UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: March 6, 2023

CBCA 5997, 6464

SBC ARCHWAY HELENA, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

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

Justin S. Hawkins, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **KULLBERG**, and **CHADWICK**.

Opinion for the Board by Board Judge **VERGILIO**. Board Judge **CHADWICK** concurs.

VERGILIO, Board Judge.

SBC Archway Helena, LLC (lessor) seeks $395,474.58 under a design/build lease with the General Services Administration (agency). The lessor blames the Government for 277 days of delay in issuing a notice to proceed (NTP), which delayed occupancy and the start of rent payments. The period of alleged delay includes 234 days predating the issuance of the NTP and forty-three days after the NTP and before acceptance for occupancy. The agency contends that the lessor simply seeks rent for the period before occupancy, which is

not available under the lease or case law, and that the record fails to demonstrate that the lessor was not responsible for the delay.

Following a hearing, we find the agency responsible for 138 of the claimed 234 days of delay prior to issuance of the NTP. Lack of input by anyone with contracting officer authority for several months contributed to the delayed issuance of the NTP, as did the fact that construction costs were higher than the parties expected at lease signing. The record fails to demonstrate any other compensable delay.

Contrary to the agency's continued assertions, the lessor is not claiming rent payments. The agency's actions lengthened the period from award to the start date of the lease. Rent was not calculated for and did not cover such a delay. The agency is liable for substantiated, allowable costs of $59,215.29.

Findings of Fact

The lease

1. On January 6, 2016, the partes signed a contract obligating the lessor to provide named premises for a firm term of ten years with an agency option to renew for five more years. The lease term would begin upon the acceptance of the premises. Appeal File, Exhibit 1 at 1.[1] The lessor was to be involved in the design and obligated to build out the space. Exhibit 1 at 25 (§ 4). The lease includes a Changes (MAR 2013) and a Disputes (JUL 2002) clause. Exhibit 1 at 245 (¶ 30), 247 (¶ 33).

2. The lease provides for annual rent as the sum of six components: shell rent, real estate taxes, tenant improvements (TI), operating costs, parking (priced at $0), and building specific amortized capital (BSAC). Shell rent, real estate taxes, and operating costs are calculated based upon rentable square footage. The TI and BSAC amounts each are set as a dollar figure amortized at 5% per year over ten years and thus are priced at $0 for the option period. Exhibit 1 at 5 (¶ 1.03.A). Rent is subject to adjustment based upon the final TI cost to be amortized in the rental rate. Exhibit 1 at 5 (¶ 1.03.C). The lease also states that a rent reconciliation may be needed based upon square footage and that the lease term commences upon acceptance of the space. Exhibit 1 at 28 (¶ 4.12).

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[1] All exhibits are in the appeal file. Although the findings of fact often contain citations to specific pages in the record, and the discussion may reference specific findings, those details are not meant to exclude reliance on the record as a whole but to offer some general guidance on what supports a finding.

3. The Real Estate Tax Adjustment clause provides for adjustments in rent for increases or decreases in real estate taxes after the real estate tax base has been established. The clause defines the real estate tax base as the unadjusted real estate taxes for the first full tax year following the commencement of the lease term, when based upon a full assessment of the property. Of relevance here, in broad terms, the clause also directs how to calculate adjustments for changes in real estate taxes. For a given year, the key factors include the difference between the current year unadjusted real estate taxes and the real estate tax base. Therefore, for a given year, if taxes increase, "[t]he Government shall pay the tax adjustment in a single annual lump sum payment to the Lessor." Exhibit 1 at 10-11 (¶ 2.07).

4. The Operating Costs Adjustment clause provides that, beginning with the second year of the lease, the agency will pay (or receive) rent adjustments tied to a cost of living index. Exhibit 1 at 11 (¶ 2.09).

5. The design-build aspect of the contract required the Government to provide design schematics and, thereafter, the lessor to provide design intent drawings (DIDs). In particular, the Government was obligated to notify the lessor of DID approval or nonconformance no later than fifteen working days after submission of DIDs. Exhibit 1 at 25 (¶ 4.01(D)). No more than forty-five working days after the approval of DIDs, the lessor was to complete construction documents (CDs). The Government had fifteen working days after receipt to review CDs before the lessor prepared a TI price proposal. The lessor was to submit a complete TI price proposal within twenty working days following the Government's review period. Exhibit 1 at 25 (¶¶ 4.01(E)-(G)). The agency then promised to "issue [the] NTP within 15 Working Days following the submission of the TI price proposal, provided that the TI price proposal conforms to the [lease] requirements . . . and the parties negotiate a fair and reasonable price for TIs." Exhibit 1 at 25 (¶ 4.01(I)).

6. The Tenant Improvements Price Proposal clause (Sep 2013) reads:

> The Lessor's TI price proposal shall be supported by sufficient cost or pricing data to enable the Government to evaluate the reasonableness of the proposal, or documentation that the Proposal is based upon competitive proposals (as described in the "Tenant Improvements Pricing Requirements" paragraph) obtained from entities not affiliated with the Lessor. Any work shown on the CDs that is required to be included in the Building shell rent or already priced as BSAC shall be clearly identified and excluded from the TI price proposal. After negotiation and acceptance of the TI price, GSA shall issue the NTP to the Lessor.

