UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: February 7, 2022

CBCA 6433

1425-1429 SNYDER REALTY, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Paul Jay Cohen of Cohen Marraccini, LLC, Southampton, PA, counsel for Appellant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA; and Donald Mobly, Office of General Counsel, Department of Veterans Affairs, Denver, CO, counsel for Respondent.

Before Board Judges **RUSSELL**, **ZISCHKAU**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Appellant, 1425-1429 Snyder Realty, LLC (Snyder or lessor), appealed the deemed denial of its claim for back rent that began accruing when respondent, the Department of Veterans Affairs (VA or agency), unilaterally rescinded a bilateral agreement that gave the agency unlimited access to the basement for an additional $5000 per month. The agency argues that the agreement lacked consideration because the lease already provided for the same access through two of its clauses. We disagree and grant the appeal.

Findings of Fact

On September 22, 2011, the parties entered into a contract for leased space in Philadelphia, Pennsylvania. The contract required the lessor to provide a fully built-out space for a residential rehabilitation treatment program for veterans, along with all services, utilities, maintenance, operations, and alterations. Upon completion of construction, the VA would occupy the first through fourth floors of the property, paying rent at a monthly rate of $36,677.08, for a fixed term of ten years with two five-year option periods.

The build-out phase of the project was lengthy and expensive. The lessor's proposed cost for construction was approximately $3.4 million. This was the lessor's first lease with the Federal Government. To keep the project on track, the lessor worked daily and closely with VA personnel from engineering, contracting, and medical departments. During construction, the lessor constantly expressed concerns about cost overruns. The VA reassured the lessor that the VA would cover costs to move walls, plumbing, and electric, among other things. As costs crept toward $6 million, the lessor informed the VA that it could not continue to fund the overruns.

The parties began discussing possible solutions to the escalating construction costs, and on October 25, 2012, they executed a bilateral supplemental lease amendment (SLA), SLA0001, which gave the VA unlimited access to the basement for $5000 per month. The basement was not part of the original lease. With the exception of a daycare that occupied a portion of it, the basement was a large, vacant space. The boiler room and sprinkler room were also located in the basement. The VA wanted to use the available space for storage and to avoid having to haul equipment back and forth for various purposes. The lessor agreed to give the VA exclusive access to, and use of, the unoccupied areas in the basement for the additional monthly payment. This arrangement satisfied the VA for its space needs and satisfied the lessor's additional funding requirements. The lessor determined that with an extra $60,000 per year, it could secure more funding from the bank to cover its costs.

The lessor gave the VA the key to the basement to use as it wished, and for four years, the VA paid rent consistent with the lease and the amendment. However, in the fall of 2016, without notice or explanation to the lessor, the VA stopped paying all rent, though it continued to operate the rehabilitation center and enjoy unlimited basement access. For months, the lessor's inquiries about overdue rent fell on deaf ears. Unbeknownst to the lessor, a new contracting officer had taken over the lease and determined that SLA0001was redundant because, from the contracting officer's view, the lease already provided for access to the basement and boiler room through Federal Acquisition Regulation (FAR) clause 552.270-10, Failure in Performance (Sept. 1999), and FAR clause 552.270-9, Inspection–Right of Entry. 48 CFR 552.270-9, -10 (2011). Consequently, the new contracting officer issued a unilateral modification (P00015) to rescind SLA0001.

Eventually, the VA resumed paying monthly rent in the amount of $36,677.08. The VA stopped paying the additional monthly rent of $5000 when it rescinded SLA0001.

The lessor opposed the rescission and submitted a claim to the contracting officer for $130,000, which represented back rent from November 2016 through December 2018, at $5000 per month. The lessor also requested $5000 per month beginning January 1, 2019, for each month of unpaid rent going forward. The lessor's position was that the parties had an enforceable agreement which was executed bilaterally. The lessor also pointed out that the lease required the lessor's consent to change the amount of space under the agreement, and the lessor did not consent. The contracting officer did not respond to the lessor's request for a final decision, and the lessor timely appealed the deemed denial of its claim.

After efforts to settle the dispute failed, the agency filed a motion for summary judgment, alleging that SLA0001 lacked consideration because the lease already gave the agency access to the basement and boiler room, and it should not have to pay twice for the same access. Although the agency urged the Board not to entertain parol evidence to interpret the amendment, the agency simultaneously argued that there was no meeting of the minds underpinning the amendment and that statements in the record prove the parties' disparate intentions in executing it. We denied the motion and heard testimony from the original contracting officer and the lessor regarding the purpose of SLA0001 as well as about what the parties intended by entering into it.

Discussion

Before the Board are two questions: first, whether SLA0001 was an enforceable agreement, and second, whether the rescission was proper. The VA contends that it was not an enforceable agreement because it lacked consideration, and there was no meeting of the minds when the parties executed it. The lessor, on the other hand, insists that the agreement was valid and should be upheld despite any concerns raised by the language in the document—which the VA drafted, signed, and complied with for years. For the reasons that follow, we find that the parties had an enforceable agreement and that, under the circumstances here, the VA's unilateral rescission of the same was a breach of contract.

