Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

GRANTED: March 10, 2003

GSBCA 15535

AIRPORT BUILDING ASSOCIATES,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

David R. Nachman of Brown & Nachman, L.L.C., Kansas City, MO, counsel for Appellant.

Catherine Crow, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **HYATT**.

NEILL, Board Judge.

Appellant, Airport Building Associates (ABA), a Missouri partnership, is the owner of a building it leases to the United States Government through the General Services Administration (GSA). ABA and GSA disagree over the application of a clause in the lease which provides the lessor with reimbursement for increases in general real estate taxes which occur over the life of the lease. For tax year 1999, ABA experienced an increase in property taxes as compared with those paid for tax year 1998. ABA submitted an invoice for the increase. The contracting officer rejected the invoice on the ground that the base year, for purposes of administering the adjustment clause, is not 1998 but 1999. ABA has appealed from this decision of the contracting officer. For the reasons set out below, we conclude that appellant is correct and that the base year is 1998.

Findings of Fact

ABA's Lease

1. The lease between ABA, owner and lessor, and the United States Government, dated January 10, 1997 (hereinafter "the lease"), provides for approximately 30,000 rentable square feet of office and related space located at 9741 North Conant Avenue, Kansas City, Missouri. The lease term begins on April 1, 1997, and runs through August 31, 2007. Appeal File, Exhibit 2.

2. By supplemental agreement number 1, dated April 14, 1997, the parties agreed that the lessor would lease to the Government "the following described premises:"

> Approximately 30,000 rentable square feet of office and related space located at 9741 North Conant Avenue, Kansas City, Missouri. Parking will be provided as follows: fifty[-]nine (59) spaces will be provided adjacent to the building on the west, thirty[-]five (35) parking spaces and one (1) oversized space for a bus will be provided in a lot secured with fencing on the west side of North Conant Avenue (across North Conant Avenue from the building), and twenty[-]six (26) parking spaces will be provided in a lot on the west side of North Conant Avenue (across North Conant Avenue from the building and north of the above mentioned secured lot) to be used for such purposes as may be determined by the General Services Administration.

Appeal File, Exhibit 2 at 68.

3. The lease contains Paragraph 3.3, TAX ADJUSTMENT, GSAR 552.270-24 (AUG 1992). It reads, in material part, as follows:

> (A) The Government shall pay additional compensation for its share of increases in General Real Estate taxes over general real estate taxes paid for the calendar year in which its lease commences (base year). Payment will be in a lump sum and become due on the first work day of the month following the month in which tax bills and paid tax receipts for the base year and the current year are presented, or the anniversary date of the lease, whichever is later. . . . If no full tax assessment is made during the calendar year in which the Government lease commences, the base year will be the first year of a full assessment.
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> (B) Full assessment is defined as the assessed value of property ready for full occupancy after completion of all construction, renovation or conversion for the intended use of the Government. Full assessment does not occur until after the expiration of any and all special assessments or reduction in tax liability for hardship and for special taxing jurisdictions and districts such as economic development of enterprise zones. Partial assessments for newly constructed projects or for projects under construction or partially completed projects, renovations, or conversions will not be used for establishing the Government[']s base year for tax adjustment payments.
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> . . . .

> (D) The Government's share of the tax increase will be based on the ratio of the square feet occupied by the Government to the total rentable square feet in the building(s). . . .
>
> (E) The Government may contest the tax assessment by initiating legal proceedings on behalf of the Government and the Lessor, or the Government alone. If the Government is precluded from taking legal action, the Lessor shall contest the assessment upon reasonable notice by the Government. . . . The Government shall be provided notices of changes in valuation or assessment of the property covered by this lease within five (5) business days of receipt of said notice. Failure to submit said notices in a timely manner may impair any legal action the Government elects to pursue.
>
> (F) In the event of any decrease in general real estate taxes occurring during the term of occupancy under the lease, the rental amount will be reduced accordingly. The amount of any such reductions will be determined in the same manner as for payment of additional compensation provided under paragraph (A) above.
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> . . . .
>
> (H) For tax adjustment purposes, in addition to the definition provided under Paragraph 3.4,[1] full assessment is further defined as assessment value after tax abatements have expired.

Appeal File, Exhibit 2 at 12-13.

ABA's Properties

4. The premises subject to the lease are located in the Platte Industrial Park. Conant Avenue runs north and south through the industrial park. The building at 9741 North Conant Avenue is on the east side of the avenue. Appeal File, Exhibit 21. It is of simple, economical, concrete construction. This and other buildings in the park are zoned for light industrial-type use. The original building covered approximately 24,000 square feet of space. Transcript at 15, 25-26. The original building is located on a parcel of land whose legal description in the Platte County Assessor's files is: Lot 9 and the South 120' of Lot 10, Block 7. Appeal File, Exhibits 10 at 18, 27; 18 at 1; 28.

