UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: August 27, 2009

CBCA 1196

BOWERS INVESTMENT CO., LLC,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Brian W. Craver of Person & Craver LLP, Washington, DC, counsel for Appellant.

Glenn H. Brown, Office of the Regional Counsel, Federal Aviation Administration, Department of Transportation, Anchorage, AK, counsel for Respondent.

Before Board Judges **SOMERS**, **GILMORE**, and **STERN**.

STERN, Board Judge.

This is an appeal by Bowers Investment Co., LLC (Bowers or appellant) from the decision of a contracting officer for the Federal Aviation Administration (FAA or respondent) denying appellant's claims arising out of a lease between the parties.

At the parties' request, the Board did not conduct a trial in this proceeding. Evidence is composed solely of the documents submitted by the parties. In numerous instances the Board needed to weigh contradictory declarations of witnesses.

The Contract

Bowers and the FAA entered into a lease agreement for 693 square feet of office space and 12,587 square feet of warehouse space in a building owned by Bowers in Fairbanks, Alaska. The lease began on October 1, 1993. The lease was renewable year to year at the option of the FAA, through September 30, 2004. Appeal File, Exhibit 10. The parties extended the term of the lease on several occasions. The lease, with extensions, was in effect from October 1, 1993, to September 30, 2006.

The agreement provided: "The Government shall pay the lessor annual rent of $256,291.20 . . . at the rate of $21,357.60 . . . per month in arrears." Beginning in the sixth year the monthly rate was to increase to $22,021.60. Appeal File, Exhibit 10.

The FAA paid for numerous build-outs or changes that were made to the premises prior to occupancy. The payment for build-out costs was made separate from the rental payments due under the lease. Rental payments were to be made by the FAA from the date of occupancy. Appeal File, Exhibit 35.

Modification 3 to the lease provided for payment of certain of the build-out costs and adjusted the amount of the monthly rent. Modification 3 stated:

> Occupancy of the office space described in the above cited lease agreement took place on January 3, 1994. Lease payments shall commence beginning on that date and shall continue in arrears throughout the life of the lease agreement on a recurring basis and in accordance with Article 5 of the basic agreement. . . .
>
> Each monthly payment shall be in the amount of $19,509.60 fully serviced as provided for in Modification 1 of the above cited agreement.

Appeal File, Exhibit 36.

Modification 7 to the lease, effective October 1, 2004, extended the lease through September 30, 2005, at the monthly rental of $20,982.50. This modification also granted the FAA the option to extend the lease through September 30, 2006, at the same monthly rent. Appeal File, Exhibit 72.

In addition, the lease contained the following payment provisions:

PROMPT PAYMENT (APR 1989)

The Government will make payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or an electronic funds transfer is made. All days referred to in this clause are calendar days, unless otherwise specified.

(a) Payment due date.

(1) Rental payments. Rent shall be paid monthly in arrears and will be due on the first workday of each month, and only as provided for by the lease.

(I) When the date for commencement of rent falls on the 15th day of the month or earlier, the initial monthly rental payment under this contract shall become due on the first workday of the month following the month in which the commencement of the rent is effective.

(II) When the date for commencement of rent falls after the 15th day of the month, the initial monthly rental payment under this contract shall become due on the first workday of the second month following the month in which the commencement of the rent is effective.

. . . .

(c) Interest Penalty.

(1) An interest penalty shall be paid automatically by the Government, without request from the Contractor, if payment is not made by the due date.

(2) The interest penalty shall be at the rate established by the Secretary of the Treasury under Section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date. This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in the Federal Register semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date.

. . . .

> PAYMENT
>
> Rent shall be paid monthly, in arrears, and only as provided for in the lease; and provided further, that adequate appropriations are available from year to year for the payment of rent.

Appeal File, Exhibit 10.

The lease also permitted the FAA to make minor alterations to the leased space:

> ALTERATIONS.
>
> . . . .
>
> (c) The Government may choose to make minor alterations and/or additions to the lease area. The Government will [submit] plans to the lessor for approval. Approval will not be unreasonably withheld by lessor.

Appeal File, Exhibit 10. Alterations were also permitted under the following clause:

> ALTERATIONS (JUNE 1985)
>
> The Government shall have the right during the existence of this lease to make alterations, attach fixtures, and erect structures or signs in or upon the premises hereby leased, which fixtures, additions or structures so placed in, on, upon, or attached to the said premises shall be and remain the property of the Government and may be removed or otherwise disposed of by the Government. If the lease contemplates that the Government is the sole occupant of the building, for purposes of this clause, the leased premises include the land on which the building is sited and the building itself. Otherwise, the Government shall have the right to tie into or make any physical connection with any structure located on the property as is reasonably necessary for appropriate utilization of the leased space.

Id.

The lease also contained a "restoration" provision, providing:

RESTORATION

The lessor will waive all rights to restoration, except for Government installed fixtures that materially change the premises (other than ordinary wear and tear) and permanently injure the lessor's interest.

Appeal File, Exhibit 10.

A default by the lessor was addressed as follows:

DEFAULT BY LESSOR DURING THE TERM (AUG 1992)

(a) Each of the following shall constitute a default by Lessor under this lease:

(1) Failure to maintain, repair, operate or service the premises as and when specified in this lease, or failure to perform any other requirement of this lease as and when required provided any such failure shall remain uncured for a period of thirty (30) days next following Lessor's receipt of notice thereof from the Contracting Officer or an authorized representative.

(2) Repeated and unexcused failure by Lessor to comply with one or more requirements of this lease shall constitute a default notwithstanding that one or all such failures shall have been timely cured pursuant to this clause.

(b) If a default occurs, the Government may, by notice to Lessor, terminate this lease for default and if so terminated, the Government shall be entitled to the damages specified in the Default in Delivery-Time Extensions clause.

Appeal File, Exhibit 10.

Finally, the lease addressed a potential holdover by the FAA.

HOLDOVER

If, after expiration of the lease, the Government shall retain possession of the premises, the lease shall continue in force and effect on a month-to-month basis. Rent shall be paid monthly in arrears on a prorated basis at the

> rate paid during the lease term. At no time will this period exceed six (6) months.

Appeal File, Exhibit 10.

Unpaid Rent

Findings of Fact

As set forth above, the FAA's occupancy of the property began on January 3, 1994. Under the terms of the lease, payments for rent, in arrears, were due commencing February 1, 1994. Neither party maintained complete records of payments under the lease. The FAA's records exist only with regard to lease payments commencing May 2, 1994. Bowers' payment records do not begin until 1998.

The FAA introduced a document from its accounting department listing payments to Bowers from May 2, 1994, to April 26, 1996. Appeal File, Exhibit 143. This document contains a cover sheet dated May 2, 1996, indicating that it was a printout of the schedule of payments to Bowers. FAA witnesses who were familiar with FAA accounting procedures testified that this schedule appeared to be one produced by the FAA's accounting system. Declaration of Claudia Hoversten (Jan. 22, 2009) ¶ 4; Declaration of Amber L. Lawson (Jan. 22, 2009) ¶ 2.[1]

One of the columns on the schedule is labeled "sch-date." Another column is entitled "confirm date." A third column is called "Document-ID." The first entry on the schedule is a payment to Bowers in the amount of $19,509.60. The "sch-date" for this payment is May 28, 1994, the "confirm date" is May 2, 1994, and the "document-ID" is "007." Appeal File, Exhibit 143. Claudia Hoversten, whose responsibilities included operation of the national accounting system, including the administration of accounts payable, was very familiar with the process of making monthly payments on FAA leases. Hoversten Declaration ¶ 3. Ms. Hoversten testified that the first entry on this schedule of payments showed that payment to Bowers was initiated on April 28, 1994. Ms. Hoversten also testified that the document-ID entry indicates the month of the fiscal year that was covered by the entry. Here, "007" indicates that the payment made on May 2, 1994, was to pay for the month of April 1994 (the seventh month of the fiscal year). *Id*. ¶ 5.

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[1] Ms. Hoversten is the FAA's deputy manager of its Western Logistics Service. Ms. Lawson was the FAA's accounting technician.

Ms. Lawson testified that she had reviewed other FAA records that showed monthly payments for every month of the lease from the first payment shown on May 2, 1994, on the aforementioned printout and concluding with the September 13, 2006, payment that is the subject of this dispute. There is no record regarding payments for occupancy during January 1994 through March 1994.

Appellant did not keep records of payments made by the FAA over the course of the lease. Records from the Denali State Bank, of Fairbanks, Alaska, in which some of the rent deposits were made over the course of the lease, reflect payments made from June 1998 to September 2006. Appellant's Supplemental Appeal File, Exhibit 1. The payments reflected in the Denali State Bank statements are consistent with the FAA's records. Along with rent, some payments included additional amounts for interest for late payment. Declaration of Jerry L. Bowers (Dec. 2, 2008) ¶ 11[2]. Other payments on the bank statements included amounts for past rent, where the FAA had failed to make a prior rent payment. *Id.* ¶ 9. The bank and FAA records reflect the following rent payments over the last two years of the lease:

09/28/04	19,509.60	+ 7.32 interest
10/28/04	20,982.50	+ 7.87 interest
11/29/04	20,982.50	+10.49 interest
12/27/04	20,982.50	+ 5.25 interest
01/27/05	20,982.50	+ 4.95 interest (Not listed by the FAA)
02/22/05	20,982.50	
03/25/05	20,982.50	
04/27/05	20,982.50	
05/24/05	20.982.50	
06/15/05	20,982.50	(Two separate rent payments in June.)
06/15/05	20,982.50	
08/29/05	20,982.50	+ 10.49 interest
09/23/05	20,982.50	
11/02/05	20,982.50	+ 5.25 interest
12/15/05	20,982.50	+ 52.48 interest
12/27/05	20,982.50	+ 5.25 interest
01/25/06	20,982.50	
02/15/06	20,982.50	
03/15/06	18,632.50	
03/17/06	2,350.00	
04/13/06	8,153.20*	+ 1.16 interest

[2] Mr. Bowers is the managing member of appellant.

04/17/06	22,341.37	
05/15/06	20,982.50	
05/26/06	1,358.87*	+11.50 interest
06/14/06	22,341.37	
07/17/06	22,341.37	
08/15/06	22,341.37	
09/13/06	22,341.35	

*The FAA indicated that these payments were for the underpayment of rent from prior months. Appellant does not disagree.

Appellant's Supplemental Appeal File, Exhibit 1; Appeal File, Exhibits 134, 144.

Linda D. Walker, a former accounting technician for the FAA, testified that she was familiar with the payment system being used by the FAA. Declaration of Linda D. Walker (Jan. 22, 2009) ¶ 2. Ms. Walker testified that the accounting system that the FAA began using for transactions in fiscal year 2004 automatically generated interest payments for Bowers' rental transactions made after the twenty-fifth day of any month due to the coding used by the FAA. *Id.* ¶ 4. Any time that the accounting technician did not manually correct this coding, an interest payment would be automatically generated. The system previously used by the FAA did not automatically generate interest payments. *Id.* According to the records submitted by the FAA, interest payments to Bowers were only made during and subsequent to 2004. Appeal File, Exhibit 134.

Mr. Bowers testified that in March 2006 he had a telephone conversation with the contracting officer regarding the March 2006 rental payment. Mr. Bowers testified that the contracting officer told him that the March payment was due on April 1, 2006. Bowers Declaration ¶ 11. This testimony of Mr. Bowers is supported in a memorandum prepared by the contracting officer in March 2006. Appeal File, Exhibit 96. In that memorandum, the contracting officer wrote that the March rent payment was due on April 1. The contracting officer also stated that the rent was being paid by the FAA in arrears. That March rent payment was made on April 17, 2006.

Under the terms of the lease, the rent was to increase starting with the month of October 2004. The FAA notes that it paid $19,509.60 on September 28, 2004, and $20,982.50 (the increased rental amount) on October 20, 2004. The FAA submits that this is evidence that its payment on October 20 was for the rent due for the month of October 2004, and that lease payments were being made before the first of each month when actually due.

Discussion

Appellant seeks the $22,341.37 rent payment due for the FAA's occupancy during September 2006, the final month of the lease. Bowers claims that the FAA's September 13, 2006, payment was for the rent due to the FAA's occupancy during August 2006. Bowers alleges that the September 2006 rental payment for the FAA's occupancy has not been made. The FAA asserts that the September 13, 2006, payment was to pay for its occupancy for the month of September 2006.

Appellant has demonstrated its right under the lease to be paid rent for the FAA's occupancy through September 30, 2006. The FAA has raised payment as an affirmative defense. The party that raises the affirmative defense of payment bears the burden of proof. *Bridgestone/Firestone Research, Inc. v. Automobile Club de L'Ouest de la France*, 245 F.3d 1359, 1361 (Fed. Cir. 2001); *Desjardins v. Desjardins*, 308 F.2d 111, 116 (6th Cir. 1962). Thus, the FAA carries the burden of proof to demonstrate that it has paid Bowers the September 2006 rent.

The FAA has shown through records and testimony that it paid all of the rent due under the terms of the lease, subsequent to the May 2, 1994, rental payment. The documents introduced by the FAA list payments for the FAA's occupancy of the property during every month of the lease from April 1994 to and including September 2006. Bowers argues that since the records do not reflect payments for the first three months of the lease, the FAA's proof is inadequate to demonstrate that all lease payments were made.

For us to agree with Bowers' argument would require our acceptance of a scenario under which one or more of the first three payments commencing January 1994 were not made and Bowers did not complain in writing or otherwise regarding the FAA error. Under this logic, the FAA's payment of May 2, 1994, would have been to pay the rent for its occupancy of January, February, or March 1994. Further, almost all subsequent payments for a period of over twelve years would have been late, without the payment of interest penalty payments for most of those payments and without any complaints by Bowers. In addition, the FAA's payment on October 20, 2004, of the increased monthly rental payment due commencing in October 2004, is consistent to show that its payments were being made early and not "in arrears." Tracking each subsequent increased rental payment to the end of the lease is consistent with the FAA's position. While the FAA has not proven that it made every payment under the lease, it has submitted sufficient evidence regarding the timing of its payments and the periods of occupancy that each payment covered.

Bowers submits that the FAA's payment of interest on numerous occasions supports its position that the payments were late and that the September 13, 2006, payment was to pay for the FAA's occupancy in August 2006. However, the FAA introduced the testimony of

a former accounting technician who was familiar with the FAA payment system. Ms. Walker testified that the FAA's payment system, during the period that interest payments were made to Bowers, automatically generated interest for payments not made before the twenty-fifth of the month. This witness testified that this was the reason for each interest payment made under this lease. We accept the FAA's argument that most of the interest payments were erroneous.

Bowers also refers to the terms of the lease, calling for rental payments to be made in arrears, and to the statement made by the contracting officer that payments were being made in arrears. While this evidence bolsters Bowers' argument that the payments under the lease were in arrears, we find that it cannot overcome the actual payment records that have been placed in evidence.

The FAA has met its burden. The September 13, 2006, lease payment was to pay for the FAA's occupancy of September 2006. Bowers' claim is denied.

Holdover Rent

Findings of Fact

The lease expired on September 30, 2006. In late September, the FAA vacated the premises. However, certain materials and equipment were left behind. The FAA abandoned the following property in the leased space:

- Built-in shelving in eight of the twenty-five leased rooms.
- Wood shelving.
- The raised floor (twelve inches above the original floor) in the computer room, which had a dimension of approximately twenty-three by twenty-eight feet.
- Entrance ramps for the handicapped leading to the computer room.
- Doors raised to the level of the computer floor.
- A telephone rack and wiring in the communications room.
- Twenty-five linear feet of large mirrors in the fitness room.
- Eighteen large power poles (twelve-foot long conduit).

Bowers Declaration ¶¶ 16-20, 22. Some of the leased space was damaged. *See* "Restoration Costs," *infra*. In addition, Mr. Bowers testified that when the raised floor and ramps were removed, it was discovered that the vinyl floor beneath them had been damaged. Bowers Declaration ¶¶ 19, 21. Further, Mr. Bowers testified that the FAA simply cut the electrical and data wiring when it removed its computer equipment. This wiring was left hanging at the time the FAA moved the computer equipment in September 2006. *Id*. ¶ 24.

Additionally, Mr. Bowers testified that he observed the FAA removing material and equipment from the premises between October 1 and 13, 2006. Bowers Declaration ¶ 23. The owner of Perfection Painting, a company hired by appellant in September 2006 to prepare the space occupied by the FAA for future tenants, stated in his declaration:

> When I first entered the former FAA lease space during the first few days of October 2006, there was a substantial amount of abandoned furniture, shattered and broken furniture, trash, garbage and abandoned foodstuffs that had been left behind throughout the FAA space. The space was left in a filthy and disgusting condition. I have seen many dozens of leaseholds turned back to landlords in the Fairbanks area, but this was by far the most unclean tenant space I have ever seen.

Declaration of Denny Melson (Dec. 1, 2008) ¶ 4.

FAA witnesses testified that Mr. Bowers gave them permission, orally, to leave many of the fixtures in place, that the premises were not left in a filthy condition, and that after September 30, 2006, the FAA no longer had access to the building as the locks on the doors were replaced. Declaration of Doneva Cheeseman (Jan. 21, 2009) ¶ 4; Declaration of Shirley M. Finnesey (Jan. 22, 2009) ¶¶ 3, 7.

By letter of October 18, 2006, Mr. Bowers wrote to the contracting officer regarding the wooden shelving, the elevated floor, the entrance ramps, the power poles, and the raised doors which remained a problem after the FAA vacated the premises. Bowers also complained that some shelving was left in disrepair and other shelving remained stacked in a portion of the building. Appeal File, Exhibit 124. On October 19, 2006, the contracting officer, by letter, offered to remove the raised wooden floor, the wooden shelving, and the entrance ramps. *Id*., Exhibit 125. The contracting officer also offered to lower the doors back to floor level. Ultimately, Bowers performed this work at its expense. *See* "Restoration Costs," *infra*.

Discussion

Bowers seeks $22,341.37 in additional rent for the month of October 2006, due to the FAA's alleged holdover, based on the FAA's leaving numerous large items and fixtures at the premises, leaving the premises in a filthy condition, and accessing the building several times during that month. The FAA counters that it was given permission to leave numerous items behind, that the premises were left in a clean condition, and that it had no access to the premises. The FAA also alleges that under the "Restoration" provision, the FAA had no duty to restore the premises and thus it cannot be liable for additional rent.

The "Holdover" provision of the lease provides that if the FAA retains possession of the premises after the lease expires, the lease will continue in full force and effect on a month-to-month basis. The validity of such provisions has been previously upheld. *See Cafritz Co. v. General Services Administration*, GSBCA 13525, 97-1 BCA ¶ 28,680, at 143,271 (1996).

While we have conflicting testimony regarding access to the building and the reason that the equipment was left behind, the weight of the evidence is that the premises could not be occupied by another tenant in October 2006, because of fixtures left by the FAA. Part of this evidence is an October 19, 2006, letter from the contracting officer offering to remove some of the equipment and fixtures. Nowhere in that letter did the FAA state that it had been authorized by Mr. Bowers to leave the equipment and fixtures in place when it vacated the premises. We find that the FAA was not so authorized. Fixtures are defined as "something that is fixed or attached as a permanent appendage or a structural part." Webster's Third New International Dictionary (3d ed. 1986). The attached shelving, entrance ramps, and raised wooden floor were fixtures. The FAA is incorrect that the "Restoration" provision excuses the FAA from its duty to remove these items. The FAA had an obligation under the lease to remove these fixtures.

Bowers has carried its burden. The FAA held onto the premises beyond the conclusion of its lease. Bowers is entitled to payment of rent for the month of October 2006 at the monthly rate in effect at the conclusion of the lease, $22,341.37.

Late Receipt of Operating Expenses

The lease provided for additional payments by the FAA for certain operating expenses. On November 9, 2006, Bowers requested a payment of $8849.90 for 2005 to 2006 rent year operating expenses. Appeal File, Exhibit 128. The contracting officer approved payment for these expenses on April 19, 2007. *Id.*, Exhibit 137. The amount due Bowers was not in dispute. With this approval, the contracting officer sent appellant a modification to sign. Appellant did not object or respond to the contracting officer

regarding the modification. Appellant signed the modification on April 18, 2008, and payment was made. *Id*., Exhibit 150.

Appellant seeks interest from October 2006 to April 18, 2008. Under the Prompt Payment Act, the required payment date is the date the payment is due under the contract for the item of property or service provided by a contractor, or thirty days after a proper invoice for the amount due is received, if a date is not established by the contract. 31 U.S.C. § 3903(a)(1) (2006). If the payment is not timely, the Government must pay interest to the contractor for its tardiness. There is an exception for payment of this interest only if there is a dispute between the agency head and the contractor over the amount of the payment or if there is a dispute regarding compliance with the contract. *Id*. § 3907(c). "Interest begins to run on the date after the required payment date; it ceases to run when the first of the following events occurs: payment is made, a claim for interest is filed under the Contract Disputes Act (CDA), or one year passes from the required payment date. *Delta Airlines,Inc. v. General Services Administration*, CBCA 1306, 09-1 BCA ¶ 34,052, at 168,407; 31U.S.C. §§ 3902(a), 3907(b).

Appellant has not explained why Prompt Payment Act interest is sought from October 2006, since Bowers did not request payment until November 9, 2006. The $8849.90 requested by appellant was approved by the FAA on April 19, 2007. At no point did the FAA dispute the amount of the payment or appellant's compliance with the contract. The FAA simply failed to make the payment due in a timely manner. Thus, appellant is entitled to Prompt Payment Act interest commencing thirty-one days after the FAA received the invoice for payment. 31 U.S.C. § 3903(a)(1). Interest begins to run on December 10, 2006. We find the Prompt Payment Act interest stopped on April 19, 2007, at the time the FAA approved payment and forwarded a modification to Bowers to be executed. Appellant did not object to signing the modification or contact the contracting officer regarding the payment. Bowers executed the modification about one year later. Appellant is not entitled to interest during the time period of its own delay.

Insect Infestation

In 2005, the FAA deducted $2350 from amounts otherwise due Bowers to cover the costs of extracting insects from the heating, ventilation, and air conditioning system. Appeal File, Exhibit 102. Both live and dead insects invaded the FAA work space. At the time of this problem, each party hired a company to attempt to determine the source of the insect infestation. On the initial inspection by the firm hired by the FAA, it concluded that the live insect problem was caused by plants brought in by FAA employees. Appeal File, Exhibit 76 at 7. It also concluded that dead insects had probably accumulated in the HVAC system and that parts of these insects were being blown into the leased space. *Id*. at 10.

A firm hired by appellant reported no infestation related to the HVAC system. Appeal File, Exhibit 80. The FAA's firm then conducted a second inspection and determined that there was a large quantity of dead bugs on the duct system that had accumulated over the thirty-year life of the building. *Id*., Exhibit 89 at 3. These dead bugs were being blown into the work area.

Bowers claims that the insect infestation was created by FAA employees who brought plants to the workplace. Bowers speculates that the same FAA employees who allegedly vandalized the building planted the dead bugs to injure appellant's relationship with the FAA. *See* "FAA Vandalism," *infra*.

The evidence in the record is contradictory. Appellant's inspection firm indicated that there was no buildup of insects in the duct system. The FAA's inspection firm indicated that there was a significant buildup of insects. Since the FAA withheld $2350 from amounts that it owed Bowers, it shouldered the burden of proving that the bug problem was appellant's responsibility and that these funds were rightfully withheld. The FAA failed to carry this burden. The FAA also failed to address whether it was authorized to withhold the payment of $2350 from Bowers. Finally, the FAA has not introduced any evidence justifying that the amount of $2350 was an appropriate amount to assess against Bowers.

Bowers is entitled to be paid the $2350 that it was otherwise due, but that was withheld by the FAA.

Cleanup Cost

Appellant seeks $405.32 for the cost of cleaning after the FAA vacated the premises. Appellant paid this amount to a vendor for the cleanup of the rented space. Mr. Bowers testified that the premises were left in a filthy condition. In addition, Mr. Melson testified that the premises were left in "a filthy and disgusting condition." Melson Declaration ¶ 4 Mr. Melson also testified that based on his experience, it was the most unclean tenant space he had ever seen. *Id*. An FAA witness at the site on September 30, 2006, testified that the premises were not left in a filthy condition by the FAA. However, this employee admitted that the dumpsters were full and that the FAA had no place to dispose of its items. Appellant's Supplemental Appeal File, Exhibit 3-5; Bowers Declaration ¶ 43; Finnesey Declaration ¶ 7.

The record contains contradictory testimony regarding the cleanliness of the vacated premises. We find Bowers carried its burden of proving the premises were left in a condition out of the ordinary. Bowers introduced evidence that it paid $405.32 in cleanup expenses. However, there was no attempt by Bowers to separate the costs of a normal

cleanup of a space as large as that rented by the FAA. We can only speculate as to what the normal cost would be. The claim is denied.

Cost of Changing the Building Locks

Bowers seeks $388.30 for the cost of replacing the cores of locks that the FAA allegedly removed from the doors.

Bowers claims that during the term of the lease, the FAA removed all the locks on the doors of the space that the FAA rented, and replaced the locks with the FAA's own locks. Bowers' principal testified that when the lease ended, the FAA removed its locks but did not replace them. Bowers Declaration ¶ 44.

The FAA counters that it did not remove the locks, but, rather, Bowers removed the locks at commencement of the lease. An FAA employee testified that she was present when appellant's contractor removed Bowers' locks at the beginning of the lease and replaced them at the end of the lease. Finnesey Declaration ¶ 3.

The record contains contradictory testimony between the FAA's and Bowers' witnesses. The evidence from Bowers is that the FAA did not replace the lock cylinders that it had removed. The FAA's witness to the events testified that it was Bowers and not the FAA that removed the locks. Bowers has the burden of proof and has failed to carry that burden. The claim is denied.

FAA Vandalism

In March 2006, the brine lines in the mechanical room of the leased space were cut. In addition, it was discovered in June 2006 that a four-inch drain pipe in the mechanical room was clogged with a grease-like substance. Bowers alleges that there was a series of floods from January to June 2006 resulting from these incidents.

Bowers paid a contractor $556 to repair the brine lines. Appellant's Supplemental Appeal File, Exhibits 7, 9. Mr. Bowers testified that he also paid two other contractors $2490 to repair damage and clear the clogged pipes. *Id*., Exhibits 10, 11, 13.

Bowers attempts to place responsibility for these two incidents on the FAA on the basis that the contracting officer's technical representative (COTR) had a key to the mechanical room. Bowers claims that the COTR lost the key and that two other FAA employees were seen by an employee of Bowers leaving the mechanical room late one night. Bowers also speculates that these two FAA employees caused the damage based on a voice mail message left by one of the employees that the FAA is "going to take care of business."

This claim is based on unsubstantiated circumstantial evidence and speculation. Appellant has failed to carry its burden on this issue. The claim is denied.

FAA Vandalism to Doors

During the term of the lease, on four occasions, doors and door jams within, or adjacent to, the leased premises were damaged. Bowers Declaration ¶ 57. One damaged door was near the communications room in the FAA space. This door had a crack about one foot long. *Id*. ¶ 59. Mr. Bowers testified that the door was bent and had a shoe print on it. Mr. Bowers replaced this door. There is no invoice or other documentary support for the cost of the door replacement. The main door to the computer room in the FAA space was also damaged. *Id*. ¶ 61. FAA employees informed Mr. Bowers that another employee had kicked the door, causing the damage. *Id*. The jam on this door assembly was broken and needed to be replaced. An invoice in the record lists an amount for the repair of the door jam along with other items. The bill does not clearly separate the cost of this repair from other work. On line one it states, "New hardware on three bathrooms." The amount of $1200 is on this same line. The next line states, "New door and jam FAA computer room." That line has no dollar amount listed. The third line states, "Hang, stain, & finish door & jam." That line has a $300 amount listed next to it.

Bowers also claims entitlement to the cost of repair of two doors in a bathroom outside the FAA space. The entrance door to this bathroom and a door on a stall in this bathroom were damaged. Bowers Declaration ¶¶ 57-62. Appellant presents this claim regarding these doors on the basis that Mr. Bowers saw an FAA employee vandalize the stall door by hanging on it. Bowers Declaration ¶ 58. Bowers speculates that the same FAA employee damaged the entrance door. The FAA employee accused by Bowers denies the charge. Declaration of Kevin O'Connor (Jan. 16, 2009) ¶¶ 2-3. In addition, the FAA submits that the accusation against the employee is not credible as it was not made until two years after the incident.

Bowers claims entitlement to the cost of repairing the four doors. Bowers submits that it spent $3200, or $800 for each of the four doors. We find that the FAA has no responsibility for damage to the two doors outside its space. There is no evidence that any damage to those doors was the responsibility of or was sanctioned by the FAA. Bowers has carried its burden of proving that there was damage to the two doors within the leased space, the door outside the mechanical room and the computer room door. The damage is not ordinary wear and tear which would not be the FAA's responsibility to repair. The FAA is responsible for the cost of repairing this type of damage to the leased space.

No evidence was submitted regarding the costs of repair of the door outside the mechanical room. There is no way for us to estimate the cost of repairing this door. An

invoice was submitted for the repair of the door jam in the computer room. However, the cost directly associated with the repair of that door is not clear. We can only speculate whether part of the $1200 damage on line one of the invoice, which is on the same line as the statement regarding new hardware on three bathroom doors, also includes a charge for the computer room door. We, therefore, deny entitlement to this claim item.

The $300 charge which is set forth on line three, following the description of the repair to the computer room door, is clearly associated with the repair of that door. We find that Bowers has proven that it spent this amount in repair of that door. Bowers is entitled to be paid $300 on this claim item.

Restoration Costs

Findings of Fact

Bowers claims entitlement to $20,110[3] for the costs of restoration of the leased premises. Bowers alleges that it spent $5500 to remove the raised computer room floor and ramps, readjust the doors to the proper height, and repair holes and dents in the walls it claims were caused by FAA movers. Bowers has submitted an invoice from a contractor, Perfection Painting, which lists the charges of $2000 for the removal of the computer room floor and ramps.

The FAA also gouged the vinyl floor in the computer and communications rooms. Appellant's Supplemental Appeal File, Exhibits 2A-2C, 2AA. Bowers claims that it paid $5360 for repairs to the floor and the installation of carpeting over the repairs. Mr. Bowers testified that appellant paid $1510 to repair the floor and "approximately" $3850 for the carpeting for the rooms. Bowers Declaration ¶ 70. The only evidence of costs submitted in support of this claim is an invoice for $1510 from Perfection Painting for preparation of floors for carpet installation. Appellant's Supplemental Appeal File, Exhibit 17.

During the term of the lease, the FAA removed doors in the leased space and replaced them with arched entryways. Bowers claims the costs of rebuilding doorways and recovering walls. Bowers also claims that the FAA damaged walls and new wall coverings. Bowers claims that it had to rebuild the walls in the areas where the archways were installed, replace the wall covering, and replace the doors. Bowers Declaration ¶¶ 71-73. Bowers claims that the total cost for this work was $5500. The evidence submitted in support of these costs is an invoice from Perfection Painting, which states: "Remove Wall covering -

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[3] Bowers claims this amount though the individual expenses claimed by it add up to only $20,060.

$600 . . . Patch Holes where Elec. was cut in walls - $800 . . . Finish seven (7) doors and jams - $2100 . . . and Insulate Walls - $800 . . . ." Appellant's Supplemental Appeal File, Exhibit 18. Another invoice stating, "Remove Wall covering - $600" and "Patch holes in walls where elec. was cut in walls - $800," was placed in the record. *Id*., Exhibit 19.

Bowers further seeks an additional $2700, which it alleges that it spent to repair the ceiling in the area where the FAA cut the wires coming from the ceiling chases and poles. An FAA witness who inspected the premises on September 30, 2006, testified that the FAA had not cut the wires. Finnesey Declaration ¶ 7. Bowers removed these items and replaced the ceiling tiles and support frames in these areas. Bowers submitted an invoice stating: "Patch in where Power Comm. outlets were - $700 Finish Painting of Exc. Walls - $2000." Appellant's Supplemental Appeal File, Exhibit 20.

Bowers also claims entitlement to $300 that it alleges it will have to spend to remove some twenty-five feet of mirrors in the exercise room. Bowers alleges that it requested that the FAA remove these mirrors, but the agency has not done so. No invoice was submitted in support of this claim.

Bowers seeks an additional $700 to remove trash and garbage and restore damaged walls in the dock and storage room. In support of this item, Bowers submitted an invoice from Perfection Painting stating, "Clean Out Deck area - $500. . . . Clean out shelving in two storage rooms - $200." Appellant's Supplemental Appeal File, Exhibit 21.

Discussion

Generally, leases contain an implied provision that a tenant will not damage the property and that when it vacates the leased space, the tenant will return that space to the landlord in the same condition as when it received the space, reasonable wear and tear excepted. *A&B Limited Partnership v. General Services Administration*, GSBCA 15208, 04-1 BCA ¶ 32,439 (2003). However, here the contract permitted the FAA to make minor alterations to the leased space, with the approval of Bowers. Indeed, before occupancy, the FAA made alterations to the space and paid appellant for these buildouts. The lease also permitted the FAA to install fixtures, which would remain FAA property. Under the Restoration clause of the lease, Bowers waived any rights to restoration "except for Government installed fixtures that materially change the premises . . . and permanently injure the lessor's interest." The FAA is therefore responsible for the cost of removing any fixture it failed to remove from the leased premises. It is also responsible for the cost of repair of any damage caused by the installation and removal of its fixtures. Otherwise, however, under these provisions, we find that the FAA is not responsible for alterations and damage, unless intentional or of an unusual nature.

The installed computer floor and ramps were fixtures that the FAA had a responsibility to remove. We find that Bowers is entitled to payment of the $2000 that it paid its contractor for removal of the computer floor and ramp. Bowers also claims entitlement to be paid for the cost of adjusting doors affected by the raised flooring. Appellant has failed to present any separate costs associated with that adjustment. The claim is denied due to appellant's failure to establish the costs of the adjustment.

Bowers also seeks the costs of repairing holes and dents in the walls caused by the movers. We recognize that this damage is beyond reasonable wear and tear. Yet, Bowers specifically waived restoration costs and we find that the costs of this type of damage would be covered by that waiver. Cost of repair for this damage is denied.

Bowers seeks the cost of vinyl floor removal and carpet installation in the computer and communications rooms. Though some photographs showing damaged vinyl tiles were placed into the record, we find the evidence insufficient in several respects. The record does not contain evidence of the extent of damage to the rooms, nor does it permit an analysis of whether the tile could have been repaired or replaced. Without evidence of the condition or the age of the floors prior to commencement of the lease, we cannot determine whether appellant's claim is reasonable. The only evidence submitted is the invoice of $1510 to prepare the floors for carpet installation. This does not demonstrate that the cost had been incurred as a result of the damage caused by the FAA. Given these deficiencies in appellant's case, we need not decide whether the costs of repair of this damage was waived by the Restoration clause. This claim is denied.

Bowers seeks reimbursement for the cost of rebuilding the walls in areas where the FAA replaced doors with archways. Appellant also seeks the cost of replacing doors and wall covering damaged by the FAA. Prior to occupancy, the FAA was permitted to make substantial revisions to the space it was to occupy. The FAA paid Bowers for this buildout. Absent other evidence, we find that the change to the doorways was part of this buildout. The Restoration clause specifically precludes recovery for the costs of restoring the premises. We find that the doorway change falls under the provision of this clause. The claim for rebuilding the doorways is denied.

We find the cost of replacing wall covering was an item that was also covered by the Restoration clause. Bowers has waived reimbursement for this item. In addition, the invoice submitted in support of these costs is not clear. This invoice refers to patching holes and insulating walls.

Bowers also submits a claim for the cost of repairing the ceiling areas where the FAA cut wiring. There is insufficient evidence in the record regarding the damage, if any, caused by the FAA to the ceilings. In addition, computers that were attached to the wiring at the

leased premises were not fixtures. Thus, any costs associated with this repair have been waived by appellant under the Restoration clause.

Similarly, appellant has waived its right under the Restoration clause to reimbursement for the removal of the mirrors in the exercise room, and for the removal of trash and restoration of walls in the dock and storage room. These claims are denied under the terms of the lease.

Conclusion

Appellant is entitled to payment for the following items:

- Rent for October 2006 - $22,341.37.
- Improper deduction for insect infestation - $2350.
- FAA damage to computer room door - $300.
- Removal of computer floor ramp - $2000.
- Prompt Payment Act interest on the $8849.90 payment for late operating expenses for the period from December 10, 2006, to April 19, 2007.

The total amount due appellant is $26,991.37, plus Prompt Payment Act interest as set forth above, and any interest in accordance with the Contract Disputes Act from the date on which the contracting officer received Bowers' claim until the date of payment.

Decision

The appeal is **GRANTED IN PART**.

JAMES L. STERN
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

BERYL S. GILMORE
Board Judge