Consideration

A binding contract requires three things: "mutual intent to contract including an offer, an acceptance, and consideration." *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir.1997). The party alleging the existence of a contract has the burden of proof as to its validity. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990). The VA's primary contention with SLA0001 was that it lacked consideration. "To constitute consideration, a performance or a return promise must be bargained for." Restatement

(Second) of Contracts § 71(1) (1981). Performance may consist of an act or a forbearance. *Id.* § 71(3). In this case, the lessor maintains that it satisfied the requirement for consideration by providing the VA with unlimited access to the basement and not renting it out to other tenants. We agree with the lessor.

Our examination of the clauses and the amendment reveals no redundancies. "The primary objective of contract interpretation is to determine the intent of the parties at the time an agreement is created." *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 16-1 BCA ¶ 36,333 (quoting *600 Second Street Holdings LLC v. Securities & Exchange Commission*, CBCA 3228, 13 BCA ¶ 35,396). "The starting point for contract interpretation is 'the plain language of the agreement.'" *Belle Isle Investment Co. v. General Services Administration*, CBCA 4734, 18-1 BCA ¶ 37,022 (2017) (quoting *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). SLA0001 states:

> Reference Purchase Order 642C20709. Additionally, the amendment covers the additional consideration for unlimited access to the basement. The additional access increases the rental amount to cover the boiler room access for an additional consideration of $5,000.00 per month.

In our decision on the VA's motion for summary judgment, we found that the amendment's language did not clearly convey the parties' intent. *1425-1429 Snyder Realty, LLC v. Department of Veterans Affairs*, CBCA 6433, 21-1 BCA ¶ 37,791. Thus, we entertained extrinsic evidence on the matter, including testimony from the original contracting parties as well as their course of dealing over the years. "If a contract provision appears ambiguous on its face, extrinsic evidence may assist in discerning the parties' intent . . . ." *A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089. The lessor and the original contracting officer both testified about the scope of the VA's access under the amendment. With the exception of the daycare, the VA could access the basement 24/7 without notice to the lessor and could use the space as it wished for an additional $5000 per month. The contracting officer and the resident engineer specifically discussed using the space for storage, and the VA did, in fact, store items in the basement.

FAR clause 552.270-9, entitled "Inspection–Right of Entry," authorized the Government to access the property, with reasonable notice to the lessor, for the purposes of inspecting the property for compliance with certain terms of the lease. The clause specifically identified items such as asbestos, heat, ventilation, air conditioning, maintenance records, leaks, spills, and hazardous material as potentially warranting inspection. FAR clause 552.270-10, entitled "Failure in Performance," stated that if the lessor fails to provide any maintenance, service, repair, or utility required under the lease, the Government has the

right to perform the service or repair and deduct the cost from the rent. It also required the lessor to facilitate access to the building for such a purpose.

A plain reading of these clauses shows that the access they reference is not the same as the access contemplated by the amendment. Unlimited access and qualified access (for specific purposes upon reasonable notice to the lessor) are distinct. Unlike the amendment, the language of the clauses is plain on its face, and the clauses were part of the contract at the time it was formed. The original contracting officer testified that she was aware of those clauses but determined that the access they afforded did not meet the VA's needs. An interpretation that creates a redundancy among the provisions in an agreement should be avoided, as it renders some aspects of the agreement superfluous and meaningless. *See PJP Building Six, LC v. Department of Veterans Affairs*, CBCA 5543, 18-1 BCA ¶ 37,042 (where the Board determined that the VA's interpretation of a lease termination provision was unreasonable because it would read back in the deleted language of the lease termination provision and render the inserted termination language meaningless).

For these reasons, we find no redundancies among the clauses and the amendment, and in so finding, the VA's argument that the amendment lacks consideration cannot stand. Furthermore, we are not persuaded by the VA's attempts to diminish the efficacy of what the VA received under the bargain. Consideration requires a benefit to the Government, however slight. *Transworld Systems v. Department of Education*, CBCA 6049 (Aug. 13, 2020); *Turner Construction Co. v. General Services Administration*, GSBCA 15502, et al., 05-1 BCA ¶ 32,924; *see also Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1332 (Fed. Cir. 2000). Simply because the VA did not appear to be maximizing its use of the space, or because the daycare placed items in an area of the hallway dedicated to the VA, does not erode or divest that benefit. The lessor gave the VA the key to the basement and exclusive access to a large portion of it rather than renting it out or expanding the daycare. Here, the benefit to the VA was clear, and as such, we find it constituted adequate consideration under the agreement.[1]

[1] Even if the original contract arguably could be interpreted to have provided the VA with broad and unrestricted access to the basement area, a contract modification that resolved any ambiguity and made the VA's full access rights clear would constitute sufficient consideration to support the modification. *See, e.g.*, *Aviation Contractor Employees, Inc. v. United States*, 945 F.2d 1568, 1574 (Fed. Cir. 1991); *Willis v. Countrywide Home Loans Servicing, L.P.*, No. CCB-09-1455, 2010 WL 2857801, at *3 (D. Md. July 19, 2010).

Meeting of the Minds

The VA also argues that there was no meeting of the minds between the parties when they executed the amendment. We disagree. "It is well recognized that the question of 'whether a legally enforceable contract has been formed by a meeting of the minds depends upon the totality of the factual circumstances.'" *Navigant SatoTravel v. General Services Administration,* CBCA 449, 08-1 BCA ¶ 33,821 (quoting *Texas Instruments Inc. v. United States*, 922 F.2d 810, 815 (Fed. Cir. 1990)). We find that the parties manifested mutual assent to the amendment. The parties' detailed testimony regarding the events leading up to the execution of the amendment provided important insight into their motivations in agreeing to the amendment and their understanding of its purpose. The parties also executed a bilateral modification to the lease because the VA wanted more space and the lessor wanted more money.

Any doubt about whether their intentions were aligned is easily resolved by their multi-year course of dealing during which the VA paid the lessor an additional $5000 per month and the lessor gave the VA unlimited access to the basement. *Griz One Firefighting, LLC v. Department of Agriculture*, CBCA 6358, et al. (Jan. 7, 2022) ("The Board defines a prior course of dealing as 'a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. The emphasis is on a sequence of events; a single transaction cannot constitute a course of dealing.'" (quoting *CFP FBI-Knoxville, LLC v. General Services Administration*, CBCA 5210, 17-1 BCA ¶ 36,648)). We turn now to the propriety of the rescission.

Unilateral Amendment Rescinding SLA0001

The lessor refused to sign lease amendment P00015, which rescinded SLA0001, so the contracting officer issued it unilaterally. The amendment stated, in relevant part:

> These parties, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, covenant and agree that . . . SLA0001 is hereby rescinded effective 10/31/2016. As such, consideration of $5,000.00, for access rights has been removed. When applicable, access rights are already provided for under the following General Lease Clauses: . . . 552.270-10 Failure in Performance . . . 552.270-9 Inspection–Right of Entry.

The contracting officer's determination to rescind SLA0001 was plainly based on the incorrect conclusion that it lacked consideration. A rescission based on flawed reasoning will not be upheld. Moreover, "[t]he validity of an agreement to rescind a contract is controlled by the same rules as in the case of other contracts; there must exist an offer by one

party and an unconditional acceptance of that precise offer by the other, prior to withdrawal by the offeror, before a binding agreement is born." *International Industrial Park, Inc. v. United States*, 100 Fed. Cl. 638, 653, *modified in part on reconsideration*, 102 Fed. Cl. 111 (2011), *aff'd*, 496 F. App'x 85 (Fed. Cir. 2013) (quoting 29 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 73:15 (4th ed. 1993)). Here, the lessor opposed the rescission and refused to sign the amendment, despite the boilerplate language to the contrary ("These parties, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, covenant and agree.").

We further find that the plain language of the termination provision under section 4 of the contract and the Changes clause under section 34 of the contract do not permit the VA to accomplish what it could not through the unilateral modification. The terms of the termination provision are unambiguous: "The Government may terminate this lease at any time by giving at least 120 days' notice in writing to the Lessor and no rental shall accrue after the effective date of termination." There are no references to partial terminations, unlike what might be found in other leases. *See HPI/GSA-4C, L.P. v. General Services Administration*, CBCA 6093, 20-1 BCA ¶ 37,567 ("The specific words of the termination provision are clear, unremarkable, everyday, short, common English words, none of which are individually or collectively susceptible to other than their everyday meaning.'" (quoting *Prete v. General Services Administration*, GSBCA 15724, et al., 03-1 BCA ¶ 32,163)). The Changes clause authorized the contracting officer to "make changes within the general scope of the lease in any one or more of the following: (1) Specifications (including drawings and designs); (2) Work or services; (3) Facilities or space layout; or (4) Amount of space, *provided the Lessor consents to the change*." (Emphasis added.) The lessor did not consent to the modification at issue. The VA contends, however, that modification P00015 (the rescission) did not fall within the scope of section (4) of the Changes clause because SLA0001 did not increase the amount of space under the lease. We do not agree with the VA's interpretation of that provision, and we further conclude that the remaining sections of the Changes clause are unavailing to the VA for the purposes of reversing or changing SLA0001.

Decision

The appeal is **GRANTED**. The VA shall pay back rent to the lessor and interest under the Contract Disputes Act, 41 U.S.C. § 7109(a)(1) (2018), on the lessor's claim from the date that the contracting officer received the claim through such time as the VA pays the full amount of the back rent.

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge

We concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge