputed the amount. On October 16, 2014, Mr. McCarty emailed the contracting officer, stating in part: "Our recent exchange of emails makes it clear that your recollection and understanding of the agreement reached in the September 10 teleconference and my recollection and understanding of the agreement reached in the September 10 teleconference are different. Nevertheless, it is much more important that the terms of the Lease Amendment No. 3 and Lease No. GS-05B-16252 be applied."

In its statement of uncontested facts, GSA asserts that it would not have executed LA3 if it knew that Belle Isle did not intend to include the previous cumulative operating costs adjustments in the new base annual rent.

Discussion

I. Standard of Review

Summary relief is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial burden of informing the Board of the basis for its motion and identifying those portions of the pleadings, depositions and affidavits, admissions, and answers to interrogatories, if any, which it believes demonstrate

the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If both parties move for summary relief, each party's motion will be evaluated on its own merits and all reasonable inferences will be resolved against the party whose motion is under consideration. *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, slip op. at 11 (May 26, 2016); *Fortis Networks, Inc. v. Department of the Interior*, CBCA 4176, 15-1 BCA ¶ 36,066.

The parties' motions require the Board to decide a contract interpretation issue. Contract interpretation is a legal question that is often amenable to summary disposition, *JAVIS Automation & Engineering, Inc. v. Department of the Interior*, CBCA 938, 09-2 BCA ¶ 34,309, at 169,478 (citing *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002)), although "the question of interpretation of the language, the conduct, and the intent of the parties, *i.e.*, the question of what is the meaning that should be given by a court or board to the words of a contract, may sometimes involve questions of material fact and not present a pure question of law." *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 16-1 BCA ¶ 36,333, at 177,129 (quoting *DJM/Reza, A Joint Venture*, VABCA 6917, et al., 05-1 BCA ¶ 32,943, at 163,208).

II. Plain Language of the Contract

Belle Isle claims that GSA breached the lease by failing to pay "adjusted rent." Belle Isle posits that the "adjusted rent" must include the annual rent plus the adjusted operating costs for each month of the extended lease. GSA disagrees, alleging that the parties had increased the base annual rent to account for the cumulative operating costs and that a new base rate for operating costs was established.

As we have noted previously, "[t]he primary objective of contract interpretation is to determine the intent of the parties at the time an agreement is created." *Systems Management*, 16-1 BCA ¶ 36,333, at 177,129 (quoting *600 Second Street Holdings, LLC v. Securities & Exchange Commission*, CBCA 3228, 13 BCA ¶ 35,396, at 173,666).

Belle Isle, focusing on the absence of terms in the lease, asserts that:

> [LA3] is for the purpose of extending the Lease term, and does evidence agreement of the parties to extend the term, and contains no language that states that annual adjustments to rent during the term will be disregarded or continued. . . . Similarly, no language in the Lease suggests that if the parties extend the term, the operable lease provisions implementing the CPI adjustments to the operating costs base of $3.94 set in the Lease will cease, or the calculation method be altered.

Appellant's Motion for Summary Relief at 18.

GSA has a different take on the language of the lease agreement. It contends that the threshold question to be resolved is whether the language of LA3, specifically the words "annual rent," is ambiguous. If so, GSA argues that we should look to the dictionary, the parties' course of dealing, or other extrinsic evidence such as Belle Isle's multiple proposals for the subsequent lease term to determine what the parties meant when they agreed to extend the current term and "increase the base rent."

We find that the plain language of the lease may be susceptible to more than one meaning. The original lease does not contemplate an increase in the annual rent. Instead, attachment A, paragraph 10 calls for the rent to be "adjusted" to cover the increases in certain operating costs, beginning with the second year of the lease. In addition, section 3.6 of the lease provides that "if the Government exercises an option to extend the lease term at the same rate as that of the original term, the option price will be based on the adjustment during the original term. Annual adjustments will continue." Although the parties did not address whether the Government's actions could be construed as exercising an option pursuant to this section, we may have to determine what the parties intended by the phrase "at the same rate as that of the original term." For example, it is possible that the "same rate" refers to the base annual rent. If so, GSA's argument that the option price for the lease extension must include the cumulative operating costs adjustments in the increased base rent makes sense. But in light of the paucity of the record on this point, we cannot reach that conclusion.

III. Interpreting the Lease

Having identified a potential ambiguity, we may be called upon to look to extrinsic evidence to aid in the interpretation of the lease. *Metropolitan Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006). "If a contract provision appears ambiguous on its face, extrinsic evidence may assist in discerning the parties' intent and may show that language appearing on its face to be ambiguous is not because, for example, the parties shared a mutual understanding as to its meaning." *Systems Management*, 16-1 BCA at 177,130 (quoting *A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,210). "'To the extent that the contract terms are ambiguous, requiring weighing of external evidence,' summary relief is inappropriate, but only if the external evidence is insufficient to create a genuine issue of disputed material fact." *A-Son's Construction,* 15-1 BCA at 176,207 (quoting *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988)). When deciding a motion for summary relief "the Board may not make determinations about the credibility of potential witnesses or the weight of the evidence." *Partnership for Response & Recovery, LLP v. Department of Homeland Security*, CBCA 3566, et al., 14-1 BCA ¶ 35,805, at 175,114.

Here, GSA presents extrinsic evidence in an attempt to establish that the parties intended to capture the operating cost adjustments from the original lease term in the annual rent for the extension period. GSA contends that the parties' course of dealing shows a common understanding that "annual rent" included the original term adjustments. "Generally, evidence of contemporaneous beliefs about the contract is particularly probative of the meaning of a contract." *Reliable Contracting Group, LLC v. Department of Veterans Affairs*, 779 F.3d 1329, 1332 (Fed. Cir. 2015). As an example of the parties' course of dealing, GSA refers to an April 1, 2014, email message to Belle Isle and GSA employees from GSA's contracting officer's representative, in which he referred to "annual rent," Mr. McCarty's deposition testimony illustrating that he understood the contracting officer's use of the phrase "annual rent" to include the cumulative operating costs adjustments, and Belle Isle's June 26, 2014, proposal, in which Belle Isle used the words "annual rent" to include the original term operating cost adjustments.[6] Therefore, GSA asserts, the extrinsic evidence supports its contention that both parties had the same interpretation of the lease, and that the words "annual rent" as used in the lease extension must include the cumulative adjustments from the original lease term.

Belle Isle does not dispute that its previous proposals included the operating cost adjustments when it referred to "annual rent." However, it claims that, pursuant to the integration clause, what the parties had said previously is not relevant in light of the specific terms contained in LA3 and the original lease.

Based upon a review of the record, including the email exchanges between the parties and declarations of the contracting officers and Belle Isle's Rule 30(b)(6) witness's deposition testimony, it is apparent that a genuine issue of disputed material fact exists concerning the parties' expressed intent in negotiating the lease amendment and whether the lease amendment accurately reflects the agreement which precludes the granting of summary relief. GSA asserts that everyone understood that the lease extension included the cumulative operating costs adjustments in the increased base annual rent. Belle Isle disagrees, highlighting an October 16, 2014, email message from Belle Isle's representative, Mr. McCarty, which states that "[o]ur recent exchange of emails makes it clear that your recollection and understanding of the agreement reached in the September 10 teleconference are different."

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[6] In that proposal, Belle Isle listed the current rent as $448,814 (calculated by adding the adjustments that had accrued from the beginning of the second year of lease term to the original annual rent of $279,810.40).

When deciding a motion for summary relief, "the Board may not make determinations about the credibility of potential witnesses or the weight of the evidence." *Partnership for Response & Recovery,* 14-1 BCA at 175,114. Where the intention of the parties is disputed, summary relief is inappropriate. *West Ridge, LLC v. General Services Administration*, CBCA 1230, 09-1 BCA ¶ 34,114 (dispute involving ambiguity of the terms of a lease preclude the granting of summary relief). The record presented thus far indicates that the parties may not have had a meeting of the minds at the critical time during the negotiation of the lease extension. A determination of what the parties intended and agreed upon will have to await development of the record. *Id*. at 168,686 (citing *Petula-Midrise IV, LLC v. General Services Administration*, GSBCA 16085, 06-2 BCA ¶ 33,386, at 165,518).

Decision

The cross-motions for summary relief are **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JOSEPH A. VERGILIO
Board Judge