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

GSBCA 15725, 15731, and 15749 DENIED;
GSBCA 15786 GRANTED IN PART: January 12, 2004

GSBCA 15725, 15731, 15749, 15786

6000 METRO LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Richard D. Lieberman of McCarthy, Sweeney & Harkaway, P.C., Washington, DC, counsel for Appellant.

Robert M. Notigan, Jr., Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **PARKER**, and **DeGRAFF**.

PARKER, Board Judge.

Appellant, 6000 Metro LLC (Metro), owns a building in Baltimore, Maryland, that is leased to the General Services Administration (GSA). Appellant filed certain claims against GSA, respondent, among which four remain. The first claim asks that the Board declare that the usable square footage of the leased property is 26,361 feet instead of 26,315 feet, the measurement upon which respondent is paying rent. The second claim seeks a lease start date of September 10, 2001, instead of September 18, 2001, the date respondent has chosen to begin paying rent. The third claim seeks an additional $15,968 for damages related to delay of the design intent drawing period associated with tenant improvements to the leased property. The fourth claim seeks approximately $224,640 per year for supplying heating, ventilation and air conditioning (HVAC) based on a $40 per-hour overtime charge, or, in the alternative, $38,682 per year for "actual and estimated" costs of computer room operation outside of normal operating hours.

Findings of Fact

1. Appellant and GSA entered into lease number GS-03B-OO367 on November 2, 2000, for approximately 20,000 to 21,000 usable square feet of office space in Baltimore, Maryland. The space was to be used as the district office of the Food and Drug Administration (FDA). Appeal File, Exhibit 1. The lease is firm for a period of five years, and had an original rent of $568,890 per year. Id. Supplemental Lease Agreement (SLA) Nos. 1-4 adjusted the annual rent to $676,295.50, among other things. Hearing Exhibit 10. Mr. Jay Denberg is the general manager of Metro, in charge of leasing and construction. Transcript at 20.

Usable Square Footage (GSBCA 15725)

2. The amount of rent paid by the Government is based on the usable square footage of the premises. Appeal File, Exhibit 1. SLA No. 1, dated December 5, 2000, adjusted the usable square footage of the property to 26,000 and states, in part: "The Government and Lessor's space planners shall confirm the square foot measurement prior to FDA occupancy and rent commencement." Id., Exhibit 2.

3. On or about May 1, 2001, appellant instructed the contracting officer to have no direct contact with his space planner. Transcript at 155-56. From that date forward, all correspondence or verbal communication from the Government had to go through Mr. Denberg, as appellant's representative. Id. at 317.

4. Appellant's space planner, Ms. Cheryl L. Ruetten, sent a letter to the contracting officer dated July 18, 2001, stating that she computed the usable square footage of the FDA office space to be 26,361. Hearing Exhibit 2. The contracting officer did not respond to Ms. Ruetten because of Mr. Denberg's May 1 instruction. Transcript at 317.

5. Ms. Gabrielle Bucak, the Government's space planner, prepared a memorandum dated August 23, 2001, for the contracting officer, attaching three different square footage scenarios for the leased space. Hearing Exhibit 3. From those measurements, the contracting officer picked the largest square footage scenario upon which to base the rent for the leased space: 26,315 usable square feet. Transcript at 323-24.

6. On September 6, 2001, the contracting officer notified Mr. Denberg that there was a difference in the parties' square foot measurements. Transcript at 320-21. The contracting officer offered to split the difference between two measurements or to participate in a conference call that included Mr. Denberg and both space planners. Id. at 321-22. Mr. Denberg refused both options, holding firm to Ms. Ruetten's estimate. Id. The parties were subsequently unable to resolve the difference in their square footage calculations. Id. The Government is currently paying rent to appellant based on 26,315 usable square feet. Id. at 50.

Rent Commencement Date (GSBCA 15731)

7. Page 40, section 20, of the lease states:

> (a) When the Lessor has completed all alterations, improvements, and repairs necessary to meet the requirements of the lease, the Lessor shall notify the Contracting Officer. The Contracting Officer or designated representative shall promptly inspect the space.
>
> (b) The Government will accept the space and the lease term will begin after determining that the space is substantially complete and contains the required . . . [u]sable square footage as indicated in the paragraph of this solicitation entitled "Amount and Type of Space."

Appeal File, Exhibit 1.

8. Page 36, section 1(k), of the lease states:

> "Substantially complete" and "substantial completion" means that the work, the common and other areas of the building, and all other things necessary for the Government's access to the premises and occupancy, possession, use and enjoyment thereof, as provided in this lease, have been completed or obtained, excepting only such minor matters as do not interfere with or materially diminish such access, occupancy, possession, use or enjoyment.

Appeal File, Exhibit 1.

9. Page 38, section 10(a), of the lease states, in part: "The Government reserves the right to determine when the space is substantially complete." Appeal File, Exhibit 1.

10. Page 14 of the lease, section 4.6, requires that "The Government shall be furnished with at least two master keys for each lock." Appeal File, Exhibit 1.

11. Appellant and respondent had agreed that, if appellant completed construction on schedule, the lease start date would be September 10, 2001. Hearing Exhibit 5.

12. The parties scheduled a formal walk-through of the space for September 6, 2001. Transcript at 69-70. The inspection was cancelled before completion after it became obvious to all parties involved that the space was not ready. Id. at 332-33. A new inspection was scheduled for September 12, the earliest date available for the contracting officer. Id. at 335. The contracting officer agreed that if the space was acceptable on September 12, the lease start date would be September 10. Id. at 341.

13. The inspection scheduled for September 12 was cancelled that morning due to the "lockdown" status of federal employees following the disaster of September 11, 2001. Transcript at 336-37. An inspection took place on September 18, attended by tenant representatives from the FDA and representatives of GSA's local field office. Id. at 342.

14. Although the space was acceptable to the Government on September 18, Mr. Denberg refused to turn over the keys. Transcript at 343. At the time, Mr. Denberg stated that he was concerned about liability for the space for insurance purposes and demanded that the GSA representatives state that GSA was now liable for the space. Id. at

343-44. The GSA representatives lacked the authority to make such a statement, and refused to comply. Id. at 414.

15. On or about September 21, 2001, the parties conducted a conference call during which the contracting officer stated that appellant would not begin to receive rent payments unless the keys to the facility were turned over to the Government. Transcript at 345. Appellant in turn requested that the contracting officer provide communication, written or verbal, documenting that GSA would then be responsible for the office space for liability and security purposes before appellant would turn over the keys. Id. at 72-74.

16. Appellant first released the keys to the Government in the late afternoon of September 24, 2001. Transcript at 328-29. On November 1, 2001, the Government paid its first rent payment based on a lease start date of September 25, 2001. Subsequently, on its own initiative, the Government has obligated itself to pay rent using September 18 as the rent commencement date, plus Contract Disputes Act (CDA) interest on the rent payable from September 18 to September 25. Transcript at 348-49.

Design Intent Drawings (GSBCA 15749)

17. Page 9, paragraph 1.11, of the lease states: "The Design Intent Drawings shall be completed within 45 days of lease award." Appeal File, Exhibit 1 (emphasis omitted). The drawings were completed 114 days late due to Government delays. Transcript at 395-98.

18. The entire space that appellant was to lease to GSA was leased, until July 9, 2001, to the Visiting Nurse Association of Maryland (VNA). Transcript at 98-99. VNA had vacated the space over a year earlier but had entered into an agreement with appellant whereby, in the event appellant leased the space to someone else during VNA's original lease period, VNA would pay appellant $10,302 per month from the time of early termination until July 9, 2001. Hearing Exhibit 19.

19. Appellant expected that the Government would occupy the premises during the period appellant was also receiving payments from VNA, and priced the rental rate taking this into account. Transcript at 103-06. This strategy allowed appellant to bid under market rate. Id. Due to the delay in completing design intent drawings, the two sets of payments did not overlap as expected for a period of 114 days. Id. at 98.

20. Appellant's original claim to the contracting officer demanded $22,664. As part of the calculation, appellant had subtracted forty-five days "for any . . . delays caused by Lessor or Lessor's representatives." Claim dated October 15, 2001. According to appellant, the forty-five day subtraction was "conciliatory" and "not within the lease." Transcript at 98.

21. Appellant has raised the amount of its claim to $38,682, which appellant states represents the full amount of its damages due to the 114-day delay. The Government, on its own initiative, has obligated itself to pay appellant $22,664, plus CDA interest, for this claim. Hearing Exhibit 30.

Overtime Heating, Ventilation and Air Conditioning (GSBCA 15786)

22. Page 3, paragraph 15, of the lease states: "In accordance with Paragraph 1.7, #5 of the Lease, the negotiated rate for overtime Heating, Ventilation and Air Conditioning (HVAC) is $40.00 per hour, with a three-hour minimum." Appeal File, Exhibit 1.

23. Page 20, paragraphs 6.1 to 6.4 of the lease, states as follows:

> 6.1 SERVICES, UTILITIES, MAINTENANCE: GENERAL
> Services, utilities, and maintenance shall be provided by the Lessor as part of the rental consideration. The Lessor must have a building superintendent or a locally designated representative available to promptly correct deficiencies. By executing this lease, lessor certifies that the building and building systems are year 2000 compliant.
>
> 6.2 NORMAL HOURS
> Services, utilities, and maintenance will be provided daily, extending from 6 am to 6 pm, except Saturdays, Sundays, and Federal holidays.
>
> 6.3 OVERTIME USAGE (JAN 1997)
> (a) The Government shall have access to the leased space at all times without additional payment, including the use, during other than normal hours, of necessary services and utilities such as elevators, toilets, lights, and electric power.
>
> (b) If heating or cooling is required on an overtime basis, such services will be ordered orally or in writing by the Contracting Officer or Buildings Manager. When ordered, services shall be provided at the hourly rate established in the contract. Costs for personal services shall only be included as authorized by the Government.
>
> (c) 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 the order for certification and payment. Orders for services costing more than $2,000 will be placed using a Form 300, Order for Supplies or Services. The clauses entitled "GSAR 552.232-71 Prompt Payment" and "GSAR 552.232-72 Invoice Requirements (Variation)" apply to all orders for overtime services.
>
> (d) All orders are subject to the terms and conditions of this lease. In the event of a conflict between an order and this lease, the lease shall control.
>
> 6.4 UTILITIES
> The Lessor shall ensure that utilities necessary for operation are provided and all associated costs are included as a part of the established rental rate.

Appeal File, Exhibit 1.

24. Page 18, section 5.6, paragraph (e), of the lease states, as follows:

> (e) ZONE CONTROL:
> Individual thermostat control shall be provided for office space with control areas not to exceed 2000 BOMA [Building Owners and Managers Association] Usable Square Feet. Areas which routinely have extended hours of operation shall be environmentally controlled through dedicated heating and air-conditioning equipment. Special purpose areas (such as photocopy centers, large conference rooms, computer rooms, etc.) with an internal cooling load in excess of 5 tons shall be independently controlled. Concealed package air-conditioning equipment shall be provided to meet localized spot cooling of tenant special equipment. Portable space heaters are prohibited from use.

Appeal File, Exhibit 1.

25. The parties were not aware that there would be a computer room in the facility when the lease was executed. Transcript at 123, 350. After the lease was executed, GSA provided the design and specifications for a computer room to be built. Id. at 123-28. The computer room, Room 127, is approximately 448 square feet in size. Id. at 238-39.

26. On Friday, November 2, 2001, the GSA Building Manager, Mr. Ed Harman, wrote appellant via e-mail, stating, "[L]eave the computer room air conditioner set to maintain 74 degrees. The unit must stay on, we will discuss with [the contracting officer] on Monday." Hearing Exhibit 21. The communication also stated: "Without this unit operating FDA will not be able to perform their mission." Id. Appellant recognized at the time that the HVAC staying on twenty-four hours per day was a necessary utility. Transcript at 185.

27. On November 6, 2001, the contracting officer, after speaking with Mr. Harman, wrote Mr. Denberg via e-mail, stating, in part:

> 5. HVAC in Room 127 - the HVAC must operate 24-hours a day. Please continue to do so. FDA should have given you the temperatures by now. However, I realize that this was not part of your original operating rent. Thus, please submit costs for overtime utilities for this room only. This is better handled via rent than through the agency. I will have the costs reviewed and upon approval, will make the increase to operating rent retroactive.

Hearing Exhibit 21, at 2. The e-mail was printed out, signed by the contracting officer, and faxed to Mr. Denberg, in accordance with Mr. Denberg's request that all change orders be manually signed and sent to him. Transcript at 364. Mr. Denberg stated that he relied upon this e-mail in keeping the HVAC on in Room 127. Hearing Exhibit 29; Interrogatory No. 11; Answer.

28. Appellant did not respond to the contracting officer's request by submitting a cost proposal for overtime utilities. Transcript at 200. Instead, appellant presented the Government with a bill for $7,680 for the period of November 2, 2001, to November 14, 2001, based on a $40 per-hour charge. Id. at 180, 200.

29. Appellant's monetary demand for HVAC usage for Room 127 per present invoicing is approximately $224,640 per year, and would be approximately $1,123,200 for the five years the lease is firm. Appellant's annual invoices are approximately forty percent of the lease's original annual rent. Hearing Exhibit 12.

30. Appellant's actual and estimated costs for computer room operation outside of the lease as presented at trial were $32,250. Hearing Exhibit 23. Appellant's alternative demand for HVAC costs if it cannot collect on its invoices is currently $28,211, as presented in its posthearing brief. Appellant's Posthearing Brief at Statement I.

31. The Government paid for the HVAC unit servicing Room 127 through the Tenant Allowance. Transcript at 119. Appellant's alternative demand includes $3200 per year for depreciation costs for the unit. Hearing Exhibit 23.

32. Appellant calculated, as part of its actual and estimated overtime electricity costs, that 47.61 percent of the electricity usage for the entire leased property was attributable to the computer room. Hearing Exhibit 23, at 3. Appellant's meter data used in its calculation to determine the 47.61 percent usage were taken from September 19, 2001, to January 21, 2002, a period when the air conditioning is not operating in the other parts of the building. Id. Appellant multiplied its total electricity costs for the entire leased property by that percentage to arrive at cost attributable to computer room HVAC and computer equipment. Id.

33. The HVAC unit in question was under warranty from August 31, 2001, to August 31, 2002, by a company called Encompass. Transcript at 194. During that time, appellant was not billed by the company for any service related to the HVAC unit serving Room 127. Id.

34. The report by the Government's expert witness, Mr. Carcaterra, estimated, on a conservative basis, the annual electrical cost for operating the HVAC unit in question for one year to be $6553. Respondent's Rule 26 Statement. Mr. Carcaterra testified that actual electricity consumption is probably less than what he projected in his report. Transcript at 303-04. Mr. Carcaterra assumed that the HVAC humidifier would run continually during the winter -- a very conservative assumption to account for the lack of a vapor retarder in the room. Id. at 246-49. The report also estimated preventive maintenance costs for the HVAC unit to be $264, based on an in-house capability. Id. at 286-87. Mr. Carcaterra also testified that electricity costs for lights and computer equipment in the room would add approximately $2796 on an annual basis. Id. at 292-93.

35. Respondent located a contractor certified to service the HVAC unit in question, suggested to appellant that it enter into the agreement, and offered to pay the associated costs. Hearing Exhibit 23. The plan to be paid for by the Government states that "[t]he equipment shall be maintained in the condition that exists at the agreement initiation date." Id. at 10. The company found the unit to be "in good condition." Id.; Transcript at 307-08. Mr. Carcaterra interpreted that inspection report to mean that at the time the company performed its inspection, the machine was operating properly. Transcript at 307-08.

Discussion

Usable Square Footage (GSBCA 15725)

Appellant asks the Board to order GSA to pay rent based upon a measurement of 26,361 usable square feet on the ground that GSA failed to coordinate with appellant's space planner to "confirm the square foot measurement" as required by the lease. See Finding 2. GSA is paying rent based on the 26,315 usable square feet measurement calculated by its own space planner. Finding 5.

We do not agree with appellant that GSA failed to comply with the lease's requirement to work with appellant's space planner to confirm the measurement. GSA did not contact appellant's space planner because, pursuant to Mr. Denberg's request, all communication between GSA and Metro was to come directly through Mr. Denberg. Findings 3, 4. GSA's contracting officer notified Mr. Denberg of the difference in the parties' square foot measurements and offered to split the difference between the two measurements, or to engage in a conference call attended by the contracting officer, Mr. Denberg, and their respective space planners. Mr. Denberg refused both options. Finding 6. This hardly shows a lack of cooperation on GSA's part; if anything, it shows a lack of cooperation by Metro. Finally, appellant has not demonstrated that its measurement was any more accurate than GSA's measurement. The appeal is denied.

Rent Commencement Date (GSBCA 15731)

In this appeal, Metro maintains that the space was substantially complete on September 10, 2001, and asks the Board to declare that date as the lease start date. We decline to do so.

The parties agreed that if the space were found to be substantially complete during the inspection scheduled for September 12, the lease start date would be September 10. Finding 12. Although the space was ready on September 10, the scheduled inspection had to be postponed due to the tragic events of September 11, 2001. Finding 13. An inspection took place on September 18, at which time the space was found to be acceptable. Id.

Although the space was found to be acceptable on September 18, appellant's representative refused to turn over the keys to the GSA representatives on that date. Finding 14. Appellant was concerned about liability for the space and insisted that the GSA representatives state that GSA was legally responsible for the space from that moment forward. The GSA representatives, lacking the authority to make such a statement, refused to comply. Id.

Later, the parties conducted a conference call during which the contracting officer stated that appellant would not begin to receive rent payments unless the keys to the facility were turned over to the Government. Appellant in turn requested that the contracting officer provide communication, written or verbal, documenting that GSA would be responsible for the office space for liability and security purposes once appellant turned over the keys. Finding 15. Appellant first released the keys to the Government in the late afternoon of September 24, 2001. Finding 16.

We hold that the lease start date should have been September 25, not September 10, because the space was not "substantially complete" until the late afternoon of September 24. The lease required GSA to promptly inspect the space after appropriate notification by the lessor and to accept the space "after determining that the space is substantially complete." Finding 7. A space is substantially complete when, among other things, "all other things necessary for the Government's access to the premises and occupancy, possession, use and enjoyment thereof . . . have been completed or obtained." Finding 8.

The lease specifically required appellant to furnish keys to every lock. Finding 10. When appellant refused to provide GSA with the keys to the space, it denied respondent something necessary for the Government's access to the premises, as well as its occupancy, possession, and use and enjoyment thereof. Simply put, without the keys, the space was useless because the Government could not enter and use it. Appellant's refusal to turn over the keys unless someone first stated that the Government would be liable at that point was both unreasonable and unnecessary. The legal relationship of the parties was governed by the lease terms: "[t]he Government will accept the space and the lease term will begin after determining that the space is substantially complete . . . ." Finding 7. By refusing to turn over the keys until a Government representative stated that the Government accepted liability for the space, appellant failed to abide by the lease terms and prevented the Government from determining that the space was substantially complete. Accordingly, appellant's claim that the lease term started on September 10 is without merit.

Design Intent Drawings (GSBCA 15749)

Appellant alleges that the Government's delay in connection with the design intent drawings cost appellant $38,682. GSA, on its own initiative, has obligated itself to pay appellant $22,664, plus CDA interest, based on a delay period of 69 days as claimed in appellant's original claim to the contracting officer.

We hold that appellant is entitled to nothing for the delay in connection with the design intent drawings. Appellant entered into an agreement with the building's previous tenant, VNA, whereby VNA would pay appellant $10,302 per month until July 9, 2001, in return for allowing VNA to end its lease early. Finding 18. Appellant expected that the Government would occupy the premises during the period appellant was also receiving payments from VNA, and priced the rental rate taking this into account. Finding 19. Due to the delay in completing design intent drawings, the two sets of payments did not overlap as expected for a period of 114 days. Id.

Appellant alleges that it lost 114 days, or 3.75 months of the $10,302 per month payments from VNA because the Government's lower rental rate was based on appellant's receiving both payments at the same time. Appellant's logic is flawed, however. Appellant actually received all of the payments due from the VNA. It also will receive all of the rent payments due from the Government, albeit 114 days later than appellant expected. What appellant did not receive was a period of overlap of the two payments for the period of time that the Government delayed the design intent drawings. Thus, appellant's damages amount to, at most, the time value of money resulting from the delayed receipt of the first rent payment from GSA and a very speculative possibility that rental conditions will be worse at

the new ending date of the lease term than they would have been at the date the lease would have ended had the delay not occurred.

In Jay P. Altmayer v. General Services Administration, GSBCA 12639, 95-1 BCA ¶ 27,515, aff'd in part, rev'd in part, sub nom. Altmayer v. Johnson, 79 F.3d 1129 (Fed. Cir. 1996), various delays by the Government prevented Altmayer's lease from starting on the date originally anticipated. Regarding the claim for lost rent, the Board stated:

> The largest element of Lessor's claim for damages is for rent not received for the period between the date on which renovation should have been completed and Government occupancy begun -- February 25, 1993 -- and the date on which actual completion and occupancy occurred -- May 28, 1993. Both the contract and case law make clear that Lessor is not entitled to this rent. The contract itself provides that rental payments shall not begin until "the entire premises or suitable units are ready for occupancy." . . . Case law establishes that when Government delay occasions later-than-anticipated commencement of rental payments, compensation may be made only for increases in costs of performance; loss of rental income, although an economic detriment, is not a cost of performance and therefore is not compensable for the delay. Coley Properties Corp. v. United States, 593 F.2d 380, 385 (Ct. Cl. 1979); see also, S.S. Silberblatt, Inc. v. United States, 3 Cl. Ct. 644, 647 (1983); Savoy Construction Co. v. United States, 2 Cl. Ct. 338, 342 (1983); Southwest Marine, Inc., ASBCA 39472, 93-2 BCA ¶ 127,763.

The Court of Appeals expressly affirmed this conclusion. 79 F.3d at 1132 n. *.

Here, as in Altmayer, a Government delay (under a lease with similar terms) occasioned later-than-anticipated commencement of rental payments. In accordance with Altmayer and the case law cited therein, appellant may recover only for increases in costs of performance. Although additional interest incurred on existing construction loans due to Government delay can be considered to be a "cost of performance" in certain situations, see Coley; S.S. Silberblatt, appellant has presented no evidence of such costs in this case. We are not aware of, nor has appellant pointed us to, any authority for considering, in the absence of outstanding construction loans, the time value of money alone as a compensable cost of performance. Even if it could be so considered, appellant has provided no evidence of quantum, or explained how such costs would not be covered by the $22,664 that the Government has already agreed to pay.

Regarding the possibility that rental conditions will be worse at the new ending date of the lease term than they would have been at the date the lease would have ended had the delay not occurred, we hold that this is not a cost of performance. Even if it were, and if appellant had provided some evidence of quantum, such damages would be completely speculative and, thus, not recoverable. See San Carlos Irrigation and Drainage District v. United States, 111 F.3d 1557,1562 (Fed. Cir. 1997) ("contract law precludes the recovery of speculative damages"). The appeal is thus denied.

Overtime Heating, Ventilation and Air Conditioning (GSBCA 15786)

In this appeal, Metro seeks approximately $224,640 per year for supplying heating, ventilation and air conditioning based on a $40 per-hour charge, or, in the alternative, $38,682 per year for "actual and estimated" costs of computer room operation outside of normal working hours.

Metro's first argument -- that the lease's $40 per hour overtime HVAC charge is applicable to a new lease requirement for a computer room that requires 24-hour per day cooling -- is without merit. When the lease is read as a whole, it is clear that the overtime HVAC charge was not intended to apply to such a situation.

Section 6.4 of the lease obligates appellant to ensure that utilities necessary for operation are provided, and requires that all associated costs be included as part of the established rental rate. Finding 23. Continuous HVAC is necessary for operation, see Findings 26-27, and, therefore, belongs in the rental rate. The $40 per hour overtime charge must refer to something else -- and it does.

In Clark College District 14 Foundation v. General Services Administration, GSBCA 15603, 02-2 BCA ¶ 32,005, the Board considered facts similar to those in the instant case. There, the lease required that the temperature be controlled in certain rooms at all times on all days. In one clause, the lease stated: "Some areas may require independent HVAC . . . zoning and 24-hr. availability. These areas will be designated." Id. at 158,135. The lease permitted the Government to "have access to the leased space at all times . . . without additional payment." However, "[i]f heating or cooling is required on an overtime basis, such services will be ordered orally or in writing by the contracting officer or the GSA buildings manager. When ordered, services will be provided at the hourly rate negotiated prior to award." Id. The Board stated:

> Because heating and cooling must always be provided to [designated] rooms and areas, it can never be required there "on an overtime basis," so payment for such services at the $20 hourly rate would be inappropriate. Although the Government, through the lease, did "request" heating and cooling services for the specified rooms and areas during nonworking hours, we consider that those hours were not "overtime," as that phrase should be understood in the context of the lease as a whole. This reading of the lease is consistent with the one we gave nearly identical provisions in Rincon.

Id. at 158,138 (citing Rincon Center Associates v. General Services Administration, GSBCA 11927, 96-1 BCA ¶ 28,126 (1995), aff'd sub nom. Rincon Center Associates v. Johnson, 108 F.3d 1393 (Fed. Cir. 1997)).

The relevant lease provisions here are nearly identical to those in both Clark College and Rincon, see Findings 23-24, and must be interpreted similarly. Thus, as was the case in those two appeals, the Government's request to leave the HVAC on in the computer room did not qualify as an "overtime" requirement. Rather, it is a change to the operating conditions for which the lessor must be fairly compensated through an equitable adjustment to the lease. To harmonize the various lease provisions, the overtime HVAC provision should be read as

applying only to general office areas, where employees who work non-regular hours may require after-hours heating or cooling. Rincon.

Having decided that the HVAC overtime provision does not apply to heating and cooling the computer room, we now turn to the question of the proper equitable adjustment to which appellant is entitled. The Board has defined an equitable adjustment as "the difference between the reasonable cost of the work required by the contract and the actual reasonable cost to (the contractor) of performing the changed work, plus a reasonable amount of overhead and profit." Stroh Corp. v. General Services Administration, GSBCA 11029, 96-1 BCA ¶ 28,265, at 141,129 (citing Greenwood Construction Co., AGBCA 75-127, 78-1 BCA ¶ 12,893, at 62,831).

Both appellant and respondent calculated proposed adjustments: appellant, through Mr. Denberg; and respondent, through its expert witness, Mr. Carcaterra. We find Mr. Carcaterra's estimate to be the more credible one; Mr. Denberg's estimate is flawed and cannot be relied upon.

Appellant calculated, as part of its actual and estimated overtime electricity costs, that 47.61 percent of the electricity usage for the entire leased premises was attributable to the computer room. Finding 32. The meter data used in the calculation, however, were taken from September 2001 to January 2002 -- a time when the air conditioning was not running in the rest of the building. Because of this, the percentage calculation becomes useless. There were other problems with appellant's costs analysis. For example, appellant's calculation includes depreciation for an HVAC unit that it does not own -- respondent purchased the unit through the tenant allowance and will replace the unit if it ceases to function. See Finding 31. Also, appellant's estimate of maintenance costs failed to take into account items that would be covered by warranty and a maintenance agreement to be paid for by the Government. See Findings 34, 35. Because of these and other problems, we decline to accept appellant's calculations in formulating the equitable adjustment.

Mr. Carcaterra, an expert, provided an estimate that is more credible. Mr. Carcaterra estimated the annual electrical cost for operating the HVAC unit in question to be $6553. Finding 31. Lights and computer equipment in the computer room added an additional $2796 in electrical costs. Id. For repairs not covered by a Government-paid service agreement, Mr. Carcaterra estimated $264 per year. Id. Preventive maintenance was estimated by both parties at $1444 per year, and we accept that figure. Appellant's Posthearing Brief at Statement I; Respondent's Posthearing Brief at 18. To this total of $11,057, we add respondent's suggested twenty percent for overhead and profit ($2211), which we find more reasonable than appellant's unsupported suggestion of thirty percent, for a grand total of $13,268. This is the amount of the equitable adjustment to which appellant is entitled.

Decision

GSBCA 15725, 15731, and 15749 are **DENIED**. GSBCA 15786 is **GRANTED IN PART**; the rental payments shall be increased in the amount of $13,268 per year for additional HVAC and other electrical usage related to the computer room. Respondent shall pay interest in accordance with the CDA.

_____
ROBERT W. PARKER
Board Judge

We concur:

_____
STEPHEN M. DANIELS
Board Judge

_____
MARTHA H. DeGRAFF
Board Judge