UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: January 4, 2012

CBCA 1931

CINDY KARP,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

John M. Comolli of McLanahan & Comolli, Athens, GA, counsel for Appellant.

Lesley M. Busch, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **VERGILIO**, and **SHERIDAN**.

HYATT, Board Judge.

This appeal is from a contracting officer's decision denying a claim for reimbursement of the cost of tenant improvements made by the lessor under a lease for office, warehouse, and storage space in Athens, Georgia. Appellant, Cindy Karp, seeks to recover $20,000 in costs incurred in making improvements under the lease. Respondent, the General Services Administration (GSA), has moved to dismiss the appeal for lack of jurisdiction on the ground that the claim was presented more than six years after it accrued.

Background

On June 29, 1999, GSA awarded lease GS-04B-39093 to appellant, Cindy Karp. The lease was for approximately 6400 square feet of office, warehouse, special, and storage space located in Athens, Georgia, to be occupied by the United States Fish and Wildlife Service (FWS). The lease commenced on July 1, 1999, for a ten-year term, with the proviso that the Government could terminate at any time on or after July 1, 2004, upon at least sixty days' written notice to the lessor. GSA's notice of intent to vacate the property in sixty days was transmitted to the lessor on July 30, 2004. The lease was terminated effective September 30, 2004.

In advance of FWS's occupancy, appellant made various repairs and alterations to the facility that were requested by the Government. Appellant seeks $20,000 to compensate it for making these alterations and repairs.

Attachment 1 of the solicitation for offers (SFO), in pertinent part, provides guidance on the required price structure:

> (a) A lease rate per square foot for the building shell rental, fully serviced but excluding the cost of services and utilities.
>
> It is the intent of the Government to lease a building shell with tenant alterations allowance. All improvements in the base building, lobbies, common areas, and core areas shall be provided by the lessor at lessor's expense.
>
> . . . .
>
> (c) The annual cost or rate to amortize the tenant alterations allowance. Such amortization to be expressed as cost per rentable and usable square foot per year.
>
> (d) The offeror shall ensure that his offer includes $23.60 . . . per USABLE square foot for construction or tenant alterations over and above the shell buildout, expressed in terms of rent dollars per rentable and per usable square foot per year. (See rate structure page at end of this solicitation.)
>
> The government, at it's [sic] sole discretion[,] may use all or part of tenant alterations allowance for tenant alterations. In addition, the government at it's [sic] sole discretion may return to the lessor any amount of the tenant

> alterations allowance in exchange for the government's choice of free rent or a decrease in rent according to the amortization rate over the firm term as indicated in the Rate Structure Schedule which is a part of the offer package.

Subparagraph (d) contains the handwritten notation "N/A" in the left margin, with the initials "CK" above it.

Page 3 of the solicitation is the "rate structure" page. It consists of six numbered boxes accompanied by the proposed rates for the items. The first box seeks:

> A lease rate for the firm term per square foot for the base building (shell) rental, including fixed costs but excluding the cost of variable services and utilities in item 2 below.

The adjacent box asks for two rates: a rate based on usable square feet (USF) and a rate based on rentable square feet (RSF).

Box number two, covering utilities and variable services costs (e.g., janitorial services), states that these items will be provided by the Government. Box number 3 asks for the annual percentage interest rate for tenant improvements. The adjacent box is marked not applicable.

Box number 4 on this page provides for "the annual amount per square foot of interest (no. 3 above) & tenant alterations/allowance amortized over the firm term of the lease." In the corresponding box calling for a price, the usable square footage rates are crossed out with the annotation "N/A," and the words "Not to exceed $20,000" are substituted. This is the amount specified in the occupancy agreement between FWS and GSA.

Box number five asks for a full service lease rate for years one to five based on adding together the rates established in boxes 1 to 4. Box number six asks for a rate for years six to ten, based on a shell rate, including operating costs but not amortization of tenant improvements.

After the lease was terminated, appellant presented a claim to GSA seeking four years of property tax increases, as well as expenses she incurred in repairing damages to the building following the tenant's vacation of the premises. This claim was denied, appealed to the Board, and docketed as CBCA 1346. Subsequently, on December 9, 2009, appellant filed a formal claim to GSA for $20,000 in alteration and tenant improvement costs required for FWS's occupancy. Appellant explains that she had learned during the deposition of the

broker used by GSA that tenant improvements made by the lessor "were not amortized over the term of the Lease and were otherwise compensable and due under the terms of the Lease." Appellant attached to her letter a copy of the lease, an excerpt from the deposition, and a copy of a bill from a local repair company for various repairs completed by July 25, 1999. The amount of these repairs totaled $20,154. Appeal File, Exhibit 15.

The contracting officer denied the claim, stating that tenant improvement costs were not intended to be reimbursed separately under the lease. Appellant appealed and dockets 1346 and 1931 were consolidated.

There is no definitive list of required improvements in the lease. One tenant improvement addressed by the parties was the construction of a boat shed, which is not one of the items on the list of repairs attached to appellant's claim. Correspondence in 2001 reflects that no boat storage had yet been provided. Subsequently, the parties agreed that storm windows would be installed in lieu of constructing a boat shed. There is no further record of whether or when the windows were installed.

Discussion

GSA has filed a motion to dismiss the appeal as time-barred because it was not presented to the contracting officer within six years of the date that the claim accrued. The Contract Disputes Act (CDA) provides, in pertinent part, that "[e]ach claim by a contractor against the government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim." 41 U.S.C.A. § 7103(a)(4)(a) (West Supp. 2011). The contractor's timely submission of a claim to the contracting officer is a condition precedent to the exercise of Board jurisdiction under the CDA, but is subject to equitable tolling. *Arctic Slope Native Association, Ltd. v. Sebelius*, 583 F.3d 785, 793 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 3505 (2010).

Appellant's claim was submitted to the contracting officer on December 9, 2009. The issue before us is the date of claim accrual under the terms of the lease and the understandings of the party as to the intended effect of the lease. Federal Acquisition Regulation 33.201 defines "accrual of a claim" as follows:

> Accrual of a claim occurs on the date when all events, which fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

48 CFR 33.201 (1999).

GSA argues that its motion should be granted because, under the FAR definition, the claim accrued as of July 25, 1999, when the repairs and alterations on the list attached to the claim letter submitted to the contracting officer appear to have been made and the tenant improvement allowance fully expended. Since the claim was not presented until December 2009, GSA asserts that it is time-barred and must be dismissed. Appellant counters that the lease does not specify any procedure for payment of a tenant improvement allowance and this does not appear to have been a subject of discussion between GSA and Ms. Karp. Appellant alleges that under GSA's internal procedures the contracting officer was supposed to request payment from the tenant agency and did not do so because he did not believe the lease required compensation of these costs. Ms. Karp did not make a specific demand earlier because she believed the amount was amortized over the term of the lease.

The existing record does not demonstrate that the claim is time-barred; hence, the Board denies GSA's motion. If, as GSA maintains, the lease does not anticipate separate payment for costs incurred in readying the building, the claim would never accrue under the lease. Appellant, however, contends that the lease anticipates payment, but contains no procedures to accomplish payment. With this approach, appellant essentially argues that GSA became liable for the amount sought when the lease terminated and the amount was not paid. This occurred in 2004, less than six years before appellant submitted her claim. With a fully developed record, the Board can reach ultimate conclusions regarding the interpretation of the lease, the basis for the claim, and timeliness or not of the claim.

Decision

GSA's motion to dismiss is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

PATRICIA J. SHERIDAN
Board Judge