5. To accommodate the Government's need for approximately 30,000 square feet of rentable office and related space, ABA, after award of the lease, constructed an addition of approximately 6000 square feet at the north end of the original building. The addition

[1] The paragraph reference is apparently in error. Paragraph 3.4 of the lease deals with the percentage of occupancy and makes no mention of "full assessment." Presumably the intended reference was to subparagraph (B) of the Tax Adjustment clause. That clause is identified in the lease as paragraph 3.3.

extended onto a small parcel of property (12,750 square feet) adjacent to the north end of the lot on which the original building was constructed. Transcript at 24-29. This parcel of adjacent or adjoining property is referred to in the county assessor's records as: The South 51' of the North 105' of Lot 10, Block 7. Appeal File, Exhibits 10 at 16, 24-25; 19 at 1; 28. This parcel was purchased by ABA for purposes of enlarging the original building at 9741 North Conant Avenue. Transcript at 30.

6. The two additional parking lots ABA was required to provide under the lease were located on the west side of Conant Avenue across the street from 9741. Although ABA already owned some property on that side of the Avenue, it purchased an additional 33,208 square feet to accommodate the two lots. Transcript at 354-57; Appeal File, Exhibit 20 at 2. The legal description in the county assessor's files for this parcel of property following its enlargement is: Tract B per certificate of Survey B/331. Appeal File, Exhibits 10 at 12, 21; 20 at 1; 28.

The Reappraisal of ABA's Properties

7. The Platte Industrial Park falls within the assessment jurisdiction of the Assessor of Platte County, Missouri. Transcript at 212. On or about August 26, 1997, an appraiser from the Office of the Platte County Assessor visited the properties on Conant Avenue which are subject to the lease. The appraiser has testified that the assessor's office is required to add to the appraised value of any property, the value of any new construction found to exist upon that property. The change in value is effective as of January 1 of the following year. At the time the appraiser inspected the leased property, the improvements called for under the lease were complete. Transcript at 318. To determine any consequent increase in the value of the properties on which the improvements had been made, the appraiser planned to use a cost approach. Id. at 325, 329. He therefore requested information on the cost of the improvements. This information was promptly provided by appellant. Appeal File, Exhibit 26; Transcript at 55, 63-65, 321-22.

8. The cost information provided by ABA to the assessor's office was relatively detailed. It showed that the original contract sum for the improvements made came to a total of $883,060. The costs of multiple line items, including demolition, were also shown on the construction contract information provided. The cost of one item entitled "Additional Parking" was listed at $48,508. Appeal File, Exhibit 26.

9. Using the cost information provided by ABA, the appraiser calculated an additional value for the property located at 9741 North Conant Avenue. To do this, he simply added to the value of the property the total cost of the construction contract, $883,060, and subtracted $48,060. The deduction represented what, in the appraiser's judgment, was the estimated cost of constructing for GSA's use the two parking lots located across the street.[2] The appraiser then added the resulting figure of $835,000 to the appraised

[2] The appraiser testified that this deduction amounted to $48,050. Transcript at 321. His calculations shown on the appraisal record sheet, however, show that the actual deduction was $48,060, i.e., 883,060 - 48,060 = $835,000. See Appeal File, Exhibit 18.

value of the property prior to improvements, namely, $869,000, for a revised value of $1,704,000. Appeal File, Exhibit 18 at 1; Transcript at 321-32.

10. In reevaluating the parking lot property across the street from 9741 North Conant Avenue, the appraiser added a value of $51,660 for improvements. The value of this parcel prior to construction of the two parking lots was $11,360. However, as already noted, in order to construct the two lots, ABA had been required to increase the size of the original parcel. Finding 6. The appraiser, therefore, in calculating the revised value of this parcel not only added the value of improvements but also increased the appraised value of the land from $11,360 to $30,570 to reflect the value of the additional property added to the parcel. This brought the revised value of the enlarged parcel to a total of $82,230. Appeal File, Exhibit 20 at 2; Transcript at 353-60.

11. The county appraiser also considered altering the value of the adjacent property on which ABA had built part of the addition to the original building at 9741 North Conant Avenue. He ultimately decided not to do so. He explained that, in accordance with office practice, the costs associated with the improvements made in the original building, and even the costs of the addition which rested in part on the adjacent property, were all included in the reappraisal of the 9741 North Conant Avenue parcel. In view of this, he elected to leave the appraised value of the adjacent property at what it was prior to the improvements, namely $12,750. Appeal File, Exhibit 19 at 2; Transcript at 318-19, 339-43.

The 1998 Notices of Change in Assessed Value

12. In late March of 1998, the Platte County Assessor's Office sent ABA a notice of change in the assessed value of the parking lot parcel on the west side of Conant Avenue. The notice advised ABA that, as of January 1, 1998, the fair market value of $11,360 attributed to the property during the prior year was increased to $82,230. Appeal File, Exhibit 10 at 12.

13. A similar notice of change in the assessed value of the small parcel adjacent to 9741 North Conant Avenue was also sent to ABA in late March of 1998. The notice listed the previous appraised value of the adjacent parcel at zero and the fair market value of the parcel, as of January 1, 1998, at $12,750. Appeal File, Exhibit 10 at 24. When asked about this notice at the hearing for this case, the appraiser who re-evaluated ABA's properties in late August 1997 explained that there really was no change in the assessed value of this parcel but that the previous value of the parcel, for purposes of this notice, was listed as zero because, prior to the property being purchased by the current owner, it was of no or zero value to that owner. Transcript at 348. The Platte County Assessor and a second appraiser from her office confirmed this practice in their testimony. Id. at 260-61, 445.

14. For some reason, which to date remains unknown, notwithstanding the appraiser's reevaluation of appellant's property at 9741 North Conant Avenue, Finding 9, the 1998 tax assessment for this parcel remained unchanged from the previous year. The appraised value as of January 1, 1997, was $869,000. Appeal File, Exhibits 9 at 4, 8; 27 at 5 (unnumbered). As of January 1, 1998, that figure remained unchanged. Id., Exhibits 10 at 18, 27; 18; 27 at 4-5 (unnumbered).

15. The Platte County Assessor testified that, for commercial property, appraisers from her office inspect properties every odd year (and every year when improvements are added) to determine an appraised value for these properties. She explained that the appraisers generally handwrite their appraisal on an appraisal record or property record card. The card is then brought back to the office and given to a clerk who enters the appraisal value into a computer system. The system then automatically determines the assessment value for the property in question. For commercial property, the assessed value is thirty-two percent of the appraised value. Transcript at 210, 234-35, 262. In the event the appraised value of a particular parcel of property (and consequently its assessed value as well) changes, the assessor's office provides the property owner with notice of the change. The Assessor explained that these notices generally are sent out each year in mid-March. Id. at 231-32. The Assessor also testified that the information in her office computer system is then taken by the county collector's office and used in generating tax bills. Id. at 232-33.

16. The Platte County Assessor was unable to explain why, in view of the revised appraisal, the assessment for ABA's property at 9741 North Conant Avenue was not increased for 1998. She testified that the revised appraisal on that parcel simply was not entered into her office computer system, that this was a mistake, and that she did not know exactly why this occurred. Transcript at 225-27, 236-40. When asked if Platte County intended to correct this mistake, the Assessor replied that no corrective action would be taken. She assured the Board that this was her decision to make and that there was no one who could overturn her decision. Id. at 235-36. In a similar vein, the appraiser who did the revised appraisal of the 9741 North Conant Avenue property in the late summer of 1997 testified that, in the absence of an appeal, an assessment is what it is regardless of whether it contains or does not contain an error. Id. at 420, 422-23.

ABA's Property Tax for 1998

17. For the three properties subject to the lease, ABA paid a property tax for 1998 which came to a total of $25,522.30. Appeal File, Exhibit 10 at 4, 18-19, 22-23, 26-26. A tax escalation invoice dated December 31, 1998, was thereafter sent to GSA. It stated that the property tax paid for 1998 amounted to $25,522.30, and further stated that 1998 was the base year. Transcript at 519; Appeal File, Exhibit 16. GSA made no objection to this invoice at the time. Transcript 84-85, 519.

18. Mr. Myron Haith is a member of ABA and vice president of Haith & Company, which manages the properties subject to the lease. Although not an expert in commercial real estate appraisals, Mr. Haith nevertheless has considerable personal knowledge of and experience with commercial real estate and, in particular, with properties located in the Platte Industrial Park, where the leased premises are located. He is a college graduate and has completed all class work for a Certified Commercial Investment Manager (CCIM) designation. He has been licensed for twenty-eight years to sell real estate in the state of Missouri. He is also licensed to sell real estate in the state of Kansas. He has been closely involved with the Platte Industrial Park since 1979, when the park was purchased by a group to which he belongs. Since then he has been aware of all sales and all leases involving properties within the park. Transcript at 14-15, 37.

19. Mr. Haith testified that he was unaware of how the county came up with its 1998 evaluation of the three properties subject to the lease but that he believes the total assessment to be reasonable. Transcript at 85, 102.[3] During the course of his testimony, Mr. Haith described and discussed the three generally accepted approaches to appraising property, namely, the sales or market approach, the income approach, and the cost approach. Id. at 40-41. He stated that he believed the most reliable approach for appraising the value of commercial real estate is the income approach. He observed that other approaches, such as the sales or market approach, can serve as a control or "litmus test" to ensure the accuracy of the income approach. Id. at 76.

20. While on the stand, Mr. Haith went through a step-by-step calculation of the overall value of the three leased properties using the income approach. He based this calculation on his personal knowledge of real estate transactions in the area. Using this approach, he concluded that the three properties together had a market value, as of January 1, 1998, of approximately $937,500. Transcript at 69-76; Appellant's Trial Exhibit 1. He pointed out that this estimate, based upon an income approach, compared favorably with an estimate of the value of the building based on a sales or market approach. He explained that in early 1998 buildings of a similar construction in the area were selling for $30 to $35 a square foot. Thus, the value of a 30,000 square foot building, such as that leased to the Government in this case, might be valued somewhere within the range of $900,000 to $1,050,000. Transcript at 76-79.

21. In commenting on the use of a cost approach to value the leased properties together with their improvements, Mr. Haith was critical of a cost approach such as that which he imagined the assessor's office had in mind when it requested information on the costs of improvements made on the properties subject to the lease. He explained that, in this particular case, the improvements made to the property would probably have a negative value since, if sold on the open market at the end of the term, the building would more likely sell as an industrial building rather than as an office building. There would be little need for the additional parking already installed and office space in excess of what is usually found in a building intended for industrial use would, in all probability, have to be demolished. Transcript at 44-45, 50-55.

22. At the hearing for this appeal, ABA also called a witness whom the Board recognized as an expert in the area of appraisal of commercial office and industrial

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[3] At the hearing for this appeal, counsel for respondent attempted to impeach Mr. Haith by confronting him with deposition testimony in which he appeared to speculate that the cost of improvements was reflected in the appraisal of the adjacent lot rather than on the main parcel at 9741 North Conant Avenue because that is where the addition was constructed. The presiding judge found no significant conflict between this prior testimony and that provided by the witness during the hearing. Mr. Haith's prior testimony regarding how the properties were reappraised appears to be little less than speculation on his part. We remain convinced that, at the time he was notified of the change in assessments for the 1998 tax year, he was far from certain as to how these changes were intended to reflect improvements completed during the prior year. See Transcript at 62, 65, 67.

properties in the Kansas City metropolitan area generally, and in the Platte County area in particular. Transcript at 115. It was this expert's opinion that the increase, as of January 1, 1998, in the appraised value of the three parcels of real estate at issue in this case was reasonable. He acknowledged that it was not altogether clear to him why the assessor had allocated certain increased values to the adjacent parcel and to the parking lot parcel but not to the parcel on which the original building was situated. Nevertheless, he believed the total increase in the appraised value of the three parcels, taken together, was reasonable. Id. at 116-17, 173. He noted that the total value given to the properties, when divided by the area of the building (30,144 square feet), yielded a per square foot value of approximately $32. He found this figure to be consistent with the range of sales of industrial properties in Platte County and in the Kansas City metropolitan area as of that time. Id. at 118-32.

23. This same expert, as Mr. Haith had done before him, testified at some length on the valuation of the three leased properties and their improvements as of January 1, 1998, using the income approach. Although using a slightly more complicated methodology, he too concluded that, using this approach, the value of the properties subject to the lease fell into a range of $900,000 to $1,050,000. Transcript at 133-57.

24. As to the valuation of appellant's leased properties using the cost approach, the expert expressed several reservations on the reliability of this approach so far as these properties are concerned. He noted first that the original building was constructed in 1984 and then enlarged in 1997 – thus making it difficult to estimate physical depreciation accurately. Further, the building, as of the beginning of 1998, had an unusually high percentage of office space, which raises the question of whether these interior improvements represent functional value in the market place. This expert was of the opinion that an accurate valuation of the properties could be done using the cost approach but that care was required to do it correctly. Transcript at 157-60. For a variety of reasons explained in detail, the expert stated that the properties could not be appraised correctly using the cost approach, as of January 1, 1998, simply by adding to the prior appraised value of the properties the full cost of all improvements made under the GSA lease. Id. at 161-71.

The 1999 Notices of Change in Assessed Value

25 For tax year 1999, Platte County undertook a countywide reappraisal of all commercial property. Transcript at 270. In order to effect a certain degree of equalization, the assessor's office set out to treat all properties in a similar manner. Commercial properties were appraised using the income approach on the assumption that such property sells based upon its expected income potential. Id. at 436. In the Platte Industrial Park, property values which had previously been set at $1.00 per square foot or less, were all raised to $1.50 per square foot. Id. at 335-36. The value of the property parcel on which the major portion of ABA's leased building rests (the 9741 North Conant Avenue parcel) was determined using the income approach. In doing this appraisal, the appraisers did not have specific information from the lease but rather based their valuation on mass appraisal information available at the time to them. Id. at 436-37, 463. As part of the equalization process, it was assumed that the income stream for this property would be basically the same as that for other warehouses in the area. Only a slight upward adjustment of this figure was made on the assumption that the rent perceived for this building might be slightly higher (estimated

at $1.25 per square foot) because of the extensive tenant finish it contained. Appeal File, Exhibit 22; Transcript at 406, 464-65.

26. No income valuation calculation was done for the parking lot parcel or for the adjacent parcel. The appraisers attributed to the adjacent parcel only the value of the land itself and allocated to the larger parcel the entire value of the improvements, even those actually made on the adjacent parcel. See Finding 11. The change in assessment for the adjacent parcel for 1999, therefore, reflects only the increase in the value of the property from $1 to $1.50 per square foot. Appeal File, Exhibit 19; Transcript at 349-53. As to the parking lot parcel, the record includes no valuation using the income approach for this parcel for tax year 1999. Rather, one of the appraisers working on the appraisals for that tax year has explained that the only increase in the appraised value of that parcel represents an increase in the property value, which had been something less than a dollar per square foot, to the new standard value of $1.50 per square foot. Appeal File, Exhibit 20; Transcript at 353-58.

27. As a result of the equalization reappraisals for tax year 1999, ABA, in late March of that year, received notices of change in the assessed value of all three parcels of property subject to the lease. The notices advised that, as of January 1, 1999, the fair market value of the parcels had increased from the prior year. The appraised value of the property located at 9741 increased from $869,000 to $1,454,900. The appraised value of the small parcel adjacent to 9741 increased from $12,750 to $19,100, and the appraised value of the parking lot parcel increased from $82,230 to $135,560. Appeal File, Exhibit 10 at 15-16, 27.

28. Mr. Haith testified that he passed on to GSA the notices of change in assessment for tax year 1999. He did not state precisely when he did this. Transcript at 87. The contracting officer testified that the notices of change in assessment for tax year 1999 were sent to GSA, but not in time for the Government to appeal the assessments in a timely manner. She also testified that the two notices of change in assessment for tax year 1998 were not provided to GSA until the time of this appeal. On cross-examination, the contracting officer admitted that no analysis of any reported change in assessment was ever undertaken to determine if the change should be challenged and, in fact, the Government has never notified appellant that any assessment should be challenged. Id. at 514-15, 518-19.

29. The expert called by appellant was critical of the appraisals done by the Platte County Assessor's Office for tax year 1999. He noted that appellant was not the only property owner to experience significant increases. He recognized that the steep increase was undoubtedly attributable, in part, to the failure of the assessor's office to undertake reassessments in 1995 and 1997 as required by law. It was his opinion that the appraised values for 1999 were "much more than the market would warrant." Transcript at 174-80. Nevertheless, when asked if a party had a reasonable chance of reducing the appraised values for tax year 1999 through appeal, he expressed some doubt, especially regarding the Government's chance of prevailing on an appeal. He observed that the Federal Government's being tenant can sometimes inhibit the owner's ability to get a reduction of taxes even if there is an over-assessment. Id. at 181-82.

30. For the three properties subject to the lease, ABA paid a property tax for 1999 which came to a total of $41,594.49. Exhibit 10 at 29, 32, 35. A tax escalation invoice dated December 8, 1999, was thereafter sent to GSA. It stated that the property tax paid for 1999 amounted to $41,594.49, which represented an increase of $16,072.19 from the 1998 base year figure of $25,522.30. Appeal File, Exhibit 3; Transcript at 89-90.

Rejection of ABA's Claim for Tax Invoice

31. GSA declined to pay ABA's invoice for $16,072.19. By letter dated August 9, 2000, the contracting officer returned the invoice and advised ABA's counsel that GSA would not pay it because Platte County had not fully assessed the property until 1999. Consequently, the base year for purposes of tax reimbursement would be 1999 and not 1998. Appeal File, Exhibit 10 at 11. By letter dated August 24, 2000, counsel for appellant resubmitted the invoice with a demand that it be paid. He argued that the contracting officer was incorrect in stating that a full assessment did not occur until 1999. With his letter, counsel enclosed documentation in support of his contention. Id. at 1-36; Transcript at 91. Eventually, by letter dated December 21, 2000, the contracting officer issued a decision denying ABA's claim. In her decision she contended again that a full tax assessment for the leased property was not completed until 1999. She wrote:

> The Platte County Assessor's office inspected the property on August 26, 1997[,] for assessment in 1998. Due to the fact the construction was not complete, the added value for the improvement was not added. On October 18, 1998, the Platte County Assessor's office inspected the property for the assessment in 1999. At that time the added value of the improvement was included bringing the assessed value to $1,454,900.

Appeal File, Exhibit 13. ABA has appealed the contracting officer's decision. Id., Exhibit 14.

Discussion

The Properties Subject to the Tax Adjustment Clause

In its post-hearing brief, the Government contends that, regardless of which year is determined to be the base year for application of the Tax Adjustment clause, only increases in the property tax on the 9741 North Conant Avenue property can be recovered by ABA. Counsel notes that no portion of the building rests on ABA's parking lot property on the other side of Conant Avenue and that, although part of the leased building rests on the adjacent property, it is clear from the evidence provided that no portion of the building improvements has been included in the appraisals and assessments of the adjacent property. Finally, counsel argues that subparagraph (D) of the Tax Adjustment clause precludes any recovery of tax increases in parcels other than that on which the building is located. Respondent's Post-hearing Brief at 32-34.

In support of its argument, the Government relies on an earlier decision of this Board, Prince George Center, Inc. v. General Services Administration, GSBCA 12289, 94-2 BCA

¶ 26,889. In that case, the claimant leased part of an office building to the Government. Pursuant to the lease, the claimant was required to provide a specific number of parking spaces. The number of spaces varied over the term of the lease from as few as forty-two to as many as ninety-two. Adjacent to the leased building were 117 parking spaces. Across the street, on four parcels of land, the building owner provided commercial parking for an additional 1483 vehicles. Under the County Code, the building owner was required to provide a minimum of 1600 parking spaces as a condition to obtaining a certificate of occupancy. When, after award of the lease, taxes were increased on the four parcels set aside for additional parking across the street from the leased premises, the owner attempted to recover from the Government a share of that increase proportionate to the Government's share of leased space in the building.

In Prince George, we affirmed the contracting officer's denial of the landlord's claim. We noted that the lease contained a provision which covered situations where the Government has not rented *all* of the space available in a given building and that, in those situations, the Government's share of the tax increase is to be based on the ratio of the square feet occupied by the Government to the total rentable square feet in the building. Further, we determined, for that case, the ratio was to be applied only to the tax parcels on which the building was situated and not to the four parcels for parking across the street from the building. We considered this limitation entirely justified under the circumstances since the number of parking spaces made available to the Government under the lease had no relation to the amount of office and storage space leased in the claimant's building. Prince George Center Inc., 94-2 BCA at 133,848.

Respondent's reliance on the Prince George decision in the instant case is misplaced. It is of course true that the Tax Adjustment clause does contain a provision similar to the one in the Prince George case. Nevertheless, that provision applies to situations where the Government has not rented *all* of the space available in a given building. The situation here is altogether different. The Government has rented all of ABA's facility and even agreed with the lessor on the construction and leasing of an addition to the original building. This has led to the extension of the original building onto an adjacent parcel of property also owned by ABA. Furthermore, in this case, all of the parking facilities are for the exclusive use of the tenant and have been specifically leased to the tenant pursuant to a supplemental agreement. Finding 2.

It is true that the County Assessor's Office, apparently for purposes of administrative convenience, is currently operating under the fiction that all improvements in the original building pertain to the lot on which the original building is located. Findings 11, 26. We know, however, that this in fact is not correct. A substantial number of improvements have been added to the adjacent parcel which itself is now an inherent part of the leased premises. Finding 5. It is also technically true that no *building* improvements were made on the parking lot parcel. Finding 9. Nevertheless, we know that there were improvements made on that parcel and that they were made solely to satisfy the Government's requirements under the lease. Finding 5. Given these facts, we find it entirely reasonable and in no way contrary to existing case precedent to conclude in this case that ABA's parking lot property and the small parcel on which a portion of the building addition now rests are as much a part of this lease and subject to it as is the parcel on which the original building was situated.

The Base Year

Having determined the properties which are subject to the lease, we come now to the central issue of this case. What is the base year for purposes of applying the Tax Adjustment clause? The clause itself provides: "The Government shall pay additional compensation for its share of increases in General Real Estate taxes over general real estate taxes paid for the calendar year in which its lease commences (base year)." The same provision states: "If no full tax assessment is made during the calendar year in which the Government lease commences, the base year will be the first year of a full assessment." Finding 3.

Since no full tax assessment was made during the calendar year in which the lease commences, the parties must determine when the "first year of a full assessment" did occur. This, of course, is key to the application of the Tax Adjustment clause. The Government contends that, although the 9741 North Conant Avenue parcel was reappraised in 1997 after completion of improvements called for under the lease, ABA's tax assessment for the subsequent tax year, owing to human error, did not reflect the cost of those improvements. Instead, according to the Government, the first assessment reflecting those improvements was the assessment for the 1999 tax year. Accordingly, we are urged to declare that 1999 and not 1998 was the first year of a full assessment. Respondent's Post-hearing Brief at 22-23.

At first blush, this line of argument has a certain attractiveness about it. On closer scrutiny, however, we find that it is not supported either by the facts in this case or by the applicable contract language.

We turn first to the specific language of the Tax Adjustment clause. The clause provides a definition of "full assessment" which is admirably simple. "Full assessment" is said to be "the assessed value of property ready for full occupancy after completion of all construction, renovation or conversion for the intended use of the Government." It has been established that the improvements called for in the lease were complete by the time that the appraiser visited the site in 1997. Finding 7. It has likewise been established that there was an assessment for tax year 1998. Finally, it has been established that the 1998 assessed value for the 9741 North Conant Avenue property is what it is and will remain unchanged despite the fact that for tax year 1998 the assessed value of that parcel remained unchanged from the previous year's assessed value. Finding 16. Based on these facts, we conclude that the requirements for "full assessment," as that term is defined in the Tax Adjustment clause, were met with the 1998 assessment and that 1998 must, therefore, be considered the base year for purposes of applying the clause.

The Tax Adjustment clause does admit a limited number of exceptions to the basic rule that "full assessment" is that which follows completion of all construction, renovation or conversion for the intended use of the Government. It states: "Full assessment does not occur until after the expiration of any and all special assessments or reduction in tax liability for hardship and for special taxing jurisdictions and districts such as economic development of enterprise zones." We find nothing in the record which suggests that any of these

exceptions would be applicable to the facts in the instant case.[4] No exception exists in the clause for situations where the owner or the tenant becomes concerned with such matters as the taxing authority's methodology in figuring the assessment, or the possibility of mistakes in processing, or the accuracy of the raw data used. These may well be issues proper for examination through a formal challenge of the assessment, but they clearly are not envisioned in the Tax Adjustment clause as exceptions to the clause's general rule for determining the appropriate base year.

As for the contracting officer's contention that the value of improvements made in 1997 by ABA was not reflected in the 1998 assessment but was included instead in the 1999 assessment, we now know, based on the record before us, that this is incorrect. The contracting officer contended that, at the time the County Assessor's Office inspected the property on August 26, 1997, for purposes of preparing the assessment for 1998, construction was not complete. Finding 31. We now know from the appraiser who did the reappraisals in 1997 that, when he visited the leased property on or about August 26, 1997, the improvements called for under the lease were complete. Finding 7. We also now know that at least the value of improvements on the parking lot parcel were in fact included in the appraisal which served as the basis for the 1998 assessment on that parcel. Findings 10, 12.

Finally, and most importantly, we now know that the costs of improvements associated with the 9741 North Conant Avenue property were most definitely not included in the appraisal which served as the basis for the 1999 assessment on that parcel. It is true that the appraised value of the 9741 North Conant Avenue parcel used for the 1999 assessment increased significantly in 1999 from what it was in 1998 ($869,000 to $1,454,900). Finding 27. Apparently, because of this significant increase, the contracting officer assumed that the cost of improvement was now finally included in the appraisal which served as the basis for the 1999 assessment on that parcel.

The contracting officer's assumption is unjustified. The appraisal for the 1999 assessment on the 9741 North Conant Avenue parcel was not based upon the cost of improvements ABA made in its original building. We have found that the 1999 assessment was the result of a countywide equalization effort which did not use the cost approach to appraise commercial properties. Rather, based upon the assumption that commercial properties sell at values reflecting their expected income potential, the county appraisers valued commercial properties for tax year 1999 using the income approach. Finding 25. In appraising the value of the 9741 North Conant Avenue parcel, therefore, the appraisers did not use specific information from the lease and, in particular, did not use the actual cost of

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[4] Subparagraph (H) of the Tax Adjustment clause provides yet another exception to the general rule of when a full assessment is said to occur. No full assessment can occur until after the expiration of tax abatements. Finding 3. Although there is reference to tax abatement on some of the notices of change in assessment in the record, we conclude that these references are of no relevance to the instant case. In a pretrial deposition submitted earlier in this case in support of respondent's motion for summary relief, the Platte County Assessor testified that the references to tax abatement on these notices do not apply to the particular parcels in this case. Deposition of Christine McQuitty (Aug. 30, 2001) at 38.

improvements made in the building. Rather, they based their valuation on mass appraisal information available to them at the time of reassessment. Id.

If the costs of improvements made by ABA at GSA's request are reflected at all in the appraisers' determination of the value of the 9741 North Conant Avenue property for 1999, it would be only indirectly to the degree that, in recognition of the fact that this warehouse building had more than the usual tenant finish in a building of its type, a slight upward adjustment was made in the estimated rental figure used in the appraisers' calculation. Finding 25. Nevertheless, given the methodology used to appraise commercial properties in Platte County for tax year 1999, we are far from convinced that, even with the inclusion of this estimated factor in the valuation of the 9741 North Conant Avenue parcel, one could say that the costs of improvements made for GSA in 1997 were included in the appraisal which served as the basis for the 1999 assessment.

Notice to the Government of Changes in Valuation

Our mention earlier of a formal challenge to the county's tax assessment raises an additional issue. Mr. Haith did pass on to GSA the various notices of changes in assessment which he received on the properties subject to the lease. Finding 28. The Government, however, contends that this was not done in a timely fashion. Mr. Haith does not appear to deny this fact. Id. The Tax Adjustment clause requires that notices of change in valuation or assessment of property covered by the lease should be provided to the Government within five business days of receipt. The clause is silent, however, on what the consequences of any failure to comply with this requirement might be. Instead, the clause simply observes that "[f]ailure to submit said notices in a timely manner may impair any legal action the Government elects to pursue." Finding 3.

It remains for us to determine, therefore, whether, in view of ABA's apparent failure to comply with these notice requirements, it is still appropriate for us to determine that 1998 should serve as the base year for administering the Tax Adjustment clause.

GSA contends that the fact that the appraised value for the 9741 North Conant Avenue property remained unchanged for the 1998 tax year was an obvious error which ABA should have called to the attention of Platte County. In failing to do so, ABA allegedly prejudiced the county by depriving it of taxes based on the higher, intended value. GSA further contends that this failure to report the error ultimately led to the Government's prejudice as well for, had the error been corrected, the 1998 tax assessment for that parcel would have been greater than the 1999 assessment. The slight reduction in the 1999 assessment on that parcel would have led to a credit for the Government under the Tax Adjustment clause. Respondent's Post-hearing Brief at 26.

We note first of all, that the notice of error which GSA faults ABA for not giving is not a notice of change in assessment or valuation. Rather, it would be a notice that the assessment or valuation of the 9741 North Conant Avenue parcel was *not* changed for tax year 1998. Therefore, we are not dealing here with any obligation under the Tax Adjustment clause.

Secondly, we are not convinced that the error was as obvious as GSA would have us believe. At the outset of this discussion, we noted that it was entirely reasonable to consider that the 9741 North Conant Avenue parcel, the small parcel adjacent to it, and the parking lot parcel across the street are all equally subject to the lease. Mr. Haith's summary approach to ABA's overall tax liability on all three parcels was, therefore, in our opinion, likewise entirely reasonable. He was undoubtedly aware that for 1998 this total liability had increased when compared to the prior year's assessment. We believe him when he explains that he was not aware of how the county came up with its 1998 evaluation of the three properties but that he considered the total assessment to be reasonable. Finding 19. His own detailed testimony as well as that of ABA's expert on the evaluation of the properties, based on either an income or a market approach, convince us that there was indeed merit in Mr. Haith's conclusion at the time that the overall 1998 assessment was reasonable. Findings 19-24. We, therefore, disagree with respondent's contention that the absence of change in the assessed value of one of the three parcels for tax years 1998 was an obviously egregious error.

What, however, of ABA's apparent failure to provide timely notice of changes in the assessed values of two properties for 1998 and of all three properties for 1999? These were notices which appellant was required to submit within the period stated in the Tax Adjustment clause. While we do not condone Mr. Haith's failure to advise GSA of these changes in a timely manner, we are not overly troubled by it. The clause does not address in any specific way what the consequence of non-compliance with the requirement to advise the Government might be. More significantly, the pertinent language of the clause indicates that it is incumbent on the Government to concern itself with the fairness or correctness of any changed assessment. The clause secures for the Government the right to contest tax assessments either on behalf of the lessor, on its own and the lessor's behalf, or on its own behalf alone. See Finding 3. One would assume, therefore, that, upon receiving information of changes in assessments, the Government would have in place some process for analyzing the fairness of such changes. In the instant case, however, the contracting officer testified that no analysis of changed assessments was ever undertaken to determine if any of them should be challenged. Finding 28. We, therefore, have no reason to believe that the information eventually submitted by ABA would have been the subject of analysis even if it had been submitted in a timely fashion. Accordingly we find no prejudice to the Government resulting from ABA's failure to comply with this requirement of the Tax Adjustment clause.

We have previously held that, generally, limitations imposed by contract provisions should be applied liberally and that, if the contractor fails to meet such a limitation, the provision should be enforced only where the Government demonstrates that it has been prejudiced by the failure. On the other hand, where the contract clearly states that the contractor will lose rights if it does not make a submission within a prescribed period of time, the limitation should be strictly enforced. Riggs National Bank of Washington D.C. v. General Services Administration, GSBCA 14046, 97-1 BCA ¶ 28,920, at 144,179. We are clearly confronted here with a situation where prejudice has not been demonstrated and the contract does not state that contractor will lose rights if it does not make a submission within a prescribed period of time. Accordingly, we decline to deny appellant the relief it

requests simply because it failed to comply with this particular notice provision of the Tax Adjustment clause.

Interest on Appellant's Claim

Appellant asks that we direct GSA to pay ABA's tax escalation invoice of December 1999 with interest from the date that payment was due. Appellant's Post-hearing Brief at 21; Transcript at 92-93.

Under the Contract Disputes Act (CDA), a contractor is entitled to interest on its claim from the date on which the contracting officer receives the claim. 41 U.S.C. § 611 (2000). Although the CDA does not define the term "claim," the Federal Acquisition Regulation (FAR) defines it as:

> a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or related to the contract.

48 CFR 33.201 (2000) (FAR 33.201).

This definition of claim has been applied by the Court of Appeals for the Federal Circuit. Reflectone Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc). It also appears in subparagraph (C) of the Disputes clause of the lease. Appeal File, Exhibit 2 at 57. Nevertheless, even though a voucher, invoice, or other routine request for payment may match these requirements as spelled out in FAR 33.201 or in the lease's Disputes Clause, both the FAR provision and subparagraph (C) of the Disputes clause specifically provide further that, unless such routine requests are already in dispute, they are not claims under the CDA. They may, however, be converted to claims by written notice to the contracting officer if disputed.

In early December 1999, ABA submitted a tax escalation invoice to GSA. It asked for payment of $16,072.19. The invoice identified 1998 as the base year for purposes of calculating the amount said to be due. Finding 30. We find nothing in the record suggesting this routine invoice was in dispute at the time of its submission. We know only that a year earlier, ABA had advised GSA that it considered 1998 to be the base year for purposes of making adjustments under the Tax Adjustment clause. At that time, GSA took no issue with ABA regarding the designation of 1998 as the base year. Finding 17. We, therefore, do not consider the invoice submitted in December 1999 to be a claim, as that term is understood under the CDA. Consequently, we cannot award interest from the date payment of the invoice was due. Instead, we find that this routine invoice was converted to a claim by counsel for ABA in his letter of August 24, 2000. In that letter he resubmitted the invoice, took issue with the contracting officer's prior rejection of it, and demanded that the sum certain stated in the invoice be paid as a matter of right. Finding 31.

Decision

ABA's appeal is **GRANTED**. For purposes of administering the lease's Tax Adjustment clause, the first full assessment of the three properties subject to the lease was made by Platte County for tax year 1998. The assessment for that year is to be considered the base year for any subsequent adjustments under the clause. Appellant's invoice of December 8, 1999, should, therefore, be paid together with interest, in accordance with the CDA, from the date on which the contracting officer received from counsel for ABA the letter asserting his client's claim of August 24, 2000.

EDWIN B. NEILL
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge
Board Judge

CATHERINE B. HYATT