UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR PARTIAL DISMISSAL DENIED: April 16, 2025

CBCA 7753

BOYD ATLANTA RHODES, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Seamus Curley of Dentons US LLP, Washington, DC, counsel for Appellant.

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

Before Board Judges **RUSSELL**, **VERGILIO**, and **ZISCHKAU**.

VERGILIO, Board Judge.

A contracting officer of the General Services Administration (agency) denied a certified claim of Boyd Atlanta Rhodes, LLC (lessor or Boyd) seeking an amount in excess of $3 million under a lease for a firm, ten-year term. The lessor maintained that the agency issued the notice to proceed, and accepted the space, on dates well beyond the time frame established in the lease. The lessor sought to be made whole for alleged Government breaches of the lease agreement, compensable delays, and constructive changes during the design-build phase of the lease which preceded acceptance of the space by the agency. The lessor attributes 401 days of delay to Government breaches. The lessor seeks to hold the agency liable for the delayed acceptance and related lost income to the lessor.

Under Board Rule 8(e), 48 CFR 6101.8(e) (2024) ("A party may move to dismiss all or part of a claim for failure to state grounds on which the Board could grant relief"), the agency moves to dismiss the claim for lost rent. The agency contends that, as a matter of law, lost rent is not recoverable for delays to the commencement of the lease term. The lessor calculates part of its recovery owed using lost rent as an element, premised on material breaches by the Government, not contractual changes. Such relief is not expressly precluded by the lease or case law. Accordingly, the Board denies this aspect of the motion to dismiss.

The agency also moves to dismiss count II of the complaint, which asserts a "cardinal delay." The agency contends that the allegations cannot constitute a cardinal change to the lease because, under the Changes clause, the agency has an unrestricted ability to make changes prior to occupancy, such that it cannot be in breach even if it caused the delay. The Board does not interpret the lease to provide the agency with such unfettered discretion that it can take any action and never be in breach. The Board denies the motion; count II remains.

Background[1]

The lease

In October 2016, the agency entered into a lease agreement with a firm, ten-year lease term that would begin upon the substantial completion of the premises and the agency's acceptance. Moreover, "[t]he commencement date of this Lease, along with any applicable termination rights, shall be more specifically set forth in a Lease Amendment upon substantial completion and acceptance of the Space by the Government." Exhibit 1.[2] Boyd became the eventual lessor under a lease amendment effective October 1, 2018, which incorporates a novation agreement signed by the agency and the leasing parties, entered into on June 26, 2018. Boyd became entitled to all rights, titles, and interests of the transferor in and to the lease as if it were the original party to the lease. Exhibit 12.

A clause identifies the rent and other consideration the Government is to pay the lessor. The annual rent, $3,452,373.21, is the sum of shell rent, tenant improvement (TI) rent, operating costs, building specific amortized capital (BSAC) costs, and parking (at zero cost). Rent is subject to adjustment based upon the final TI cost and BSAC cost, each to be amortized in the rental rate. Exhibit 1 at 5-6. In exchange for the rental payments and other considerations, the lessor is to provide all improvements to meet the requirements of the lease. *Id.* at 6. The lease establishes a dollar amount as a tenant improvement allowance

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[1] This section draws from the complaint and materials referenced therein (i.e., the lease agreement and claim) to put the dispute and resolution in context.

[2] All exhibits are in the Rule 4 appeal file.

(TIA), amortized at zero interest over the lease term which the Government may use for TIs. The Government may spend in excess of the amount, reduce TI requirements, make lump sum payments, and/or decrease the rent to account for a lump sum payment. *Id.* at 6. The Government may make similar determinations regarding its use of BSAC and appropriately alter rental payments. *Id.* at 6-7. Further, "[r]ent is subject to adjustment based on the final [BSAC] cost to be amortized in the rental rate, as agreed upon by the parties subsequent to the Lease Award Date." *Id.* at 6. The rent and other considerations are to fully compensate the lessor for "[a]ll costs, expenses and fees to perform the work required for acceptance of the Premises in accordance with this Lease, including all costs for labor, materials, and equipment, professional fees, contractor fees, attorney fees, permit fees, inspection fees, and similar such fees, and all related expenses." *Id.* at 6. Upon the Government's acceptance of the space, the lease term commences, and a reconciliation of the annual rent is to occur. *Id.* at 27-28.

The lease contains a Rate for Adjustment for Vacant Leased Premises (SEP 2013) clause:

> In accordance with the paragraph entitled "Adjustment for Vacant Premises," if the Government fails to occupy or vacates the entire or any portion of the Premises prior to expiration of the term of the Lease, the operating costs paid by the Government as part of the rent shall be reduced as such, should the Government elect to vacate space, in partial or whole: [rates set out for partial floor, full floor, full building.]

Exhibit 1 at 7. The referenced provision states:

> A. If the Government fails to occupy any portion of the leased Premises in whole or in part prior to the expiration of the term of the Lease, the rental rate and the base operating cost adjustments will be reduced.
>
> B. The rate will be reduced by that portion of the costs per [a standardized measure of] SF of operating expenses not required to maintain the Space. Said reduction shall occur after the Government gives 30 calendar days' prior notice to the Lessor and shall continue in effect until the Government occupies the vacant Premises or the Lease expires or is terminated.

Exhibit 1 at 12.

The lease contains a No Waiver clause (SEP 1999), 48 CFR 552.270-26:

> No failure by either party to insist upon the strict performance of any provision of this lease or to exercise any right or remedy consequent upon a breach thereof, and no acceptance of full or partial rent or other performance by either party during the continuance of any such breach shall constitute a waiver of any such breach of such provision.

Exhibits 1 ¶ 1.07, 6 ¶ 6.

As noted, the lease term begins with the agency's acceptance of the premises. Exhibit 1 at 1. The general clauses of the lease recognize that the contracting officer may "during the term of this lease, require changes to be made in the work or services to be performed and in the terms or conditions of this lease. Such changes will be required under the Changes clause." Exhibits 1 at 6, 6 at 91 (Proposals for Adjustments clause (¶ 30)). For such proposed changes within the general scope of the lease, if the cost exceeds $100,000, the lessor is to provide a proposal including various costs, overhead, profit, and employment taxes. Exhibit 6 at 91. A Disputes clause (Federal Acquisition Regulation (FAR) 52.233-1 (MAY 2014) (48 CFR 52.233-1)) is part of the lease. Exhibit 6 at 94-95.

The referenced Changes clause (MAR 2013) specifies that the lease contracting officer, by written order, may at any time "direct changes to the Tenant Improvements within the Space, Building Security Requirements, or the services required under the Lease." For any such change that causes an increase or decrease in the lessor's costs or time required for performance, the lessor is entitled to an amendment "providing for one or more of the following: (1) [a]n adjustment of the delivery date; (2) [a]n equitable adjustment in the rental rate; (3) [a] lump sum equitable adjustment; or (4) [a] change to the operating cost base." Exhibit 6 at 92 (Changes clause (¶ 31)).

The lease agreement contains a construction schedule, commencing within five days after lease award, which "shall be used" by the lessor and Government. The document identifies the number of work days allowed to complete various tasks. The lessor is to provide design intent drawings (DIDs) within forty days. The Government has twenty days to review and approve the DIDs. Then, within twenty-five days, the lessor is to prepare and submit construction drawings with Government review to be completed within twenty days. The lessor then has forty days to prepare and submit the TI and BSAC price proposal with forty days for the Government's review and approval. Within ten days thereafter, the Government is to issue the notice to proceed, and within the next 100 days, the lessor is to complete the work. Thus, the total workdays from lease award to Government acceptance is 295 days. Exhibit 10 at 130.

Actions under the lease agreement

As alleged by the lessor, the Government failed to meet several of its dates of performance; i.e., the Government (the agency or one of three tenant agencies) acted well in excess of the contract-defined time limits when it made determinations and changes to the design and other requirements, or simply failed to provide information necessary for the lessor's progress. The alleged Government delays relate to the initial meetings, the formulation and approval of design intent drawings, various iterations of construction drawings and TI and BSAC price proposals, selection of a design that would come within budget, and the issuance of the notice to proceed. All of these actions were required for the lessor to complete the building spaces such that the agency could accept the spaces which would trigger the rent commencement date. The lessor periodically submitted revised construction schedules, which the agency approved. The lessor contends that, taking into account its delays, the agency was responsible for 401 days of delay, which required the lessor to expend additional time and effort to obtain the notices to proceed and to complete the space to allow for acceptance and occupancy. The alleged actions affected more than TI, building security requirements, and services required under the lease. The agency altered requirements outside of these areas and reconfigured the space to be occupied by three tenants instead of one, as initially detailed in the lease.

As stated in the complaint, on March 24, 2018, the lessor informed the agency that, to date, the Government was liable for 220 working days of delay. Complaint ¶ 147. The lessor still anticipated completion of the space by December 31, 2018, as it proposed lease commencement dates in February 2018 (with a retroactive start date and payment of rent) and in October 2018 (which reflected the payment of rent before the acceptance). *Id.* at 22. The lessor alleges in the complaint that, thereafter, Government delays continued, as reflected in failures and delays in responding to inquiries that required responses and in alterations to requirements in the design. *Id.* at 23.

Effective April 9, 2019, lease amendments contained notices to proceed with construction and alterations for three tenant spaces in the building. The amendments established dollar lump sum pricing (not to be exceeded) for TIs and BSAC improvements with all work to be substantially complete by December 9, 2019. Exhibits 14, 15, 16. As the lessor relates in an initial request for an equitable adjustment (REA), dated November 14, 2019, the lessor sought in excess of $2 million based upon 258 days of delay. The agency initially denied payment of damages but indicated that it was willing to consider adjustments relating to tax rates, square footage, and operating costs with issues to be revisited after substantial completion and acceptance. Various ensuing change orders altered or added work and established prices.

With substantial completion achieved, the agency accepted the spaces by bilateral lease amendment, effective May 6, 2020. Rental payments began under the terms of the lease. The amendment established rates (shell, operating costs, TIA, BSAC, parking) for the rent of the spaces with a total annual rent of $3,461,692.26; the lessor reserved its rights to pursue recovery of increased costs and/or damages. Exhibit 27. Thereafter, the parties resumed discussions of the lessor's request for equitable adjustments which had been refined, based upon additional information and further alleged Government delay and/or breaches, for a total in excess of $3 million.

Certified claim and actions prior to the appeal

With the space for three tenants accepted and the REA unresolved, the lessor submitted its certified claim to the contracting officer. The lessor sought $3,171,372.85, arising from the Government's alleged breach of contract, compensable delays, and constructive changes. Exhibit 33 at 400-01. The contracting officer denied the claim, stating that it is well established that lost rent is not recoverable for a government-caused delay, the lessor did not calculate or detail other costs such that they are not recoverable, and lease amendments will fully compensate the lessor for fees and other costs sought. Exhibit 46.

The lessor raises four counts for relief in its complaint, seeking $3,117,210.11 (a lesser figure than its claim, given refinements based upon actual, not estimated costs, although precise calculations remain to be detailed) or any other relief that the Board deems just and proper. The four counts:

I. Government delay. The lessor raises delay as a basis for relief alleging multiple material breaches which are said to have resulted in significant and pervasive delay. The lessor contends that the Government failed to carry out its duties and obligations under the lease within a reasonable time, causing the rent commencement date to be delayed for over 400 days. In its complaint, the lessor asserts, "There is no squarely applicable remedy-granting clause in the Lease." The lessor contends that it is entitled to recover costs and damages to be made whole for the Government's actions and inactions. Complaint ¶ 258.

II. Cardinal delay. The lessor again references delays of over 400 days, contending that some breaches are so profound that they are outside of the scope of the contract. The lessor maintains that the delay "caused the 10-year term of the Lease to greatly expand to a length never contemplated by the parties, which in turn significantly delayed rent commencement." The lessor seeks to recover costs and damages to be made whole for Government actions and inactions. Complaint ¶ 264.

III. Breach of the implied covenant of good faith and fair dealing. The lessor asserts that the Government delayed the completion of the project and rent commencement

for an egregiously long period of time and caused the lessor to incur significant additional costs and to suffer damages. The lessor reasserts that Government-caused delays rise to the level of contract breach that caused the lessor to incur substantial financial losses. The lessor seeks to be made whole as in the other counts.

IV. Constructive change. The lessor recognizes that the lease contains a Changes clause but states that the agency did not use the clause when unilaterally making changes throughout the design and construction process affecting the rent commencement date. The lessor seeks recovery under the Changes clause, including incurred costs and a reasonable profit.

The lessor seeks to be placed in as good of a position as it would have been had the agency performed its lease obligations. Its calculations of damages are based in part on the net rent it would have received during the delay period or the time value of the rent had it been paid during the delay period. The lessor also seeks operating costs incurred and paid during the delay period and preparation costs for its request for an equitable adjustment. A substantial part of the dollar amount sought arises from the alleged breaches and reflects calculations based upon the rent the lessor would have received but for the delay, or the time value of the lost rent, according to the lessor.

Discussion

In its Rule 8(e) motion, the agency contends that, as a matter of law, the lessor cannot recover rent for the period preceding acceptance of the space. Accordingly, it moves to dismiss those portions of counts II and III which seek payment of lost rent. Further, it seeks to dismiss count II (alleging cardinal delay) entirely because a "cardinal delay" is not a valid claim.

"Lost rent"

In ruling on this motion to dismiss for failure to state a claim, the Board determines if the lessor alleges "factual content" that could "'support a reasonable inference that the [agency] is liable,' making 'a claim for relief . . . plausible on its face.'" *NoMuda, Inc. v. Department of Homeland Security*, CBCA 7999, 24-1 BCA ¶ 38,662, at 187,945 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted)). It is appropriate to look to the underlying claim when construing the complaint. *RocJoi Medical Imaging, LLC v. Department of Veterans Affairs*, CBCA 6885, 20-1 BCA ¶ 37,746, at 183,196.

Under the lease, the term "rent" refers to a payment to be made after acceptance of the space for the ten-year term. The agency is correct that the lessor cannot recover such rent

during design and construction because the ten-year term of the lease did not change, although it shifted in time, and the period in question precedes acceptance. The term of the lease remains ten years, the period for which the lessor will be paid rent under the terms and conditions of the lease. At times, the lessor states that it seeks an award in an amount equal to the net rent it would have received during the delay period. This is readily answered, as it would have received no rent under the lease because the trigger for the commencement of the lease term had not occurred—the premises were not ready for occupancy and the agency had not accepted the space.

As is apparent in the claim and each count of its complaint, the lessor seeks to be made whole for what it contends are Government breaches and uncompensated changes. At issue in the motion are the aspects of the dispute regarding the alleged breaches. The allegedly uncompensated changes relate to other delays and alterations said to be within the terms of the lease and Changes clause. The lessor uses the term "rent" to reflect a dollar amount utilized in calculating the damages it contends it is due. The lessor values the space for the days of alleged Government delay at the rental rate it would have received had occupancy not been delayed. The lessor contends that rent payments did not commence within the time frame established in the lease agreement because the Government improperly impeded the lessor's progress and delayed issuing the notice to proceed with tenant improvements and, thereafter, inappropriately interfered with the lessor's performance. Thus, the phrase "lost rent" represents what the lessor believes is an appropriate measure of damages arising from the Government's actions and inactions, which the lessor equates to breaches.

The agency's position largely rests on *Coley Properties Corp. v. United States*, 593 F.2d 380, 385-86 (Ct. Cl. 1979) (The Court denied relief, noting that it knew of no case "in which loss of expected income during the period of delay has been viewed as a 'cost' of performance of the contract for which the contractor received an equitable adjustment under the Changes clause.") and its progeny, including *SBC Archway Helena, LLC v. General Services Administration*, CBCA 5997 et al., 23-1 BCA ¶ 38,298, at 185,945 (The lessor did not seek rent payments but rather sought relief arising from Government delays in issuing the notice to proceed; the lessor recovered impact costs for the 138-day period of Government delay in issuing the notice to proceed.); *Kap-Sum Properties, LLC v. General Services Administration*, CBCA 2544, 13 BCA ¶ 35,446, at 173,833-34 (The Board concluded that the agency had not breached the contract and the lessor could not recover costs and lost income arising from the lessor's (not the agency's) termination of the lease.); and *Altmayer v. General Services Administration*, GSBCA 12639, 95-1 BCA ¶ 27,515, at 137,123 ("Case law establishes that when Government delay occasions later-than-anticipated commencement of rental payments, compensation may be made only for increases in costs of performance; loss of rental income, although an economic detriment, is not a cost of

performance and therefore is not compensable for the delay."), *aff'd in relevant part*, 79 F.3d 1129, 1132 n.* (Fed. Cir. 1996). The Board did not find a material breach in these cases.

The Court in *Coley*, 593 F.2d at 385, was specific in concluding that the contractor:

> is not entitled to an equitable adjustment under the Changes Clause for the rents it did not receive during the periods of delay. The Changes Clause covers changes that cause "an increase . . . in the . . . cost of . . . performance of the contract . . . ." The purpose of this provision is to compensate the contractor for the unanticipated and extra out-of-pocket expenses it incurred in performing the contract as a result of the changes. Although Coley suffered economic detriment when it failed to receive the rents it had expected during the period of delay, this loss of income was not an additional "cost of . . . performance of the contract." The rents that Coley did not receive did not impose any out-of-pocket expenses upon it but merely reduced its income.

The Changes clause considered in *Coley*, 593 F.2d at 383, states:

> The Contracting Officer may at any time, by a written order, and without notice to sureties, make changes in the drawings and/or specifications of this Contract if within its general scope. If such changes cause an increase or decrease in the Lessor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the Agreement to Lease shall be modified in writing accordingly.

In contrast, this Changes clause permits the lease contracting officer at any time to "direct changes to the Tenant Improvements within the Space, Building Security Requirements, or the services required under the Lease" and that the lessor will be entitled to an equitable adjustment "[i]f any such change [i.e., to the Tenant Improvements, Building Security Requirements, or services required under the lease] causes an increase or decrease in Lessor's costs or time required for performance of its obligations under this Lease." Exhibit 6 at 92. Apart from the relief the lessor seeks for challenges under the Changes clause, at issue in this motion is the "lost rent." The lessor asserts that the agency instituted many actions that did not relate to tenant improvements, building security requirements, or the required lease services. For example, the lessor contends that the agency altered basic design specifications, reconfigured the space from one tenant to three, and delayed performance in such ways as to constitute breaches. The lessor alleges that the contract's Changes clause does not preclude the Government's actions from constituting contract breaches for which, according to the lessor, lost rent could be a measure for relief.

At this stage of the proceedings, based on the allegations contained in appellant's claim and complaint, the Board is not asked to determine if Government actions and inactions constitute a breach or fall outside of the Changes clause as alleged by the lessor. *Coley* does not compel the result the agency seeks at this stage of the litigation. Moreover, the Court addressed appellant's position that some cases potentially could support an award of a form of lost rent where the Government's wrongful actions were not covered by a Changes clause and therefore constituted contract breaches:

> The two other cases were situations in which the government had breached a contract, and the rents the contractor lost as a result were allowed as an item of damage for the breach. *J.D. Hedin Constr*[*uction*] *Co. v. United States*, 456 F.2d 1315, 197 Ct. Cl. 782 (1972); *Chain Belt Co. v. United States*,115 F. Supp. 701 [(Ct. Cl.] 1953). Coley has cited no case, and we know of none, in which loss of expected income during the period of delay has been viewed as a "cost" of performance of the contract for which the contractor received an equitable adjustment under the Changes Clause.

Coley, 593 F.2d at 385-86. The Court addressed relief under the Changes clause, while recognizing that relief for a breach could differ.

The agency also contends that the lessor is precluded from seeking the relief because it forfeited the right to seek such relief through bilateral modifications. However, the No Waiver clause of the lease, the lessor's assertions, and the agency's actions relating to the REA undercut that argument, particularly at this stage of the proceeding.

Although the agency is correct that nothing in the contract or case law suggests that payment of rent is the appropriate remedy for a change, ultimately the lessor seeks a dollar figure relying substantively on theories of both breach and actions of the Government outside of the Changes clause. That is, the lease permits the contracting officer to make changes "*during* the term of the lease," which only began with acceptance, a time that post-dates the actions at issue here. Exhibits 1 at 10, 6 at 91 (emphasis added). Further, under the Changes clause the lease contracting officer may make direct changes to the TIs within the space, building security requirements, or the required services. The lessor maintains that actions occurred inconsistent with such provisions and that the actions amount to breaches. The lessor seeks to be made whole. Precedent does not preclude the lessor from attempting to establish the damage it may recover for a breach; that damage ultimately is a dollar amount. The agency does not acknowledge a breach, the existence or not of which remains to be litigated. The Board need not speculate on available relief. The lessor may attempt to establish the appropriate relief if a material breach (rather than a change under the Changes clause) occurred.

We are mindful that the monthly lease payments appear to reflect agreed upon pricing for particulars of a completed, occupied building with various costs amortized over the life of the lease after the agency has calculated payments in light of lump sum payments for various items. Although not required to resolve this motion, the lessor has yet to provide support and details of its calculations of the relief it seeks for the pre-acceptance period to ensure that elements of its demand are not included in the payments of rent. The burden rests on the lessor.

Cardinal delay

The agency moves to dismiss count II, cardinal delay, "because even if [the Government] is responsible for the delay alleged by [the lessor], the allegations do not constitute a cardinal change to [the lease]." Agency's Motion to Partially Dismiss at 10. The agency posits that it has an unrestricted ability to make changes prior to occupancy and concludes that no change can form the basis for breach damages. The agency focuses first on the language in the Proposals for Adjustment clause (¶ 30) under which a contracting officer may direct changes "during the term of the lease" – that is, post-occupancy. The clause specifies a method for the lessor to seek an adjustment if the contracting officer "makes a change within the general scope of the lease." Second, in contrast, the agency notes that the Changes clause (¶ 31) permits a lease contracting officer "at any time" to direct changes to the TIs within the space, building security requirements, or services required under the lease.

The agency views this Changes clause as containing no restrictions on what the agency may alter and concludes that the lessor can never prove a breach during the pre-occupancy period. The agency seems to overlook both the specifics of the clause, which itemize categories of permissible changes, and the relief provisions in the Changes clause, which specify that a lessor shall be entitled to a lease amendment providing for various adjustments to time and payment if a change alters the lessor's costs or time for performance under the lease and is silent on relief if the changes go beyond the lease. We find unpersuasive the agency's argument of its unfettered ability to alleviate a breach. The provision, and lease as a whole, do not preclude a claim alleging a breach arising from Government actions that go well beyond what was allowed under the scope of the lease.

As is clear in its claim, the lessor seeks to be made whole for what it maintains are Government breaches of the lease which extended the pre-occupancy period by more than 400 days. In this count of its complaint, the lessor seeks to be made whole under its theory of cardinal delay, as it maintains that this additional time establishes a basis for receiving compensation which the agency has not provided.

At this stage, the Board rejects the agency's reading of the lease to endow the agency with an unrestricted ability to make changes pre-occupancy. Even with that broad ability, the proper relief would have to be determined. However, in denying the agency's motion, the Board is not concluding that, in this situation, a cardinal delay theory is viable or differs from the cardinal change and delay theories raised in count I. Those determinations await further development of the record. It would be productive for the parties to consider and address guidance found in *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320 (Fed. Cir. 2003):

> A cardinal change "occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for." . . . A cardinal change can occur even when there is no change in the final product because "it is the entire undertaking of the contractor, rather than the product, to which we look."

Id. at 1332 (citations omitted). Also, "[t]he cardinal change doctrine asks whether a modification exceeds the scope of the contract's changes clause." *AT&T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993).

Decision

The Board **DENIES** the agency's motion to dismiss.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

We concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge