UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: July 15, 2020

CBCA 6093

HPI/GSA-4C, L.P.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Maureen C. McDonald, Scott M. Heimberg, and Elise A. Farrell of Akin Gump Strauss Hauer & Feld, LLP, Washington, DC, counsel for Appellant.

Alexander C. Vincent, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Judges **VERGILIO**, **KULLBERG**, and **RUSSELL**.

RUSSELL, Board Judge.

Appellant, HPI/GSA-4C, L.P. (HPI), appealed the contracting officer's decision denying its claim for unpaid rent under a lease agreement between appellant and respondent, the General Services Administration (GSA or agency). HPI claimed that GSA did not provide proper notice to terminate the lease agreement and seeks rental payment for the period of August 20, 2016, through March 6, 2017, and other costs. The parties filed cross-motions for summary judgment. By decision dated March 31, 2020, the Board granted HPI's motion on entitlement. Based upon the plain language of the lease, we found that GSA failed

to provide proper notice as required under the termination provision of the lease and remained obligated to pay rent for the disputed period. *HPI/GSA-4C, L.P. v. General Services Administration*, CBCA 6093, 20-1 BCA ¶ 37,567.

The parties subsequently submitted a joint report on damages addressing three issues: (1) mitigation—specifically, whether the sale price of the leased property in a condemnation action included an amount covering the damages at issue in this appeal such that HPI has already been fully compensated for the loss of rental income from GSA; (2) calculation of damages and interest under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018); and (3) HPI's entitlement to interest under the Prompt Payment Act, 31 U.S.C. §§ 3901- 3907. Each of these issues is addressed in turn.

Mitigation

This appeal relates to a property that HPI leased to GSA and that was the subject of a condemnation action filed by California in October 2015. GSA and California subsequently entered into a stipulation in February 2016 pursuant to GSA's decision not to oppose California's use of the property. HPI opposed the condemnation action separately and did not sign the stipulation. GSA's tenant agency, the Internal Revenue Service, vacated the property on August 19, 2016. GSA stopped making rental payments after that date. HPI, its lender, the owner of the land on which the property sat, and the owner's lender entered into a separate settlement agreement with California, and the state took possession of the property on March 7, 2017.

In April 2018, HPI appealed to the Board GSA's denial of its claim for rent for the period August 20, 2016, through March 6, 2017. As indicated above, we found that GSA failed to provide proper notice that it was terminating the lease as required by the terms of the lease and, thus, remained obligated to pay the rent for this period.

Although GSA does not dispute that HPI received nothing from the sale proceeds, the agency nevertheless wants the Board to infer that HPI received a benefit because California considered various factors, including future rental income stream, in settling the condemnation action based on the state's assessment of the property's value. However, GSA was not a party to that action and did not alter its contract with HPI to change its contractual obligations.

While the above permits the Board to conclude that GSA remained obligated to pay rent, further arguments by GSA are unavailing. GSA has offered no evidence that a purpose of the settlement agreement and California's payment under the agreement was to compensate HPI for its loss of rental income under the lease at issue in this appeal, or to

extinguish GSA's obligation to pay HPI amounts due under the lease. Indeed, California's representative in the action provided deposition testimony that, with an unsegregated offer, the state leaves it up to the landlord and tenant to resolve matters of amounts due under a lease, between themselves or with the assistance of a court. HPI's vice-president and secretary provided deposition testimony that "[a]t no time did HPI believe or agree that the $10.9 million payment to HPI's lender included any rent that GSA owed HPI, or would come to owe HPI, . . .[the] outstanding rent was not suffered by reason of California's acquisition of the [p]roperty but was caused by GSA's breach of the [l]ease." He added that the parties to the mediation pursuant to which the condemnation action was resolved did not discuss back rent owed by GSA at all. GSA has produced no evidence rebutting or conflicting with this testimony, or otherwise raising a triable issue on mitigation, notwithstanding the opportunity for discovery prior to the parties' filings on summary judgment. GSA relies on *Kansas City Power & Light Co. v. United States*, 143 Fed. Cl. 134 (2019), in which the court held that the contractor was not entitled to recover damages from the agency after receiving an insurance payment covering the same costs for which it sought damages. However, in that case, the contractor indisputably received a specific payment amount from the insurer, and the court found that the contractor was not entitled to a double recovery. *Id*. at 147. Here, GSA has not produced similar evidence. The agency has not shown that a purpose of the settlement agreement was to cover GSA's rental obligations under its lease with HPI, nor has it shown that HPI received a portion of the settlement proceeds for this purpose.

Damages and CDA Interest

The parties do not dispute the calculation of damages. The parties agree that the principal amount of HPI's losses in this case is $825,464.68, comprising $799,882.26 for rent for the period from August 20, 2016, through May 6, 2017, and a real estate tax adjustment of $25,582.42. The parties also agree that $27,662, the amount that HPI saved in operating costs, should be deducted from the principal amount of its losses. The deduction results in an adjusted loss amount of $797,802.68.

Consistent with 41 U.S.C. § 7109(a), the parties also agree that HPI is entitled to simple interest under the CDA from the date that GSA received HPI's certified claim on October 18, 2017, through the date on which GSA pays any amount that is adjudged and stipulated to be owed. Accordingly, given that the amount of HPI's losses is undisputed, we find that HPI is entitled to $797,802.68 plus interest under the CDA.

Prompt Payment Interest

The parties dispute whether HPI is entitled to payment of interest under the Prompt Payment Act. GSA contends that HPI is not entitled to such interest because there was a dispute between the parties as to the amount owed and compliance with the lease, and the Prompt Payment Act does not provide for payment of interest in the case of such disputes. In support of its position, GSA relies on General Services Administration Regulation (GSAR) clause 552.232-75 - PROMPT PAYMENT (SEP 1999), which was incorporated into the lease:

> Interest penalties are not required on payment delays due to disagreement between the Government and Contractor over the payment amount or other issues involving contract compliance or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.233-1, Disputes.

We agree with GSA that HPI is not entitled to Prompt Payment interest. The GSAR clause restates the rule in the Prompt Payment Act not requiring "an interest penalty on a payment that is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract." 31 U.S.C. § 3907(c).

"Although both the [Prompt Payment Act] and CDA call for interest to be paid by the government, the statutes apply in differing circumstances. When there is no disagreement over a payment to be made under a contract, the [Prompt Payment Act] applies." *Bay County, Florida v. United States*, 114 Fed. Cl. 755, 758 (2014). However, "[i]f there is a dispute over a contract claim," as here, "the CDA is the appropriate statutory authority and its interest provisions are applicable to [the] claim." *Id.*; *see also 1441 L Associates, LLC v. General Services Administration*, CBCA 3860, 17-1 BCA ¶ 36,673 (finding that, given that the dispute was over payment, the lessor had not articulated a basis to recover interest under the Prompt Payment Act); *Inversa, S.A. v. United States*, 73 Fed. Cl. 245, 247 (2006) ("[Prompt Payment Act] interest is available only when Government payments are inadvertently late, and *not* when the Government refuses to pay or questions its underlying liability"). Here, only the CDA's interest provisions apply. Accordingly, HPI is not entitled to interest under the Prompt Payment Act.

Decision

The claim is **GRANTED IN PART**. The Board grants HPI's claim for damages of $797,802.68, plus interest under the CDA, and denies HPI's claim for Prompt Payment interest.

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge