Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED IN PART: November 20, 2002

GSBCA 15674

HPI/GSA-3C, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Scott M. Heimberg of Akin, Gump, Strauss, Hauer & Feld, L.L.P., Washington, DC, counsel for Appellant.

David M. Smith and Jeremy Becker-Welts, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **DeGRAFF,** and **GOODMAN**.

BORWICK, Board Judge.

In this appeal, appellant seeks $54,240 allegedly due under one invoice and $1,573,200 allegedly due under another invoice for overtime heating, ventilation and air conditioning (HVAC) services that appellant provided under a Government lease for the Winchester Center Building in Kansas City, Missouri. Appellant maintains that under clauses 6.6(e) and 13 of that lease there are 366 zones in the building because each zone is an area controlled by a thermostatic sensor. Appellant argues that the Government is required to pay overtime HVAC at a base charge of eighty dollars per hour and a zone charge of forty dollars per hour for each of the 366 zones activated in the process of providing overtime HVAC in the building.

Respondent, the General Services Administration (GSA), argues that claimant's formula is outrageously expensive, and that the lease does not establish 366 zones in the building but only two zones. The Government also argues that the overtime HVAC zone charge is not hourly, but per occurrence. The contracting officer decided appellant was entitled to $48,520.

We agree with the Government that appellant's interpretation of the zone charge provisions is unreasonable. We conclude that under this lease a zone is the amount of space

capable of being served by an air handling unit. Since there are two air handling units in the HVAC system, there can be at most two zones in the building. However, we do not agree that the zone charge is a per occurrence charge. The zone charge is an hourly charge.

The record does not demonstrate that more than one zone's worth of HVAC was provided for the overtime HVAC services at issue in this appeal. We award appellant $70,680. That figure is the total of the base $80 per hour charge times the number of overtime HVAC hours provided plus one zone at $40 per hour times the number of overtime HVAC hours provided. We deny appellant's claim for interest under the Prompt Payment Act (PPA) interest since the Government disputed appellant's invoices.

Findings of Fact

Solicitation for offers (SFO)

1. The solicitation for offers (SFO) for the lease announced that GSA desired to lease approximately 348,660 square feet of rentable space to yield a minimum of 307,450 occupiable square feet. Appeal File, Exhibit 1 at 95 (¶ 1.01.(a))[1]. The SFO stated that the needs of the United States Department of Agriculture (USDA) would be met by a 314,760 square foot building with a floor plan of approximately 56,600 occupiable square feet for each of its six floors. Id. at 203. The minimum required floor plate size was 35,000 occupiable square feet per floor. Id. at 95.

2. For the general office space, the SFO's HVAC requirements provided in pertinent part:

> Occupancy density for purpose of ventilation design shall be 150 s. f. per person of occupiable space for offices as specified in ASHRAE [American Society for Heating, Refrigerating and Air Conditioning Engineers, Inc.] Standard 62-1989, or local building codes, whichever is higher in density. Air diffuser performance (ADPI) shall be 80% at a minimum. HVAC controls shall be zoned on each floor.

Appeal File, Exhibit 1 at 197. The SFO also provided:

> ZONE CONTROL:
>
> Individual thermostat control shall be provided for office space with control areas not to exceed 2000 occupiable square feet. Areas which routinely have extended hours of operation shall be environmentally controlled through dedicated heating and air conditioning equipment. Special purpose areas . . . with an internal cooling load in excess of 5 tons shall be independently controlled.

Id. at 131 (¶ 6.6(e)). The zone control provision is boilerplate in GSA leases. Transcript at 647.

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[1] The page citations to this exhibit refer to the handwritten consecutive pagination within the exhibit.

3. The SFO stated more stringent additional HVAC requirements for special purpose space, i.e., the vending/break rooms, copy/fax rooms, and smoking rooms. Id. The SFO specified additional HVAC units to maintain temperature and humidity, twenty-four hours a day, seven days a week, for federal grain inspection areas, a security control center, and automated data processing areas. Furthermore, under the SFO certain smaller rooms were to be "supplemental separately zoned with duct penetration baffles." Id. at 198. The SFO further stated that normal working hours for the contemplated building were six in the morning to five in the evening, except Saturdays, Sundays, and federal holidays. Appeal File, Exhibit 1 at 135 (¶ 7.2).[2]

Original offer

4. On October 10, 1996, Golub and Company (Golub) submitted its initial offer for 307,500 occupiable square feet of office space in a contemplated six-story building comprising a basement and five floors. Respondent's Supplemental Appeal File, Exhibit 3 at 8; Appellant's Supplemental Appeal File, Exhibit 19 at 2.[3] Heat and utilities during working hours were included in the base rent, but Golub offered an overtime rate of $45 per hour for heating or cooling the whole building. Appellant's Supplemental Appeal File, Exhibit 19 at 2; Transcript at 147-48, 493. As reflected in the required lessor's annual cost statement, Golub estimated annual electricity costs of $522,750, or $1.70 per net usable square foot. Respondent's Hearing Exhibit 2 at 2. In its initial offer, Golub stated that "in accordance with Section 1.10 [of the SFO,] Price Evaluation, we are including an annual CPI [consumer price index] adjustment for operating expenses equal to fifty [percent] (50%) of the CPI." Appellant's Supplemental Appeal File, Exhibit 19.

5. According to Golub's lease negotiator, Mr. James R. Wieger, Transcript at 138, CPI adjustments usually are at one hundred percent. Golub offered the CPI discount of fifty percent because Golub "wanted to win" the award and the fifty percent CPI escalation discount was intended to make sure that no other bidders were close to Golub's bid. Transcript at 153-54.

Initial lease negotiation

6. GSA conducted negotiations with all offerors for the prospective lease. Respondent's Hearing Exhibit 3. In preparation for the negotiations, GSA developed negotiation objectives. Id. at 6. One of the objectives was to pay from $40 to $75 for hourly heating or cooling overtime for the whole building. Id.; Transcript at 490-91. GSA developed this objective by comparing overtime utility pricing for five other leases in the Kansas City area.

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[2] Amendment two of the SFO expanded the working-hour period by half an hour in the morning; under amendment two the working-hour period ran from five-thirty in the morning to six in the evening. Appeal File, Exhibit 1 at 44 (¶ 7.2)

[3] When Golub received the SFO it did not yet even own the property upon which it intended to construct the building. Upon receipt of the SFO, Golub consulted a broker, found land it considered suitable, and entered into an option to purchase the property. Transcript at 141.

Id. The negotiation objective for the annual rental rate amount was between $6,000,000 and $9,362,056. Id.

7. On December 5, 1996, Golub and GSA conducted their first in-person negotiation session. As noted above, Mr. Wieger was Golub's lease negotiator. Before entering private industry, Mr. Wieger served in GSA's Office of Congressional Affairs and, later, as a special assistant to the Commissioner of GSA's Public Buildings Service. Transcript at 134. Mr. Wieger left GSA and, after a one-year waiting period, specialized in bidding on property management contracts with the Federal Government and in offering leased space to the Federal Government. Id. at 134-36. He also obtained his law degree. Id. at 132.

8. The Government was represented by Ms. Cindy Jackson-Kiley, who was the procuring contracting officer for the lease. She has worked for GSA since 1986 and began her career in GSA real estate in 1989. Transcript at 484-85. In 1994, she received her contracting officer's warrant and has earned professional training certificates from several real estate institutes and associations. Id. at 485-86. However, she has no technical or engineering background. Id. at 486.

9. At the first negotiating session, Ms. Jackson-Kiley explained to Mr. Wieger the Government's intent to lease a building with an efficient HVAC system. She told Mr. Wieger that GSA wanted an HVAC system that could be operated, during overtime hours, in such a manner as to serve only that part of the building requiring overtime utilities. GSA did not want to run HVAC for the whole building in order to supply HVAC for a small area during overtime hours. Appellant's Hearing Exhibit 13 at 10; Transcript at 75, 81.[4] Mr. Wieger does not remember mention of the purpose of the HVAC system at this meeting. Transcript at 157. Rather, Mr. Wieger recollects that the discussions concerned adjustments to pricing elements of Golub's offer. Id. at 155-56. At the end of these discussions, Golub's offer for overtime HVAC remained at $45 per hour for the whole building. Id. at 493.

Request for revised offers and response

10. On January 24, 1997, Ms. Jackson-Kiley issued amendment two to the SFO requesting, no later than February 18, 1997, revised offers to provide (among other items):

> An hourly overtime rate for the following:
>
> Base or Minimum Hourly Charge _____
> Cost per zone _____
>
> Hourly calculation: Number of zones needed by tenant, times hourly charge per zone, plus base or minimum hourly charge=total hourly charge.

[4] Ms. Jackson-Kiley mentioned this because the tenant agency, the USDA, was located in leased space with an old HVAC system requiring operation of the whole system for the building to supply overtime HVAC to one or two rooms. Transcript at 75.

Appellant's Supplemental Appeal File, Exhibit 19.[5] Ms. Jackson-Kiley wrote this letter, after initial discussions with the offerors and at the suggestion of one offeror, to make sure the Government would pay only for the operation of the HVAC equipment necessary to provide overtime HVAC in the space that needed the overtime utilities. Transcript at 37. Ms. Jackson-Kiley's intent in writing this letter was to inform the offerors that they were to supply a cost per zone on an hourly basis for the overtime HVAC. Id. at 69. However, she did not have a conception of the square footage a zone would cover. She was thinking in terms of the equipment to provide overtime HVAC to any zone, whatever the square footage. Id. at 41.

11. Golub viewed Ms. Jackson-Kiley's letter differently. Golub thought its original offer of a flat rate of $45 overtime for the whole building was too low. Transcript at 164-65. Golub knew that pricing of overtime HVAC was not an evaluation factor in the SFO. Thus, Golub concluded that the formula in Ms. Jackson-Kiley's letter represented an opportunity to raise revenue, without damaging its chances for award, by associating a zone with every two thousand square feet of the building and charging an hourly rate for each two thousand square feet requiring overtime HVAC. Id. at 163-67. On February 17, Golub, through Mr. Wieger, responded to Ms. Jackson-Kiley's letter of January 24, offering a $120 rate for the "base or minimum hourly charge" portion of Ms. Jackson-Kiley's letter and a $40 rate for the "cost per zone" portion of Ms. Jackson-Kiley's letter. Appellant's Supplemental Appeal File, Exhibit 21.

12. At the time Golub responded to the letter, it anticipated that there would be about one hundred seventy-five zones in the building. Transcript at 166. However, in responding to Ms. Jackson-Kiley's letter, Mr. Wieger did not alert her to Golub's conception of "zone." Mr. Wieger explained:

> I don't like roiling new clients with a bunch of questions that . . . sound like a lawyer, you know. I usually just answer the question, try to be a team player. I had my architect there and the GC [general contractor] there, and our goal is to make her think that we're going to work with her in a positive team fashion. Which I think we accomplished all throughout the project, you know, even during the construction phase. So our goal is to get along with the clients, not . . . to _ _ _ _ them off with a bunch of legal questions.

Transcript at 163.

Second negotiation session

[5] GSA also asked offerors for the zoning of the offered and adjacent properties, a site plan of the building, building elevations identifying building materials, principal elevations and significant features of the building, two sets of one-sixteenth inch first generation blue line plans of the space offered, a colored artist rendering of the building, future areas for walking trails, identification of both occupiable and rentable square footage for the space, a list of materials for the exterior of the building, a monthly schedule for construction, and a traffic study for the offered property. Appellant's Supplemental Appeal File, Exhibit 20.

13. In March of 1997, the Government and Golub conducted a second round of negotiations, with Ms. Jackson-Kiley leading the discussions for the Government and Mr. Wieger representing Golub. Transcript at 499. Ms. Jackson-Kiley explained to Mr. Wieger that the purpose of the zone charge was to enable the Government to pay only for that equipment that was turned on in a specific area of the building to satisfy a request for overtime HVAC. Id. at 500. According to Ms. Jackson-Kiley, Mr. Wieger responded that it was possible to supply such a system. Id. Ms. Jackson-Kiley testified that Mr. Wieger did not advise her of Golub's conception that a zone meant two thousand square feet of space or a thermostat or variable air volume (VAV) box associated with two thousand square feet of space. Id. at 500, 503. Mr. Wieger did not remember the specifics of that meeting. Id. at 226.

14. In fact, between the January 24 letter that issued amendment two to the SFO and GSA's request for best and final offers (BAFOs), Mr. Wieger did not have conversations with the contracting officer on how to calculate overtime HVAC. Mr. Wieger explained: "No, like I said, I try not to ask these really harsh, legal-type boxing questions, because sometimes it's not to my advantage." Transcript at 176.

Best and final offer

15. On March 20, 1997, GSA requested the offerors to submit their BAFOs no later than April 22. Respondent's Hearing Exhibit 3 at 20. Golub submitted its BAFO offering a fully-serviced ten-year lease in a building with 327,865 rentable square feet and 310,794 Building Owners and Managers Association (BOMA) usable square feet. Golub offered an annual rental rate of $5,495,017.40, which is a rentable cost per square foot of $16.76. For overtime HVAC, Golub offered an hourly base rate of $80 and cost per zone of $40. Appellant's Supplemental Appeal File, Exhibit 22. Mr. Wieger still assumed that there would be one hundred seventy five zones in the building. Transcript at 227. Mr. Wieger did not point out to the contracting officer the potential cost disparity between Golub's initial flat-rate whole-building offer of $45 for overtime HVAC and its zone-based BAFO offer for overtime HVAC, which (by Mr. Wieger's count of zones and theory of calculation) had ballooned to $21,000 per hour to provide overtime HVAC for the whole building. Transcript at 227.[6] Mr. Wieger explained: "I'm not her teacher, I'm not her law school professor; I don't want to teach her how to interpret a contract or how to read provisions that she drafted. It's not reality." Id. at 232.

16. Three vendors offered HVAC overtime rates on a "floor per hours" basis. Respondent's Hearing Exhibit 3 at 21, 23, 32. One vendor offered one hourly price on a "zone" and an "hourly whole building" price approximately eight times the zone price. Id. at 15.

Price negotiation memorandum

[6] Mr. Wieger testified that, using his formula, the potential whole-building hourly cost would have been $24,500. The correct calculation, adopting Mr. Wieger's logic, is actually $21,000. ($80 hourly base + $40 cost per zone) x 175 zones.

17. In her price negotiation memorandum (PNM) of May 23, 1997, Ms. Jackson-Kiley noted Golub's fifty percent reduction in the CPI escalator percentage. Respondent's Hearing Exhibit 3 at 8. Ms. Jackson-Kiley concluded that the offered rate from Golub "is considered to be advantageous to the Government. The effective rental rate is $5,495,017.40 annually ($16.76 per rentable square foot or $17.68 per occupiable square foot) and fully serviced. No further analysis is required. The rate is well within the prospectus level limitation of $9,362,056 annually fully serviced." Id. at 41.

18. Golub's BAFO was $3.9 million less than the top figure that GSA had established as a negotiating objective for the lease and $500,000 lower than the lowest figure that GSA had established as a negotiating objective for the lease. Respondent's Hearing Exhibit 3; Transcript at 58.

19. Ms. Jackson-Kiley had no discussions with Mr. Wieger about paying a forty dollar per hour rate for each zone in exchange for other concessions in the lease. Transcript at 501. The PNM reflects no discussions concerning an alleged Government agreement on an overtime rate favorable to the landlord in exchange for a fifty percent CPI escalator. Respondent's Hearing Exhibit 3. In fact, Ms. Jackson-Kiley testified that had she known what Golub's conception of "zone" was, she would not have signed the lease, because the overtime costs would have been outrageous. Transcript at 510.

20. By letter of May 29, 1997, the Government notified Golub that the Government accepted its offer and would be forwarding two copies of the lease contract for Golub's signature. Respondent's Hearing Exhibit 25.

Discussions as to HVAC system design

21. On or about December 17, 1997, Golub and the Government started discussions concerning the design of the HVAC system for the building. Appellant's Supplemental Appeal File, Exhibit 24 at 18. Golub proposed a central HVAC system consisting of two water-cooled centrifugal chillers of five hundred tons capacity each, accompanied by chilled water pumps and two built-up draw-through air-handling systems served by two controllable pitch supply fans. The chillers would be connected to a central loop system going through each floor, work in conjunction with thermostats "as required in the SFO," and work in conjunction with VAV boxes. Id. The system would be redundant and, if any part failed, would still be capable of servicing the building. The system could also serve the needs of the special purpose space that the lease required be served by separate HVAC equipment. Id.

22. In response to this letter, GSA stated that it was not reasonable to run five hundred ton chillers to maintain the required HVAC loads for general purpose space. Appellant's Supplemental Appeal File, Exhibit 24 at 13. The Government asked how Golub would provide twenty-four hours a day cooling independently of the main HVAC system. Id. The

Government asked for a riser diagram showing how each twenty-four hour cooling requirement would be serviced by the equipment. Id.[7]

23. In response to the first issue, Golub advised that it would supply three chillers of three hundred and fifty tons each instead of two five-hundred ton chillers. Appellant's Supplemental Appeal File, Exhibit 24 at 13. In response to the second issue, Golub stated that the central system would provide cooling for both the general office space after hours and the special purpose space twenty-four hours per day, but that the central system would have four separate vanaxial fans cross-connected so that any one fan could serve the entire building at reduced loads. Additionally, VAV terminals would be computer controlled so as to allow complete shutdown of areas not needing service in accordance with the lease. Id. Golub also noted the reconfiguration of two chillers to three smaller chillers such that one chiller could serve the building at reduced loads. Id.

24. In response to that letter, on January 16, 1998, the Government asked why Golub was prepared to run central chillers to twenty-four hour per day areas when those areas were to be separately serviced with other HVAC equipment. Appellant's Supplemental Appeal File, Exhibit 24 at 8. The Government pointed to the computer room as an example and stated that it was "unclear to us why the central system needs to operate during non-occupied periods if a computer room unit is being provided to serve those areas." Id. The Government asked Golub to confirm that separate computer room units were to be installed and whether the central HVAC system was to operate during non-occupied periods in areas which required continuous HVAC service. Id.

25. On January 28, Golub responded that separate computer room air conditioning units would be installed in the computer rooms and that the central HVAC system would be operated to provide code-required outside air to computer rooms during occupied periods and for all other areas requiring continuous HVAC service. Appellant's Supplemental Appeal File, Exhibit 24 at 5.

Lease signing and lease provisions

26. On April 19, 1998, the Government entered into the lease with Golub for a six story building (which eventually was named the Winchester Center Building) to be constructed in suburban Kansas City, Missouri, at an annual rental rate of $5,495,017.40, at the rate of $457,918.22 per calendar month in arrears. Appeal File, Exhibit 1 at 1. The space to be delivered was to contain no more than 314,675 and no less than 307,450 usable square feet of space. The lease was for a ten year term beginning on the date the space was accepted for occupancy by the Government. Id. at 3. Golub was required to construct and build out the space within 810 days of receipt of Government-approved drawings; however, the Government could not accept or occupy the premises before January 1, 2000. Id.

27. The actual lease dates and square footage to be rented were to be established by supplemental lease agreement upon delivery of the space. Appeal File, Exhibit 1 at 3. Upon

[7] The Government also asked other questions concerning the aesthetics and placement of equipment of the system. Appellant's Supplemental Appeal File, Exhibit 24 at 14.

delivery of the space and mutual field measurement, the actual rental was to be determined by multiplying the rate for the appropriate period of the lease times the actual square footage delivered. Rental was to be computed at the per annum rate of $17.68 per usable square foot per year and subject to the escalation provisions. Id.

28. The lease was a fully serviced lease, with utilities being furnished as part of the rental consideration. Appeal File, Exhibit 1 at 2 (¶ 6). In addition to incorporating paragraph 6.6(e) of the SFO, the lease provided:

> The Government shall have access to the leased space at all times, including the use of elevators, toilets, lights, and small business machines without additional payment.
>
> If heating or cooling is required on an overtime basis, such services shall be ordered orally or in writing by the Contracting Officer or Buildings Manager. When ordered, services shall be provided at the hourly rate negotiated prior to award.
>
> When the cost of service is $2,000 or less, the service may be ordered orally. An invoice shall be submitted to the official placing an order for certification and payment.

Id. at 135 (7.0, ¶ 7.3(a-c)). The lease also provided:

> As provided for in the Services, Utilities and Maintenance Section, Paragraph 7.3, Overtime Usage, if heating and cooling is needed on an overtime basis, it shall be paid at the rate of $80.00 hourly base plus $40.00 cost per zone.

Id. at 3 (¶ 13).

29. The lease required Golub to submit intermediate and final design development documents for the Government's approval. Appeal File, Exhibit 1 at 103 (¶ 3.20). The design documents were to include "zone control diagrams indicating spaces served." Id. at 111.

HVAC drawing submissions and design and operation of HVAC system

30. On or about September 4, 1998, Golub submitted preliminary fifty percent design intent drawings for the HVAC system. Appellant's Hearing Exhibit 23 (Large Scale Drawings), Sheet M.1.6a; Transcript at 123. Golub submitted ninety percent drawings on October 19, 1998, one hundred percent drawings on January 26, 1999, and final review drawings on March 18, 1999. Id. The drawings were intended to show the spaces and how the mechanical systems related to the spaces. The drawings show a schematic of the chillers, the air handling units, and the duct system branching to each floor. They also depict "thermostats" and VAV boxes serving individual areas of space. See Appellant's Hearing Exhibit 23 (Large Scale Drawings), Sheets M.1.3a, .7a, .7b. At most, it would be possible to extrapolate from the drawings what a "zone" might be. Transcript at 112-13. Nothing in those drawings, however, purports to depict explicitly what appellant considered a "zone"

for HVAC purposes under the lease. Id. at 117. The drawings, for example, did not show zone boundaries. Id. at 119.

31. The system, as shown on the drawings, and as eventually designed, consists of three chillers resting on the penthouse of the building and a central air system consisting of two penthouse air handling units each having two supply fans. Appellant's Hearing Exhibit 23 (Large Scale Drawings), Sheets M.1.7a, .7b; Appellant's Hearing Exhibit 19 at 5-6. One air handling unit serves the east half of the building and the other unit serves the west half. Appellant's Hearing Exhibit 23 (Large Scale Drawings), Penthouse. Each pair of supply fans is housed within a common supply air plenum that serves primary supply air ducts which are routed vertically to each floor and then horizontally on each floor making a supply loop. Respondent's Hearing Exhibit 20 at 6; see also Id., Sheet M.1.3a. The vertical ducts run the height of the building and cross-connect on each floor. Id., Penthouse; Transcript at 557.

32. The system delivers cooled air through use of VAV boxes to cool defined spaces, each of which appellant calls a "zone." VAV boxes control the amount of cooled air to the so-called zone through solid state computer thermostatic sensors associated with each box. Each sensor sends a signal to a building automated control (BAC) system. Transcript at 242, 250. The designer of the system, an employee of the Fagan Company, id. at 241, explained why the HVAC system was installed with about 360 thermostats and VAV boxes. He testified that the number resulted from a confluence of three factors: (1) the requirements of the lease, which the designer interpreted as stating that no zone was to exceed two thousand square feet; (2) specific areas in the building that were required to have separate thermostatic controls, such as conference rooms, and that were typically much smaller than two thousand square feet; and (3) the addition of more thermostatic sensors in specific areas, where the owner felt it necessary, to meet the lease's temperature specifications which forbid deviation from the specified temperature by more than two degrees. Id. at 241, 246. According to appellant's lease manger, there are presently 366 thermostatic sensors in the building. Id. at 389.

33. The BAC system has the capability of controlling the equipment within both the chilled water plant and the central air system. Respondent's Hearing Exhibit 20 at 6. The BAC system can stage the operation of the chilled water plant and modulate the air handling units' supply air fans to account for the changing of heating and cooling throughout the building. In theory, the BAC system allows for independent control of each VAV box within the facility. Each of the VAV boxes is referenced in the BAC system's host computer and operates at programmed normal occupancy mode. Id. The BAC system allows a controller to override the normal occupancy mode and establish an overtime occupancy mode for each VAV box. Id.

34. In actual operation, because of the size of the system, if overtime HVAC is requested for any amount of space, the BAC system must provide cooling to a size equivalent to at least one half of one floor. Transcript at 257-58. The system must operate at this minimum level to prevent vibration and noise throughout the HVAC system. Id. Thus, to cool any space during overtime hours, at least 25,000 square feet must be cooled. Id. at 273. After the system delivers cool air to 25,000 square feet of space during overtime hours, it may deliver cool air incrementally to an individual VAV box. Id.

35. During a view of the system at the hearing on the merits, a BAC system engineer explained that to send cool air to the VAV boxes during overtime hours, the BAC system operators would first have to activate "building zone overrides," of which there were two on each floor, or twelve in all. Transcript at 797-98. The overrides start the clock so that the air handling units will send cold air through the ducts to the designated VAV boxes. Id. at 798-99.

36. The building construction started in late 1998. The HVAC system installation commenced in early 1999; by the fall of 1999, the building structure, including the mechanical systems, was largely complete. Transcript at 110.

37. On October 8, 2000, the Fagan Company provided a shop drawing to Golub describing operation of the BAC system as it relates to overtime HVAC. Transcript at 274-75. The drawing stated that the BAC system could be programmed for any desired after-hours occupancy schedule "on a floor by floor basis." Respondent's Hearing Exhibit 9. The designer of the HVAC system testified that the reference to "floor by floor" in that document was an erroneous description. Transcript at 275-76. He testified that Fagan employees mistakenly imported that language from another document, and, in fact, the BAC system was programmed to handle smaller increments. Id. The designer explained that this shop drawing was prepared when the building owners were receiving many requests for overtime HVAC services, which required the BAC system to be programmed to satisfy those requests. Id. at 336-37. The designer explained that the note on the document should have stated that the BAC system could be programmed for any desired after-hours occupancy with a minimum of 25,000 square feet being served on a box-by-box basis. Id. at 337.

Incidental lease matters

38. At some point in time, Mr. Wieger had formed a partnership with Golub on the lease. The partnership was named Golub-WEGCO. Transcript at 138. On May 9, 2000, the Government and Golub-WEGCO executed supplemental lease agreement (SLA) seven. Appeal File, Exhibit 8. That SLA established the actual measurement of space at 314,702 BOMA net usable square feet. The parties agreed to base payment of rent on 314,675 net usable square feet. The SLA established the lease term as having commenced on March 1, 2000, and ending on February 28, 2010. The annual rent was agreed to be $5,673,590.25, payable at $472,799.19 per calendar month in arrears, a daily rate of $15,544.08 if one divides the annual rent by 365 days. Id.

Requests and invoices for overtime HVAC and resulting claims

39. On June 1, 2000, the USDA requested a total of forty-eight hours of weekend (including Friday evening) overtime HVAC between June 3 and July 8, to accommodate its move into the building. Appeal File, Exhibit 13. On July 27, Golub-WEGCO, through Mr. Wieger, invoiced the Government for a total of $151,200 for the forty-eight hours of overtime HVAC provided on June 2 and 3, June 9 and 10, June 23 and 24 and July 7 and 8. Appeal File, Exhibit 14. Mr. Wieger calculated the zone rate by adding the lease's $80 hourly base rate to the lease's $40 zone rate to derive a rate of $120 per hour per "zone." Id.

40. For the overtime use of June 2 and 3, Mr. Wieger assumed thirteen zones and multiplied the assumed number of zones by $120 per hour to obtain $1560 per hour, which when multiplied by number of hours of overtime HVAC use (twelve) resulted in an invoice of $18,720. Mr. Wieger assumed each zone amounted to the area controlled by a thermostatic sensor, that is, approximately two thousand square feet of space. Mr. Wieger testified at the hearing on the merits that, in calculating his invoice, he probably asked an engineer to count the zones, probably on the basis of the sensors. Transcript at 191.

41. For overtime HVAC use for the remaining periods, Mr. Wieger took the same rate and concluded that the Government had used twenty-four zones for each period for twelve hours. He therefore invoiced the Government for $34,560 for each period.[8] The invoice was not certified.

42. On August 7, 2000, contracting officer Ms. Patty Comstock requested overtime HVAC services for the entire second floor from 6:00 a.m. to 6:00 p.m. for the weekends of August 12 and 13, 19 and 20, and 26 and 27, and September 2 and 3, 9 and 10, 16 and 17, and 23 and 24, and Saturday, September 30. Appeal File, Exhibit 15.

43. On August 11, 2000, the contracting officer issued what she called a final decision denying the invoice charges, stating that Golub-WEGCO's interpretation of the term "zone" was unreasonable. Ms. Comstock noted that if one applied Mr. Wieger's formula to running the whole building for forty-eight hours on a typical weekend, the bill would be $2,108,160. Appeal File, Exhibit 16. Ms. Comstock stated that the building's HVAC system had four air-handling supply air fans units. Id. Because the duct work was interconnected, she stated that one fan might be sufficient to supply limited supply air and limited cooling to the entire building. Id.

44. Thus, applying the term "zone" to supply air zones, the contracting officer determined that for the twelve hours of overtime for June 2 and June 3, the cost would have been $1000. She derived this figure by multiplying the lease's $80 per hour base rate by twelve hours and derived $960. She then assumed the operation of one zone and multiplied the one zone times $40. Appeal File, Exhibit 16. The contracting officer did not consider that, as with the base rate, the lease's $40 zone charge was to be multiplied by an hourly figure. Id. The contracting officer determined that Golub-WEGCO was entitled to $4000 for all of the overtime HVAC it had sought in its invoice.

45. On August 18, 2000, Golub-WEGCO filed an appeal from the contracting officer's decision. Golub-WEGCO Kansas City I, LLC v. General Services Administration, GSBCA 15387 (filed Aug. 18, 2000).

46. On August 21, 2000, Golub-WEGCO submitted an invoice for $184,320 for twenty-four hours of overtime HVAC requested for the entire second floor of the building and supplied on August 12 and August 13. According to the invoice, Golub-WEGCO supplied

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[8] Mr. Wieger calculated the hourly rate as follows: 24 zones x $120 per hour = $2880 per hour. He then calculated the charge for each period as: $2880 per hour x 12 hours = $34,560.

overtime HVAC from 6 a.m. to 6 p.m. to sixty-four zones. At a alleged rate of $120 per hour, the hourly rate for supplying sixty-four zones was $7680. Multiplying the hourly rate for sixty-four zones by twenty-four resulted in an invoice of $184,320.[9] Appeal File, Exhibit 19.

47. On or about October 17, 2000, appellant purchased the building from Golub-WEGCO and assumed the lease and the overtime claims of Golub-WEGCO. Transcript at 191, 352.

48. On April 20, 2001, appellant, through its counsel, wrote the contracting officer (now Dennis Clemens) concerning the disputed overtime payments for overtime HVAC services provided by the prior landlord to the Government in June 2000 and overtime HVAC services provided after June 2000. Appellant's Hearing Exhibit 1, Tab 2. Appellant noted that both Golub-WEGCO and appellant had been providing overtime HVAC services as ordered by GSA from August 2000 through March 2001. Appellant also stated that due to the dispute over payment terms GSA had not been billed for those services. Id. This last statement was not accurate, since Golub-WEGCO had submitted an invoice to the Government for overtime HVAC services in August of 2000.

49. Appellant explained that its formula for HVAC overtime differed from that of Golub-WEGCO. Appellant's formula was as follows: $80 base fee x number of overtime hours = Charge A. Number of zones x $40/hour x number of overtime hours = Charge B. Total charge = Charge A + Charge B. Appellant's Hearing Exhibit 1, Tab 2. This formula differed from Golub-WEGCO's in that the $80 base fee was not multiplied both by the number of overtime hours and the number of zones. Appellant maintained that the formula it used "tracks the language of the lease and results in a lower cost to GSA than the previous owner had claimed." Id.

50. Appellant submitted an invoice (in the form of a spreadsheet) along with its letter of April 20, 2001. Appellant's Hearing Exhibit 1, Tab 1. In that invoice, appellant sought a total of $1,573,200 for overtime HVAC services supplied between August 12, 2000, and March 31, 2001. Id. The invoice assumed a zone to be each area served by a thermostatic sensor and VAV box. Id.

51. On August 6, 2001, this Board dismissed Golub-WEGCO's appeal for lack of jurisdiction, since the appellant had failed to submit a certified claim to the contracting officer. Golub-WEGCO Kansas City I, LLC v. General Services Administration, GSBCA 15387, 01-2 BCA ¶ 31,553.

52. On August 8, 2001, appellant, through its counsel, submitted a certified claim for reimbursement for overtime HVAC services furnished in June and early July 2000 that had been the subject of Golub-WEGCO's invoice of July 27, 2000. Applying appellant's version of the lease's overtime formula, appellant sought $54,240. Appellant's Hearing Exhibit 1, Tab 2. Appellant stated that under its reading of paragraph 6.6(e) of the lease, for the

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[9] Mr. Wieger calculated the hourly rate as follows: 64 zones x $120 per hour = $7,680 per hour. He then calculated the charge for each period as: $7,680 per hour x 24 hours = $184,320.

purpose of calculating overtime HVAC, there were 366 zones in the building. For example, for the twelve hours of overtime furnished on June 2 and 3, appellant charged $7200, derived as follows: $80 x 12 hours = $960; 13 zones x $40 x 12 = $6,240; and $960 + $6240 = $7200. Appellant sought $54,240 overtime HVAC provided on the days covered by the July 27 invoice.

53. To its claim, appellant also attached invoice K010301, billing the Government $1,573,200 for HVAC overtime provided between August 13 and March 31. Appellant's Hearing Exhibit 1, Tab 2. In its claim appellant also stated: "Moreover, the GSA must pay all overtime charges incurred after [June and July 2000] pursuant to the calculation mentioned herein, which is consistent with the requirements of the Lease." Id. Appellant in its invoices says it supplied a total of 649 hours of overtime for the overtime HVAC from June 2000 through March 2001. Id.

Contracting officer's decision and basis therefore

54. On September 7, 2001, the contracting officer issued his decision. Appellant's Hearing Exhibit 1. He rejected appellant's interpretation that paragraph 6.6(e) of the lease established 366 zones in the building:

> [Paragraph] 6.6 does not define the term "zone" for overtime utilities purposes but rather specifies the method for controlling temperature conditions by sub-dividing the building areas into smaller spaces, each having its own thermostat control. Moreover, your interpretation is unreasonable because it yields an absurd profit rate for overtime HVAC services. The parties did not intend for the lessor to reap a windfall every time GSA ordered overtime HVAC.

Id. The contracting officer concluded, based upon appellant's submitted invoices for overtime HVAC, that appellant was billing the Government for each hour of overtime HVAC at a rate of $2057.61, when the Government, through the monthly lease payments, paid an average hourly utility cost from Kansas City Power and Light of $167.28 during normal business hours. Id. The contracting officer also noted that according to Kansas City Power and Light data, the average overtime hourly utility rate for the building was $11.60. Id.

55. Respondent's witness Mr. Daniel O'Grady, an expert in estimating commercial building operating costs, Transcript at 663, estimated that appellant's actual costs for providing overtime HVAC services for the ten-month period at issue in the two invoices was $12,428, based upon an average cost of $.052 per kilowatt hour. Respondent's Hearing Exhibit 18; Transcript at 665-70. Mr. O'Grady's analysis is credible and we accept his analysis as an accurate estimate of the actual costs of overtime HVAC supplied by appellant during the ten-month period covered by the invoices at issue in this appeal.

56. Under appellant's formula, the per hour cost to the Government of overtime HVAC for 366 assumed zones would be $14,720, which would be comprised of an $80 base charge plus $14,640 (366 x $40). Applying appellant's formula to the 175 zones Golub-WEGCO's Mr. Wieger says he anticipated being placed in the building would amount to an hourly charge of $7080 for supplying overtime HVAC to the building.

57. In his final decision, the contracting officer stated that the reasonable interpretation of the word "zone" in the context of overtime utilities was that it applied to the two air-handling units on the penthouse, serving the respective halves of the building. Appellant's Hearing Exhibit 1. The contracting officer noted that each air handling unit had two fans each of which in turn has 125 horsepower variable frequency drive speed motors. Each air handling unit could use $20 worth of electricity per hour if operated at maximum speed. Id. The contracting officer stated that the Government would reimburse the landlord on the basis of $80 per hour for the base charge and $40 per zone (air handling unit) without applying an hourly charge for the use of the air handling unit. Id. The contracting officer developed a spreadsheet to apply his formula to appellant's invoices for overtime HVAC from June 2, 2000, through March 31, 2001. The contracting officer concluded that appellant delivered 589 hours of overtime services. The contracting officer subtracted sixty hours of HVAC overtime from the 649 hours of HVAC overtime appellant had stated on its invoice to avoid the double-counting of hours due to appellant's assumption that there were multiple zones. Id. The contracting officer concluded appellant was entitled to $48,520. Id.

58. Mr. Douglas Benton, a GSA employee who is a registered professional mechanical engineer, assisted the contracting officer in writing his decision and making the calculations stated on the spreadsheet attached to the decision. Transcript at 537, 540-41, 592. Since his graduation from college in 1979, Mr. Benton has spent his whole career in private industry and with Government in designing and working with HVAC systems. Transcript at 536, 539.

59. Mr. Benton concluded that each of the two air handling units in the building served a zone. Transcript at 544. Mr. Benton based this conclusion on the HVAC design of similar major office buildings in the Chicago, Illinois, area. Transcript at 545-46.

60. Mr. Benton developed the spreadsheet calculations in the contracting officer's decision. Transcript at 592. The spreadsheet assumes one zone (air handling unit) was necessary to provide the requested overtime HVAC appellant had invoiced. Appellant's Hearing Exhibit 1, Attachment A. Mr. Benton based that assumption upon his judgment as to how many air handling units would have been necessary to provide the requested overtime HVAC. Transcript at 592. Appellant never told the Government how many air handling units were necessary to provide the requested overtime HVAC. Id. at 600. However, the designer of the system testified that one air handling unit could supply the whole building with HVAC at any time, although with the loss of some comfort. Id. at 292. We find, therefore, that the limited overtime provided was supplied by one air handling unit, i.e., one "zone."

Market rate rent

61. Appellant's expert Mr. Gregory Galvin estimated the rental costs for the Winchester Center Building annualizing the overtime HVAC costs appellant had invoiced for the ten-month period covered in the invoices. The rental rate for the building without overtime HVAC is $18.45 per usable square foot. Appellant's Hearing Exhibit 3 at 3. With the overtime charged on the two invoices annualized, the Government would pay annual rent of $7,688,078, or a rental rate of $23.45 per usable square foot. Id. This rate is 27.10% more than the lease's usable per square foot rental rate. Mr. Galvin opined that $23.45 is within the market rate for comparable buildings in the area. Id. at 2.

"Zone" as a term of art in HVAC industry

62. The term "zone" is not a specific term having a well-understood definition in the HVAC industry. The reference handbook published by the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) describes many different types of zones. Transcript at 266. Some HVAC systems may require perimeter zoning while the interior may require cooling at different times. Respondent's Hearing Exhibit 7 at 2.2. The manual explains that interior zones may require constant cooling because they are isolated from external influences, but that "cooling loads in interior spaces may vary with changes in the operation of the equipment and appliances in the space and changes in occupancy." Id.

63. According to the ASHRAE handbook, VAV systems "can be applied to interior or perimeter zones, with common or separate fans, with common or separate air temperature control, and with or without auxiliary heating devices." Respondent's Hearing Exhibit 7 at 2.10. While the handbook states that "the term zone implies the provision of, or the need for, separate thermostatic controls," nothing in the handbook suggests a hard and fast rule in the industry that there is always one thermostat per zone. Id. at 2.1. According to other technical literature, a zone could represent one room or a twenty story building. Respondent's Hearing Exhibit 6 at 101 (Real Estate Manager's Technical Glossary) (IREM Institute of Real Estate Management).

64. The testimony of technical witnesses in this case differs sharply as to whether a zone is defined as an area controlled by one thermostat. Mr. Benton, who assisted the contracting officer, testified that, in his opinion, for the leased premises a zone is an air handling unit, based upon his experience with office building design in Chicago. Transcript at 544-45. In contrast, appellant's expert testified that a zone is an area controlled by a single thermostat. Id. Appellant's Hearing Exhibit 2 at 2.

Discussion

Appellant's arguments

Appellant repeats themes it developed in its motion for summary relief. Appellant argues that the term "zone" in this lease unambiguously means an area covering a maximum of two thousand square feet. Appellant's Memorandum at 28. Appellant argues that even if the term "zone" is ambiguous, appellant's interpretation must prevail as its interpretation is reasonable. Id. Appellant argues that its interpretation of the term "zone" is reasonable because it is based on boilerplate language of the lease and the intent of the parties that negotiated the lease, and is consistent with how the term is used in the HVAC industry. Id. Appellant suggests that the contracting officer agreed to the $40 per hour per zone charge in exchange for favorable pricing in CPI escalation under the lease. Appellant's Brief at 26.

Appellant argues that its interpretation is consistent with the contracting officer's desire to have a HVAC system for the building that could be partially turned on during overtime hours for small portions of the building, and consistent with the term of art of "zone" in the building. Appellant's Brief at 29-30. Appellant also argues that its interpretation is reasonable because the overall lease payments using appellant's formula are

consistent with market rents for comparable office buildings in the Kansas City, Missouri, area and consistent with the maximum amount the Government was willing to pay. Appellant's Brief at 31.

The overtime provisions are ambiguous

A contract is ambiguous when it is subject to more than one reasonable interpretation. Metric Constructors v. National Aeronautics and Space Administration, 169 F.3d 747, 751 (Fed. Cir. 1999); HPI/GSA-3C, LLC v. General Services Administration, GSBCA 15674, 02-1 BCA ¶ 31,762.

In this lease, paragraph 6.6(e), which is GSA lease boilerplate specifying the maximum space for zone control, Finding 2, would be non-controversial, except for the presence of paragraph 13 of the lease. That provision, negotiated with the offerors, says that overtime HVAC "shall be paid at the rate of $80.00 hourly base plus $40.00 cost per zone." Findings 10, 28. It is the operation of that paragraph in conjunction with paragraph 6.6(e) that is at the heart of the overtime provisions in this lease. These provisions read together are ambiguous since paragraph 6.6(e) deals with the subject of zone control, not zone definition and since paragraph 13 mentions zones, but does not define what a "zone" is.

Whether appellant's interpretation of the term "zone" is reasonable

Appellant's interpretation of the meaning of the term “zone” would impose an extreme overtime HVAC charge multiplier on the Government. The formula resulting from that interpretation imposes on the Government a contingent liability for hourly HVAC overtime for the whole building equal at the very least (assuming the presence of 175 "zones" appellant's predecessor says it contemplated at lease award) of forty-five percent of the daily rental rate for the building and now (assuming 366 "zones" appellant maintains are in the building) of about ninety-four percent of the daily rental rate for the building, when the actual cost of all electricity during overtime use (including overtime HVAC) is $11.60 per hour. See Findings 20, 38, 54, 56. The formula also means that the Government is potentially liable at a $40 per hour rate for each new thermostatic sensor the appellant puts in the building.

Appellant seeks to minimize the extreme expense burden its formula imposes on the Government by maintaining that the total square foot cost of the annual rental plus the annualized square foot cost of the HVAC overtime appellant had billed amounts to a per square foot market rent of $23.45, which, according to appellant's expert, is close to market rents for commercial rents in the area. Appellant's Brief at 30-31. The fault with this analysis is that it ignores the contract the parties actually made. In fact, the figures supplied by appellant's expert provide further illustration that appellant's formula is unreasonable, since the $23.45 per square foot rental rate, which factors in the limited overtime HVAC service appellant provided, drives the square foot rental rate up by 27.10% above the lease square foot rental rate of $18.45.

If the contracting officer had agreed to such a seemingly imprudent bargain, we would have expected it to be absolutely clear in the lease negotiation records, including the PNM.

See, e.g., Adelaide Blomfield Management Co. v. General Services Administration, GSBCA 13125, 97-1 BCA ¶ 28,914, appeal dismissed, 152 F.3d 938 (Fed. Cir. 1988 table). The contracting officer would have discussed at length the advantages and disadvantages of assuming such a large contingent liability. Instead, the record before the Board compels the contrary conclusion. The contracting officer made it known to appellant's predecessor that the purpose of paragraph 13 of the lease was to limit or to minimize the Government's overtime HVAC charges, not to increase those charges.

The contracting officer told Golub-WEGCO's Mr.Wieger in the first negotiation session that she desired an efficient HVAC system to operate during overtime hours in general purpose office space. Finding 9. Since, during normal working hours, the Government paid for electricity as part of the base rent in the general purpose space, and paid extra for overtime HVAC use, her desire for efficiency must refer to the object of limiting the Government's cost when operating overtime HVAC in the building. Findings 4, 28. The contracting officer made it clear to Golub-WEGCO during the second negotiation session that the Government did not want to have to pay for the whole HVAC system running in a small portion of the building. Finding 13.

When a party enters into a contract with knowledge of the other party's reasonable interpretation and does not object to it, the party is bound by the other party's reasonable interpretation. Perry & Wallis, Inc. v. United States, 427 F.2d 722, 726 (Ct. Cl. 1970); Lykes-Youngstown Corp. v. United States, 420 F.2d 735, 743-44 (Ct. Cl.) cert. den., 400 U.S. 865 (1970); BRS Contracting Co., GSBCA 7945, 89-2 BCA ¶ 21,884, at 110,109; Ship Analytics International, Inc., ASBCA 50914, 01-1 BCA ¶ 31,253, at 154,352 recon. den., 01-1 BCA ¶ 31,394; Maintenance Engineers, Inc., VABCA 5350, 5457, 99-2 BCA ¶ 30,513, at 150,678; Restatement (Second) of Contracts § 201(2) (1981).[10]

During these negotiation sessions, Mr. Wieger stated that the landlord would supply a system that could meet the requirements of the Government, leading the Government to believe that it would not have to pay the cost of running the full HVAC system for the building during overtime hours. Findings 12, 13. Mr. Wieger did not tell the contracting officer that the landlord interpreted the term "zone" in such a manner that overtime HVAC "zone" charges to the Government would be multiplied by a forty dollar per hour charge per each thermostatic sensor. Indeed, Mr. Wieger deliberately shied away from the subject, in his words, to "make [the contracting officer] think that we're going to work with her in a positive team fashion." Finding 14. Consequently, appellant, as the landlord's successor in interest in this lease, is bound by the Government's reasonable interpretation of paragraph 13 of the lease.

Addressing appellant's other arguments, the record does not support the notion that the contracting officer agreed to an exorbitant zone charge in exchange for a fifty percent

[10] Section 201(2) of the Restatement provides: "Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (a) that party did not know of any different meaning attached by the other, and the other party knew the meaning attached by the first party."

discount on the CPI escalator. Rather, the CPI escalator was part of Golub-WEGCO's initial offer when it was prepared to offer a $45 flat-rate charge for overtime services. Finding 4.

Appellant supports its interpretation by relying upon what it argues is the traditional definition of "zone" in the HVAC industry, i.e., an area controlled or served by a single thermostat. Appellant's Brief at 30. A term of art is "a specific term that has a well-understood meaning in the industry and that was used in . . . the contract." Jowett v. United States, 234 F.3d 1365, 1369 (Fed. Cir. 2000). Contracting parties may thus "serve as their own lexicographers" and use trade terms that vary from the ordinary meaning of the term. Id. at 1368.

Here, there is no showing that the contracting officer intended to use the term "zone" in any technical sense when she inserted paragraph 13 into the contract, since the contracting officer lacked a background in the HVAC industry, or any technical training for that matter. Finding 8. She developed the language relying on the suggestions of a vendor. Finding 10.

Appellant has not established that the term "zone" has a well-understood meaning in the HVAC industry. Indeed, technical literature shows that the term zone does not mean only an area controlled by a single thermostat. The ASHRAE handbook defines many types of zones, including perimeter and interior zones. According to the ASHRAE handbook, zones can have common or separate air temperature controls. Finding 63. In the Winchester Center Building, for example, because of the design of the HVAC system, it would be as accurate to define a "zone" as whatever combination of areas make up the first twenty-five thousand square feet of space (in which there are thirteen thermostatic sensors) served by an air handling unit as it would to define "zone" as that area controlled by a single thermostatic sensor. Other literature in the real estate industry notes that the term "zone" can include one room or a whole building. Finding 63. Finally, the record in this case establishes sharp disagreement about the meaning of the term "zone" between two accredited and credible mechanical engineers. Finding 64.

Appellant argues that the rule of contra proferentem supports its interpretation. Appellant's Brief at 40-41. We disagree. The rule does not apply when the contract terms are negotiated. Parcel 49C Limited Partnership v. General Services Administration, GSBCA 15222, slip op. at 23 (Oct. 31, 2992), Cray Research Inc. v. United States, 44 Fed. Cl. 327, 330-31 (1999) (citing Consumers Ice Co. v. United States, 388 F.2d 317, 329 (Ct. Cl. 1967)). Here, while paragraph 6.6(e) of the lease is Government boilerplate and was not negotiated, paragraph 13 of the lease was negotiated with the vendors and inserted at a vendor's suggestion. Finding 10. The purpose of the paragraph was discussed during the negotiation sessions with Golub-WEGCO's Mr. Wieger. Further, contra proferentem only applies when the interpretation advanced by the non-drafter is reasonable. We have found that the interpretation advanced by appellant is not reasonable.

Appellant suggests that post-lease award correspondence and respondent's approval of the design of the HVAC system amounts to acceptance of appellant's interpretation of paragraph 13 of the lease. Appellant's Brief at 11. Again, we must disagree. The post-lease award correspondence dealt with maintaining separately supplied HVAC for special purpose space. Findings 21-25. The drawing submittals for the HVAC system did not depict the

number of zones for which appellant intended to charge at a $40 per hour overtime rate, much less the boundaries of the purported zones. Finding 30.

Whether the Government's interpretation of the meaning of the term "zone" is reasonable

The Government argues that, for the purpose of this lease, the term "zone" in paragraph 13 means the square footage of space served by an air handling unit. Respondent's Brief at 40. The Government's interpretation of the term zone is reasonable because it fulfills the purpose of the paragraph 13 as explained by the contracting officer to appellant and the other vendors during lease negotiations.

Respondent's interpretation is also consistent with the way the HVAC system in the Winchester Center Building was designed and built. The thermostatic sensors do not turn on the air handling units; rather, they send a signal to the BAC system computer that activates the air handling units and opens the VAV boxes which have previously been programmed in the computer to deliver treated air to certain spaces at pre-defined times. Findings 31, 32. In short, the operation of the air handling units and VAV boxes of the HVAC system is centrally controlled by a BAC system computer, not by area-based thermostats starting and stopping HVAC equipment. Finding 32. Further, in this HVAC system, at least twenty-five thousand square feet of space (the space does not have to be contiguous) must be treated by the HVAC system if any area served by a thermostatic sensor is programmed for overtime operation. After the first twenty-five thousand square feet is treated, individual VAV boxes may be activated as needed for overtime HVAC in space exceeding twenty-five thousand square feet, with air coming from the air handling units. Finding 34. Here, the HVAC system is not thermostatically controlled but centrally controlled by a computerized BAC system. Thus, for the HVAC system in the Winchester Center Building, a "zone" can be any mix of at least twenty-five thousand square feet, or the smallest area served by a thermostatic sensor, or any combination that is programmed into the computer. Given the flexibility of the system's design, it makes little sense to define the term "zone" in terms of a set amount of space and makes much more sense to define "zone" as the Government does, i.e., the amount of space served by the air handling units when delivering overtime HVAC.

Whether the zone charge is an hourly charge or a charge per occurrence

Appellant argues that the zone charge is hourly, while the contracting officer viewed the charge as per occurrence. Compare Appellant's Brief at 44 with Finding 57. We conclude that appellant's position on this issue is correct.

The contracting officer's letter of January 24, 1997, requested the offerors to offer pricing on what was to become paragraph 13 of the lease based upon an "hourly charge per zone." Finding 10. The contracting officer candidly admitted at the hearing that her intent was to obtain offers based on an hourly zone charge. Id. Many of the bidders offered hourly zone charges. Finding 16. The provision states that overtime HVAC "shall be paid at the rate of $80.00 hourly base plus $40.00 cost per zone," but the contracting officer and the offerors, including Golub-WEGCO, mutually understood the paragraph to mean that HVAC overtime charges for both the base and zone charges would be on an hourly basis.

Quantum

We consider that the claim presented to the contracting officer included both invoices for the June-July and August-March time frames. Although the claim letter itself referenced the sum of $54,240, for the June-July HVAC overtime, it included the invoice for $1,573,200 for the August to March HVAC overtime and demanded payment of all invoices in accordance with appellant's theory. Findings 52-53. The contracting officer concluded that both invoices were at issue and decided the quantum of both. So do we.

Appellant is entitled to reimbursement for supplying 589 hours of overtime HVAC from June 2000 through March 31, 2001, at the $80 per hour base charge per hour and at the $40 per hour zone charge for one zone. This amounts to $70,680 ($120 per hour x 589). This figure is based on one air handling unit providing overtime services for the 589 hours the contracting officer calculated on the spreadsheet attached to the contracting officer's decision. Findings 57, 60. The contracting officer believed one air handling unit sufficed to supply the overtime HVAC. Finding 60. While his reasons were hazy, the designer of the system testified that the HVAC system had built in redundancy such that one air handling unit could supply HVAC to the whole building. Id. Thus, we have found that one air handling unit was used to supply the limited HVAC involved. Finding 60.

Prompt Payment Act

Appellant is not entitled to interest or penalties under the Prompt Payment Act, because appellant's invoices were not proper and were disputed by the Government. Marut Testing & Inspection Services Inc. v. General Services Administration, GSBCA 15412 (Aug. 2, 2002); Active Fire Sprinkler Corp. v. General Services Administration, GSBCA 15318, 01-2 BCA ¶ 31,521.

Decision

The appeal is **GRANTED IN PART**. Appellant is awarded $70,680 for the invoiced overtime services under the lease, plus interest as provided by the Contract Disputes Act of 1978.

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ANTHONY S. BORWICK
Board Judge

We concur:

_____
ALLAN H. GOODMAN
Board Judge

_____
MARTHA H. DeGRAFF
Board Judge