Exhibit 1 at 26 (¶ 4.03).

7. The above-referenced Tenant Improvements Pricing Requirements paragraph specifies, in pertinent part:

> D, Each TI proposal shall be (1) submitted by the proposed General Contractors (or subcontractors) using the TICS [tenant improvements cost summary] Table in CSI Masterformat; (2) reviewed by the Lessor prior to submission to the Government to ensure compliance with the scope of work (specified above) and the proper allocation of shell and TI costs; and (3) reviewed by the Government. General Contractors shall submit the supporting bids from the major subcontractors along with additional backup to the TICS Table in a format acceptable to the Government. Backup will follow the TICS table Master format cost elements and be to level 5 as described in P-120, Project Estimating Requirements for the Public Building Service.
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> . . . .
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> G. The Lessor shall demonstrate to the Government that best efforts have been made to obtain the most competitive prices possible . . . . The LCO [lease contracting officer] shall issue to the Lessor a NTP with the TIs upon the Government's sole determination the Lessor's proposal is acceptable.

Exhibit 1 at 26 (¶ 4.05).

8. Within thirty days after award, the lessor was required to provide the names of at least two proposed construction contractors. The contractor was to complete all work within 100 working days after the NTP. Exhibit 1 at 12 (¶ 2.10.B), 25 (¶ 4.01.K).

9. The lease specifies that the lease term commencement date, final measurement of the premises, reconciliation of annual rent, and amount of commission credit, if any, shall be memorialized by lease amendment. Exhibit 1 at 28 (¶ 4.12).

After lease award

10. When initially interfacing with the lessor, the agency used both an agency contract specialist and a contracted broker. The record does not identify the authority of the broker, who communicated with various participants. The record contains no warrant that would permit or authorize either the specialist or broker to act as a contracting officer. *See* Exhibit 1 at 8 (¶¶ 1.01.(B) (definition of "broker"), 2.02 (authorized representatives are reflected by signatories to lease or delegated by notice or transferred)).

11. On February 18, 2016, the broker wrote to the lessor, citing the lease, and advising:

> Please note that you will need to bid a MINIMUM of 2, preferred 3, subs deep per each trade. If you are unable to provide competitive bids, then you must notify the Govt that only 1 bid will be provided and provide ALL backup documentation associated with that bid. An independent Govt estimate or a technical analysis will have to be completed to confirm fair and reasonable pricing.

Exhibit 2. The same document provides specific direction: "You will be providing 2 separate TICS tables. 1 for TI pricing and 1 for the BSAC costs. These costs must be segregated so that the applicable allowances can be applied according to the lease." Also, "[P]lease be sure to demonstrate both the SHELL Costs and the TI costs accordingly. The Govt requires that this be demonstrated so that verification of the allocation of costs is done per the lease." The suggested requirement for BSAC costs in a separate TICS table is not supported in the lease. Exhibit 1 at 26 (¶ 4.03) (a paragraph addressing BSAC price proposals was deleted from the lease), 216-23 (lease exhibits E and F address security requirements and reflect pricing incorporated into the lease). Although the agency has not identified the support for a BSAC TICS table, the agency was entitled to a breakout of BSAC costs. When security requirements changed, the agency appropriately sought details related to the changes.

12. On July 18, 2016, the tenant (another government agency) wrote to the agency, lessor, and broker that the tenant was "entitled to more than 1 review [of proposed drawings] . . . . We will not concur on 100% drawings without additional reviews and I will not go to my leadership for additional RWA [(reimbursable work authorization)] funding until the needs of the CLIENT are satisfied." In response, after commenting that lease requirements are other than suggested by the tenant (indeed, the lease does not require 50% or other interim CDs), the lessor states that "upon confirmation that we've been forwarded all the 100% CD review comments, we will review and confirm that they conform to the Lease requirements and the approved DID's." Exhibits 52, 53. The lessor does not identify in the record what, if anything, the agency (or tenant) ultimately did or required that did not comply with the lease's design requirements. The mere submission of drawings identified as 100% complete by the lessor did not mean that they were in accordance with the lease and would not require refinements or be subject to negotiations.

13. On September 6, 2016, the lessor submitted a TI budget proposal with a breakdown of TI and shell costs, each including "other lessor soft costs . . . typically project management, mortgage banking fee, counsel, travel, appraisal, permits, etc.," although the details priced only building permit costs. Noted as absent, but submitted on September 23,

2016, was a price for tele/data cabling. Exhibits 3 at 2-3; 4 at 1; 5. On September 8, 2016, the lessor was informed that shell work was not segregated in the submission. In an attempt to conform to the lease requirements, on September 9 and 23, 2016, the lessor submitted additional information regarding price breakdowns and proposals. Exhibits 4, 5. On October 12, after conferring with an agency lease specialist and an estimator, the broker provided comments to the lessor. The broker wrote that the submissions were not in the proper format, did not identify shell and BSAC costs, and did not contain detailed subcontractor pricing or bid comparison worksheets. Exhibit 6. On November 1, 2016, the lessor submitted a revised TI budget proposal, backup documentation, and responses to agency budget comments. Exhibit 7.

14. The lessor maintains that on September 23, 2016, GSA issued, but withheld from the lessor, a "fair and reasonable determination" after performing a review of the lessor's TI proposal and considering previously awarded projects similar in scope and price. The agency did not issue such a price determination. The determination by an agency estimator was internal and did not address all of the TI costs in the latest proposal. Exhibit 164.

15. By October 26, 2016, the lessor had completed shell construction and demobilized the construction site awaiting completion of negotiations and receipt of the NTP. Transcript, Vol. 2 at 51.

16. Following various discussions and submittals (including requests for information from the lessor on behalf of a general contractor, Exhibit 17), in November and December 2016 and January 2017, the lessor submitted proposed TI and BSAC pricing with backup documentation. The final submittals reflect some new pricing, accounting for variations in the market, and the withdrawal of one subcontractor's bid and pricing by another. Exhibits 7, 15, 16, 18; Transcript, Vol. 1 at 76. On November 9, the lessor received approval on the updated 100% CD's and thereafter submitted revised security pricing. Exhibit 10. The agency was aware of both the lessor's desire to obtain the NTP and move forward with the work and various concerns of the tenant. Exhibits 57-59, 133 (broker to lease specialist: "Are we within the allowance and RWA that has been provided? If not, we need to know ASAP so [tenant] can go back and get additional funding. Shell construction is complete and the lessor is antsy to get the TI going.").

17. On January 3, 2017, relying upon a review of submissions, comments from the broker, and a fair and reasonable determination by an agency estimator (again, internal, and not issued to the lessor), the agency's lease specialist indicated to the broker that there appeared to be a "green light" for issuance of the NTP. Exhibit 167. There was no contracting officer action and no indication of contracting officer involvement at this point in time. The NTP was not issued for several months, following further submissions by the

lessor and discussions. The lessor provided revisions to its security pricing on January 6, 2017, and backup and further pricing in February, March, April, and May 2017. Exhibits 18, 23, 24, 27, 29.

18. By early January 2017, the Government had made a determination of fair and reasonable pricing on the latest submissions covering the scope of the project. The lease specialist acknowledged this, and indicated that the NTP should be issued. No contracting officer was involved at this point to take action—affirmatively issuing the NTP or providing a basis not to issue the NTP. Direction was not given to the lessor. A valid reason to withhold the issuance of the NTP from the end of January 2017 until its actual issuance is not supported in the record. As explained below, the contracting officer's stated reasons for not issuing the NTP prior to June 2017, are not sound. Anything accomplished by the contracting officer, lessor, and tenant between early January and June 2017, should have been done by January 2017, with active contracting officer involvement.

19. Although the lessor alleges that its delay began in October 2016, that conclusion does not give sufficient weight to the lessor's failure to allocate pricing, and provide adequate support, for its TI, BSAC, and shell costs. The lessor obtained new pricing when a proposed subcontractor rescinded its bid. This new pricing reflected additional competition. The need for new pricing was not the fault of the Government. It reflected a circumstance of the negotiation process, which also required agreement on the pricing and design, which had to be within the budget of the tenant. The lessor is overly ambitious in asserting the negotiation process would have concluded within fifteen days of its submission of pricing; the issuance of the NTP was premised on the contracting officer's determination that the proposal is acceptable. The lessor played a role (i.e., concurrent delay) in not obtaining a fair and reasonable determination until early January. Therefore, the excusable and compensable delay cannot begin until the date the NTP should have issued. With the active involvement of a contracting officer, the NTP should have issued on January 30, 2017.

<u>After January 2017; issuance of the NTP in June 2017; and beneficial occupancy</u>

20. The record reveals no involvement by a contracting officer for several months between the lease signing and mid- to-late February 2017, when the contracting officer began to get familiar with the situation. Exhibit 157; Transcript, Vol. 2 at 83-84. Although the contracting officer testified that a contracting officer would have been brought into the process when needed, Transcript, Vol. 2 at 91, the agency provided no authoritative responses to various lessor inquiries that would affect the lessor's actions, or specific determinations on any alleged inadequacy of a lessor submission. No contracting officer responses to lessor inquiries or statements of agency position were issued during the early period of negotiations to finalize the design build aspects of the space and the pricing.

21. The contracting officer sought additional pricing from the lessor; the tenant needed to see additional support for the dollars and seek additional funding. Exhibit 51. On May 4, 2017, the lessor provided final pricing. Exhibit 29. By May 2017, the contracting officer was trying to determine what additional information the tenant would need to be satisfied. The contracting officer did not specify any information lacking for the agency. Exhibit 118.

22. On June 16, 2017, the contracting officer issued the NTP as to tenant improvements. Exhibits 31. As of that date, the lessor proceeded with performance. The substance of the notice is repeated in a bilateral lease amendment signed in June and July 2017. The agreement provides:

> [T]hese parties for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, covenant and agree that the said Lease is amended, effective, **Upon Government Execution, as follows**:
>
> . . . .
>
> [The agency] approves the Tenant Improvement and Building Amortized Security Costs (BSAC) price of $2,014,175.38. The Lessor shall amortize the amounts of $470,589.54 (TI) and $120,000 (BSAC) for a total of $590,589.54 into the rent at the rate of 5.0% percent [sic] over ten (10) years. The remaining amount not to exceed $1,423,585.85 via a one-time lump sum payment by the Government upon completion, inspection, and acceptance of the tenant improvements by the Government and receipt of an invoice from the Lessor.
>
> . . . .
>
> All other terms and conditions of the lease shall remain in force and effect.
>
> Do NOT proceed beyond this amount without the expressed written permission of the Contracting Officer.

Exhibit 32 at 1. The amendment provided the lessor 140 working days after the NTP to complete all work. Exhibit 32 at 2. This alters the lease, as originally signed: the 134 working days reflects an increase from the original lease period of not later than 100 working days following issuance of the NTP. Exhibit 1 at 25 (¶ 4.01.K); Transcript, Vol. 1 at 139-40 (lessor requested the additional time based on anticipated impact of additional complexity, costs, and effort needed to perform). The parties do not address the express limitation ("Do

NOT proceed beyond this amount without . . . permission of the Contracting Officer") as a factor in the relief sought by the lessor.

23. On September 6, 2017, the lessor submitted a request for equitable adjustment (REA) seeking $276,871.95, premised on a delay in issuing the NTP from October 26, 2016, to June 16, 2017. Exhibit 33. The lessor certified the REA as a claim on November 6, 2017. Exhibit 34.

24. The contracting officer denied the claim on January 4, 2018, writing that the lessor was responsible for the delay. Exhibits 37, 38.

25. By bilateral lease amendment, the parties established the lease term to begin January 11, 2018, and continue through January 10, 2033, with ten of those years firm. Moreover: "All other terms and conditions of the lease shall remain in force and effect." The document establishes the real estate tax base, TI allowance, operating costs, and the BSAC amount, with the total annual rent the same as in the original lease. Exhibits 1 at 5 (¶ 1.03.A), 39 at 2 (¶¶ 1.03.A, .C).

26. On January 12, 2018, the lessor filed with the Board the appeal docketed as CBCA 5997. Exhibit 40.

27. The lessor submitted to the contracting officer an amended claim dated August 3, 2018, revising the amount sought to $349,714.31 for delay totaling 277 calendar days. Exhibit 145. The contracting officer denied the claim on August 23, 2018. Exhibit 147.

28. On March 4, 2019, the lessor submitted an amended claim seeking $395,474.58, for the same 277 calendar days. Exhibit 149. On May 6, 2018, the lessor filed an appeal from a deemed denial of the claim, docketed by the Board as CBCA 6464. Exhibits 151, 152.

Other relevant facts

29. The lessor's initial and subsequent drawings and pricings were for a design-build project at a cost greater than that identified in the lease. Lease amendments specify that the TI allowance was $590,589.50, whereas the allowance in the NTP was $2,014,175.38. Exhibits 143, 144; Transcript Vol. 1 at 139. The lessor contributed approximately $80,000 toward the shell, in addition to what was anticipated under the lease, for which the lessor would not be reimbursed. Transcript, Vol. 1 at 104-05. These "extra" costs, with implications for the life of the lease (because of Government liability for tax increases based on the value of the property, and other costs to be paid as a lump sum or amortized over the

term of the lease), were a factor for the tenant to consider regarding the requirements, its true needs, and its budget, as it needed to secure additional funding to proceed. *E.g.*, Exhibit 51.

30. The lessor has not identified in the record what, if any, requirements the agency imposed in addition to those required under the lease, without compensation, or what the agency may have inappropriately rejected. Stated another way, the record does not demonstrate that what the lessor submitted at each stage was acceptable and in accordance with the terms and conditions of the lease. Overly broad testimony that everything complied at every stage is not convincing. With few exceptions, the record and briefing do not detail the determinations or actions of the agency (or tenant) alleged to be inappropriate. The lease allowed for a negotiation process.

31. The agency and contracting officer maintain that the lessor failed to comply with the terms and conditions of the lease in specific instances: (1) the lessor never supplied competitive bids; (2) the lessor (itself or its contractors) used Davis-Bacon wage rates; and (3) the lessor's price proposals failed to conform to lease requirements.

32. The agency has an obligation, as made explicit in the lease, to negotiate fair and reasonable pricing. The lease discusses fair and reasonable pricing and best efforts to obtain competition. The contracting officer testified regarding his involvement, noting reliance on the reservation of the right to reject all bids, at his sole discretion. He concluded that the bids provided by the lessor were unreasonably high, so he exercised his discretion to require competition to achieve lower prices. Transcript, Vol. 2 at 125-26. The bases for his opinion regarding the prices is not sufficiently supported in the record. Moreover, the agency does not rebut the lessor's communications in September 2016, that it had a limited ability to obtain competitive pricing and often received single bids for subcontracts. Exhibit 4 at 1.

33. The agency identifies no language in the lease that *prohibits* Davis-Bacon Act wage rates, and we see none. The agency first raised the use of Davis-Bacon rates as a problem on April 26, 2017, and, on the same day, issued a determination that this project does not require such rates. Exhibits 28, 107, 110. Thus, about one year elapsed during which the lessor received no authoritative direction not to use the rates. A timely contracting officer's determination would have resolved the matter well before January 2017.

34. The testimony of the contracting officer failed to demonstrate persuasively what was missing from the lessor's TICS submissions, beyond some initial failure to segregate certain costs. We do not doubt the testimony that the pricing tables did not conform in every respect to those specified in the lease, Transcript, Vol. 3 at 37-40, but no practical impact was demonstrated, particularly as the information sufficed for agency determinations of fairness and reasonableness.

35. Regarding the lack of competitive bids or proposals, the language of the lease references a Government ability to make a fair and reasonable determination on price. Such occurred on various occasions. The lessor explained that its success at obtaining competition was limited as it received only one bid for various items despite seeking pricing from multiple vendors; the location and work involved drew little interest. The agency had a duty and right to seek competition, but its withholding of the NTP for several months has not been fully tied to the lack of underlying pricing, particularly by the time a contracting officer took action under the lease. The parties needed to negotiate a fair and reasonable price for a design that was acceptable to and within the budget of the tenant. Given the variance between the expected, and proposed costs, the negotiation process took some time and required the tenant to obtain funding. The record supports the conclusion that the time was reasonable through the time the lease specialist concluded that the NTP should be issued, because at that point there was apparent initial agreement. No contemporaneous contracting officer issuance discounted the conclusion. Subsequent discussions and negotiations finalized designs and pricing, but the NTP should have been issued after the lessor finalized pricing in its submissions of January 2017.

36. Many of the observations and conclusions of the contracting officer and agency seem disingenuous. Whatever the contracting officer accomplished during his involvement, beginning only after months had elapsed in the preoccupancy phase, could have been accomplished by an active contracting officer to permit the issuance of the NTP after obtaining the seeming go-ahead in January 2017.

Compensable delay period

37. Based upon the record (including the contemporaneous conclusions of the lease specialist, with support from the agency estimator), negotiations should have been concluded and an acceptable price established by early January 2017. Given the apparent agreement and subsequent price revisions, and the lease requirement to act within fifteen working days, the agency should have issued the NTP by January 30, 2017. A contracting officer's timely involvement would have facilitated such an issuance. The observations and positions of the contracting officer and agency supporting the actual issuance of the NTP in June 2017, overlook a basic point of factual and legal significance: a contracting officer's involvement in the process by January 2017 (at the latest) should have brought matters to resolution by the end of January.

38. The lessor claims it was further delayed from November 30, 2017, through January 11, 2018. The record supports no delay for that period. Finding 20; Transcript Vol. 1 at 146-48, 150 (lessor mobilized and began construction before receipt of formal NTP). That the lessor completed the construction earlier than anticipated is not evidence of delay.

Lessor's costs

39. The lessor received no payments under the lease before occupancy. The time between award and occupancy was lengthened by Government-caused delay. Costs for that extended period were not part of the calculated lease compensation. The lessor had anticipated a twelve-month period between award and occupancy, not a period made longer by delay. *E.g.*, Transcript, Vol. 1 at 134–35, 163.

40. Both the real estate taxes and the operating costs calculated in the "rent and other consideration" reflect the product of the rentable square footage and the tax base and operating costs base, on an annual basis. The calculation is for the period of occupancy. Exhibit 1 at 5.

41. Receipts demonstrate that, for the period from October 26, 2016, to June 16, 2017, the lessor incurred $18,267.06 for property taxes, $2136.94 for insurance, $29,024.07 for the mortgage, $42,483.73 in operating costs, and $8496.73 for a construction loan, a total of $100,408.53. These ultimately claimed costs are not simply estimates based on pricing in the lease (which reflects a completed building for operating costs, taxes, and some other items). Exhibits 33, 145, 149; Transcript, Vol. 1 at 162. The lessor did not include any of these amounts as preoccupancy costs when calculating the rental payments, initially or subsequently. Transcript, Vol. 1 at 134-35. The agency has not indicated what in the record might rebut the assertions of the lessor that rental payments do not include a portion for the claimed period of delay. A prorated amount to compensate the lessor for these costs for 138 of the 234 claimed days of delay is $59,215.28 (138/234 x $100,408.53).

42. The lessor also seeks increased, future insurance costs ($37,500 for fifteen years), inflation ($26,089.54 over fifteen years), return on capital ($123,431.10 for fifteen years), inefficiency ($30,220) (without supporting documentation or credible support), and legal fees ($50,472.14 and increasing). Exhibit 149.

Discussion

The Board makes a de novo determination, considering the record as a whole. The dispute involves alleged periods of delay and payment for those periods. The Board has rejected the agency's position that the lessor is foreclosed from obtaining any relief. The lessor is not seeking lost rent or rental income as asserted by the agency. *SBC Archway Helena, LLC v. General Services Administration*, CBCA 5997, 19-1 BCA ¶ 37,207 (2018). The agency does not contend that any particular cost the lessor is seeking must be denied because: (1) it was or should have been included in the lease pricing, or (2) the bilateral amendments (which establish pricing at particular dollar amounts and specify a dollar

amount as a limitation of payment not to be exceeded without written permission) preclude relief. *See, e.g.*, Findings 13, 22, 25.

This situation of an agency suspending or delaying performance before occupancy, thereby delaying rental payment and consideration to the lessor, is not unique. Given the general rejection of any liability by the agency here, despite earlier cases, the Board explains further the potential implications when the Government delays the start of occupancy and rent payments. The lease does not price separately, as a basis for reimbursement, lessor costs or expenses that are incurred prior to occupancy. Payment of rent, for the period of occupancy, is not at issue. However, with a preoccupancy period lengthened by the delay, the lessor incurred costs under the lease (from signing, through the preoccupancy phase made longer by the delay, to the end of occupancy) that it would not have incurred under the lease as signed. That is, preoccupancy costs of the lessor for the period of delay are not reflected in the lease pricing. Such out-of-pocket costs are impact costs for which an agency is liable. That is, although a lessor routinely may incur various costs preoccupancy, a delay requires it to incur the costs under the lease for the delay period—the longer period not priced under the lease. The impact costs do not duplicate payments made under the lease but reflect costs during the lease period that would not have been incurred under the lease without the delay.

The delay

The agency discounts the lessor's attempt to be reimbursed for the alleged delay periods. As found above, the record demonstrates that the lessor was a contributing cause for some, but not all, of the claimed period of delay; the lessor bears the responsibility for its portion of the delay. With a developed record, the agency contends: "[The lessor] has presented no evidence that it contemporaneously requested damages for any delay. Indeed, the only evidence is that [the lessor] failed to conduct a CPM [critical path method] analys[i]s and failed to engage an independent consultant." Agency's Post-Hearing Brief at 5. The agency misevaluates the record. The agency was aware of the lessor's attempts to hasten the issuance of the NTP and had received communications about Government delays and potential lessor claims. The record does not discount or rebut the lessor's general contention that without assurances of the NTP, it could not move forward with construction, such that it was unable to fit out the space and make it ready for occupancy. Only with the space accepted for occupancy would the lessor receive lease payments. A CPM analysis and an expert are not needed to establish such a proposition (lacking the assurances of the NTP, the lessor could not move forward to make the building ready for occupancy and obtain rental payments). This is self-evident, particularly without substantive specifics in opposition. Government delay meant that the time from lease award to the start of occupancy (or the end of the lease term) increased by 138 calendar days. Those extra days are not accounted for under the lease payments. Case law does not dictate that the contractor foot the entire bill for impact costs for the period of compensable delay preceding occupancy.

Regarding the alleged periods of delay, the facts, as explained above, support the conclusion that the NTP should have been issued by January 30, 2017, but not earlier. The lessor, in relying on the NTP by October 2016, fails to account for the negotiation process, the actual higher-than-expected prices which required the tenant to obtain funding, and the lessor's actions in not segregating or supporting various costs in the TI, BSAC, and shell components. Active contracting officer involvement and a willing lessor should have achieved the NTP issuance by the end of January 2017. Separately, the claimed period of delay from November 30, 2017, through January 11, 2018, has not been substantiated factually or legally. The lessor completed work faster than anticipated in a bilateral lease amendment. Findings 37-38.

The Board concludes that the record supports a portion of the delay claimed by the lessor. The agency is liable for 138 days of claimed delay preceding the issuance of the NTP but not liable for the remainder of the claimed delay (the lessor's own actions and inactions contributed to some of the delay prior to the NTP issuance, and no delay has been established for the post-NTP issuance period when the lessor completed work in fewer days than allocated by bilateral lease amendment). The compensable delay period falls within the preoccupancy period, a time for which the lease allocates no specific payment. The lessor does not seek rent for this period (rent under the lease began with occupancy) but seeks what it characterizes as its costs incurred. Having determined the compensable delay period, the Board must determine what costs are compensable as proven on the record.

Pricing the delay

The situation can be described as follows. At the time the parties signed the lease, lease payments included consideration for a preoccupancy period (POP) without the delay, and for the tenant occupancy period (TOP). What had been envisioned as sequential periods are no longer consecutive. There is a delay period in between, only the Government-caused portion (GCP) is of significance here (the lessor bears the burden of lessor-caused delays and time for a reasonable negotiation process which can be treated as part of the POP). Thus, the lease as signed covered the period of POP + TOP. Because of the Government-caused delays, the lease covers POP + GCP + TOP. Although one can assume that lessor-incurred costs during the GCP would have been incurred to some degree without the delay as part of the initially expected TOP, the total period for lessor-incurred costs expanded, essentially shifting costs covered under rent payments to the new TOP. Because the lease now covers a longer period than agreed to at lease signing (from signing to the end of occupancy), the lessor must incur taxes, insurance, mortgage, operating costs, and construction loan costs for the added days of the GCP. These costs in the GCP are unaccounted for in the payments. Alternatively, if one views the costs incurred during the GCP as built into the rent (ignoring that costs would be related to an occupied space), then the same period at the end of the TOP would be unaccounted for. The lessor has elected to seek the costs for the GCP period,

which are both costs for an incomplete space and costs which now are defined or known. The costs expected and priced in the lease for the TOP reflect a built-out space with inherent taxes and operating and other costs. Thus, the approach of the lessor is geared to reflecting its true, uncompensated impact costs arising because of the Government-caused delay.

The contracting officer and agency remain of the view that the lessor is liable for all delay. Accordingly, there is no indication that the ultimate total payments under the lease will compensate the lessor for those claimed costs attributable to Government delay and the longer total period from award to the end of occupancy. Had the contracting officer negotiated rates to include the period for delay, such should have been identified in the record.

While each party makes broad arguments in support of its position, with limited case analysis, the panel concludes that the language of the lease and instruction in one precedential case dictates the results here. In *Coley Properties Corp. v. United States*, 593 F.2d 380 (Ct. Cl. 1979), the contract incentivized the contractor to complete construction of both Government and commercial space as quickly as possible so as to start rent income on each aspect. Although the contractor completed construction during the contract-designated period, there was Government delay during construction. (Using the shorthand from above, although the POP + TOP period was not altered, the POP would have been shortened—but for the compensable change—and accrued to the benefit of the contractor.) The Changes clause obligated the Government to compensate the contractor for its increase in the costs of performance, which the court read as limited to unanticipated and extra out-of-pocket costs.[2] These compensable costs were for both the Government and the commercial spaces, which together formed part of the consideration under the contract; the latter space was to be completed within a time frame after completion of the Government space. The compensated costs were for real estate taxes, premium time, general conditions expenses, field and supervisory payroll, and home office overhead—incurred in performing the contract as a result of the delays or changes. A contract clause prohibited payment of increased interest paid on construction loans. Although in one sense all of the costs were expected to be incurred, the delay which lengthened the contractor's time to complete the spaces, rendered the costs unanticipated and extra out-of-pocket expenses under the lease. Reduced income

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[2] The phrase "unanticipated and extra out-of-pocket costs" may be viewed in light of this example: Owner (O) rents an apartment to tenant (T) with T to pay rent plus utilities and other costs. For a portion of the rental period, T sublets to dweller (D) with D to pay rent plus utilities and other costs. D stays an extra month. T is entitled to extra consideration; D's assertion that T would have incurred rent and other costs anyway does not lessen the impact of D's extension and D's obligations, as the extra month is not priced under the sublet agreement.

when rent was not received under the Government or commercial portions because of delay did not translate to an out-of-pocket expense. Aware of the economic detriment suffered by the contractor, the court held that the lack of rent income was not a cost of performance.[3]

The lessor does not ask for lost rent, although, without any factual support, the agency continues to so characterize the claims. Under the lease, rent obligations began with occupancy and continue for at least ten years. The rental period remains intact; however, it began later than anticipated at lease signing. In substance, the lessor seeks compensation for costs it has paid or will be obligated to pay that are not reflected in the rent payments. Regarding taxes and operating costs, the lessor maintains that the base rates (for which it is liable under the lease) have increased because of the delay, such that its cost of performance increases. Other costs, relating to construction loan interest, return on capital costs, costs incurred as a result of inefficiencies and delays, and legal fees, it maintains were incurred only because of agency delays. Further, the lessor seeks payment for what it describes as operating cost increases (higher insurances costs) arising from tenant improvements priced higher than anticipated in the awarded lease.

As required under the lease and *Coley*, the Government is liable for impact costs the lessor incurred during the 138-day period of Government-caused delay. The lease pricing does not compensate the lessor for the added property taxes, insurance, mortgage, operating costs, and loan costs the lessor must bear because of the delay. As a change, constructive suspension, or delay, the costs that have been supported as incurred and priced on a daily basis are reimbursable as compensable impact costs. Payment for the costs incurred during

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[3] The agency offers no sound reason to read the lease and apply *Coley* in a different manner. The result here is consistent with the notion that the relief rests on a cost claim, not a repricing claim. *See, e.g., Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,474, at182,039. This lessor's costs were impacted by the delay, unlike the showing in *JDL Castle Corp. v. General Services Administration*, CBCA 4717, et al., 16-1 BCA ¶ 36,249, at 176,857 ("Although JDL provided documents concerning two mortgage loans in connection with the property, it failed to provide any evidence that these loans were procured because of or were affected by the delay." JDL did not prove its impact costs.). This lessor could not perform while it awaited the NTP, such that the length of the revised preoccupancy period, caused by Government delays, resulted in additional costs during the contract period. Moreover, as in *Coley*, lease pricing incentivized the lessor to complete the building for occupancy, so delay directly impacted lessor's expenditures because of the lengthened time. *Nassar Group International*, ASBCA 58451, 19-1 BCA ¶ 37,405, at 181,832 ("Appellant is entitled to an equitable adjustment for *costs incurred as a result of* any unreasonable government caused delays . . . under a constructive suspension theory." (emphasis added)).

the period of delay during non-occupancy is somewhat akin to what the Eichleay formula addresses–unabsorbed home office overhead costs that would have been and were incurred during a period of suspension but are not part of the payments under the contract. *Eichleay Corp.*, ASBCA 5183, 60–2 BCA ¶ 2688, *aff'd on reconsideration*, 61-1 BCA ¶ 2894 (1960). However, this lessor does not seek that (unabsorbed home office overhead) relief but, rather, seeks other costs directly tied to the leased space and the delay and change to the lease.

The record supports payment of $59,215.29 for the period of delay. The amount is derived as a percentage of the substantiated, compensable costs incurred during the claimed delay period. As required under the lease and by *Coley*, the agency must pay its share of local property taxes, insurance, mortgage, operating costs, and the construction loan, for the delay period. The lessor incurred these costs as preoccupancy (not rental) costs because of the delay; the costs were not factored into the lease payments because the Government delays extended the length of the preoccupancy period. The lessor will incur these types of costs for a longer period (from signing to the end of occupancy) than priced under the lease. That extra time period represents a compensable delay or change for which the lessor is to be made whole under the lease.

The lessor also seeks relief based on projected consumer price index (CPI) changes, as well as claimed inefficiency costs, return on capital costs, and attorney fees and expenses. Each of these attempts at recovery fails.

Claims for relief on projected CPI changes are speculative. Further, the lessor has not provided a factual or legal basis for relief. The projected period to finalize the build out was established in conjunction with the NTP and again reflected in a bilateral amendment associated with occupancy. The bilateral agreements retained the language of the lease but did not attempt to alter the basis for CPI calculations. Findings 22, 25.

The lessor seeks inefficiency costs and returns on capital costs. Again, legal and factual shortcomings in its presentation prevent relief. No reliable facts in the record address true inefficiency costs. The lessor contends that it infused additional capital into the project. Part of that appears to be for shell costs for which the lessor says it is not seeking compensation. The remainder has not been shown to be other than costs factored into the ultimate pricing for the space or compensable under the contract. To the extent that some of the costs reflect interest, there is no basis to award interest on monetary claims. *Servidone Construction Corp. v. United States*, 931 F.2d 860, 863 (Fed. Cir. 1991) (a court may not award interest on monetary claims against the Government unless specifically authorized by statute or contract, citing the Contract Disputes Act, 41 U.S.C. § 611 (1988) (now codified at 41 U.S.C. § 7109 (2018)), which contains an explicit statutory grant for the collection of interest on a recovery under a claim but has no separate provision for recovery of interest on borrowings).

The lessor seeks attorney fees and expenses in connection with its preparation of its initial and subsequent claims and the prosecution thereof. Lessor's Post-Hearing Brief at 21 (¶ 7). The lessor has not identified any attorney-related costs not associated with the preparation and prosecution of its claims. Such fees and expenses related to claim prosecution are not recoverable as a contract cost (if at all, a successful claimant may be compensated under the Equal Access to Justice Act, 5 U.S.C. § 504 (2018)). *Tip Top Construction, Inc. v. Donahoe*, 695 F.3d 1276 (2012). The lessor does not recover the requested costs here.

Decision

The Board **GRANTS IN PART** the lessor's appeals, such that the lessor is to be paid $59,215.29. Interest runs from November 6, 2017, the date the contracting officer received the initial certified claim, 48 CFR 33.208 (2021).

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

I concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

CHADWICK, Board Judge, concurring.

Absent controlling precedent, I might not agree that the costs awarded in this decision were caused directly *by* the agency's delay (as opposed to being merely costs that the lessor paid *during* the delay). I tend to think that the but-for costs of the initial delay will not be known until the end of the lease term—when the value of the agency's later-lasting tenancy in the building can be netted against the lessor's costs of financing the preoccupancy delay of about 4.5 months. As the majority notes, we do not write on a clean slate. The Court in *Coley Properties Corp. v. United States*, 593 F.2d 380 (Ct. Cl. 1979), awarded a lessor "impact costs" apparently "including real estate taxes . . . , general conditions expense, field and supervisory payroll, and home office overhead" in similar circumstances. *See id*. at 383

(defining "impact costs" for the "postal portion" of the project rather than for the "tower portion" addressed by the court). I concur here as an application of *Coley*, even though I do not think the *Coley* court focused on the question of but-for causation. *See id*. at 383-84 (addressing mainly "whether . . . the Changes Clause of the Agreement applies to construction of the tower as well as to construction of the postal portion").

Kyle Chadwick

KYLE CHADWICK
Board Judge