GOVERNMENT OF THE DISTRICT OF COLUMBIA

CONTRACT APPEALS BOARD

APPEAL OF:	)	
	)	
TRANSWESTERN CAREY WINSTON, L.L.C.	)	CAB No. D-1193
	)	
Under Contract No. DCPS-97104-6531-OA	)	

OPINION GRANTING SUMMARY JUDGMENT

(*Courtlink Filing Id 3397372*)

Appellant, Transwestern Carey Winston, L.L.C, ("Transwestern") and Appellee District of Columbia Public Schools ("DCPS") entered into a contract effective July 18, 1997, (Contract, Appeal File (AF) Ex. 1), for, among other purposes, leasing services for excess school buildings. DCPS agreed to pay Transwestern a "Lease Fee [of] 3% of gross rent less any concessions. . . ." (*Id.* Appendix I[1]). Transwestern secured a 20-year lease for the Carter G. Woodson School. (AF, Ex. 12). The lease agreement, after stating the rent, provides that the "[r]ent shall however be reduced by such amounts as [lessee] spends on capital improvements to the premises approved and constructed." (*Id.*, Art 4(b)). The question presented in this appeal is whether a rent reduction for capital improvements constitutes a "concession" resulting in a reduction in the rent upon which the lease fee payable to Transwestern is computed. It is the position of the Appellant that the credit for capital improvements is not a "concession" and that Transwestern is entitled to a lease fee of $248,686.32 based on the total gross rent. It is the position of DCPS that the credit is a rent concession and that Transwestern is only entitled to a fee of $37,290.00 based on the minimum rent. Transwestern has moved for summary judgment as to the amount of the commission to which it is entitled. The Board agrees with Appellant that the credit for capital improvements is not a "concession" as contemplated by the contract and grants judgment to the Appellant in the amount of $248,686.32, less any amounts previously paid to Appellant as a lease fee for the Woodson School lease, payable as rent payments are received by the District from the lessee.

FACTS

On May 16, 1997, after a qualification process, DCPS selected Appellant "to be one of four companies to assist the . . . Public Schools in the disposition and reutilization of our excess school properties." (Letter from Suzanne H. Conrad, AF, Ex. H). In the selection letter, the District proposed a commission schedule which, with regard to leases, provided for a "Lease Fee [of] 3% of gross rent less any concessions." The proposed compensation was accepted by Transwestern. A contract incorporating the May 16, 1997, letter as its compensation terms was

[1] The contract states in Article IV, § A that "D. C. Public Schools agrees to pay the Contractor for all services rendered . . . in accordance with the fee schedule attached in Appendix I. No fee schedule was attached to the contract. The parties agree that Ms. Conrad's letter dated May 16, 1997, was intended as the fee schedule. (Motion, 2; Opposition, 2).

signed effective July 18, 1997. (Answer ¶ 6) The contract was drafted by DCPS (*Id*.). The record does not indicate that there was any discussion of the language of the contract or of the compensation schedule prior to execution.

Transwestern sought lessees for a number of excess school buildings. On February 2, 2000, DCPS signed a lease with a party secured by Transwestern for the Weatherless School. (Motion, Ex. 3). Article 4(B) of the Weatherless School lease negotiated by DCPS provided that the lessee was entitled to a credit against rent for payments made for approved capital expenditures subject to a minimum rent which limited credits to approximately 83% of the contract rent. (Minimum rent of approximately 17% of base rent). Capital expenditures were approved for the Weatherless School. Transwestern did not consider the credit for capital expenditures to be a "concession" to be deducted from the gross rent for purposes of computing the lease fee. On March 1, 2000, Transwestern invoiced DCPS for its lease fee on the Weatherless lease. Transwestern computed its compensation pursuant to the total gross rent, with escalation, but without deduction for approved capital expenditures. Transwestern's invoice to DCPS clearly showed that the credits were not deducted showing on its face:

"Less Concessions $0.00."

The invoice was paid by DCPS without objection. (Interrogatory Answer 15).

Transwestern secured a lessee for the Carter G. Woodson School. (Interrogatory Answer 8). The Woodson lease, executed on May 26, 2000, well after Transwestern had invoiced DCPS for the Weatherless lease fee, contained a provision for capital expenditure credits identical to the Weatherless lease and a similar, approximately 17%, minimum rent provision ($1,243,000 over the lease's full term). (Motion, Ex. 6). DCPS approved approximately $12,261,983 in capital improvements resulting in only the minimum rent being payable. On August 21, 2000, Transwestern submitted an invoice for a lease fee of $248,686.32 based, as was the previous invoice for the lease fee on the Weatherless School lease, on the full rent amount, including escalation ($8,289,544), without deduction for any capital improvement credit.

On December 2, 2002, the contracting officer denied Transwestern's claims for commissions in excess of $37,290 asserting that:

> . . . [Transwestern's] claim is based upon its interpretation that when improvements are being made on property such as Friendship, these "are not considered as concessions." The agreement [Transwestern] entered into with [DCPS], with no objections or changes made during negotiations prior to contract execution by the parties, is that improvements are considered to be concessions.

The decision further stated:

> [DCPS] cannot from a prudent business perspective pay to [Transwestern] more than [DCPS] receives as "proceeds" for rent.

Transwestern appealed the Contracting Officer's decision to the Chief Procurement Officer. On January 7, 2003, the Chief Procurement Officer affirmed the decision of the contracting officer copying the contracting officer's decision almost verbatim[2] but emphasized that "the real issue here as the contracting officer's Decision clearly stated is that [DCPS] cannot, from a prudent business prospective pay to [Transwestern] more than [DCPS] receives as 'proceeds' for rent."

DISCUSSION

Whether or not DCPS's interpretation of the meaning of "concessions" is correct, the stated basis of the contracting officer's decision and its adoption by the Chief Procurement Officer is plainly wrong. The contracting officer asserts that DCPS cannot, from a prudent business prospective, pay Transwestern more than DCPS receives as proceeds for rent. Even if that proposition is true, it is irrelevant, since Transwestern's claim does not request an amount greater than the minimum cash proceeds of the rent. Transwestern claims 3% of the rents due before credits for capital improvements. The minimum rent to be collected by DCPS during the term of the lease is approximately 17% of the rents due before credits. DCPS concedes that they will receive $5,250 per month for over 19 years. Transwestern claims that it is entitled to $248,686.32. DCPS will receive in excess of the claimed amount as cash proceeds from rent in the first 4 years of this 20 year lease. It is mathematically impossible that the 3% commission to which Transwestern claims it is entitled could ever exceed the 17% minimum rent.

Notwithstanding the flawed logic, the issue still remains before the Board as to the proper interpretation of the contract. The contract was drafted by DCPS. (Answer ¶ 6). The meaning of the term "concessions" which is in dispute is not defined in the contract, nor was it discussed in contract negotiations. It appears that Transwestern acted on one assumption as to the meaning of concession and that DCPS acted on another. Transwestern assumed that the term "concessions" did not include credits for capital improvements. DCPS assumed that credits for capital improvements were "concessions" and were therefore properly deductible from Gross Rent when computing the lease fee.

"Whether or not a contract is ambiguous is a question of law for the [Board]. A contract is not rendered ambiguous merely because the parties disagree over its proper interpretation. Instead, a contract is ambiguous when, and only when, it is, or the provisions in controversy are, reasonably or fairly susceptible of different constructions or interpretations, or of two or more different meanings. If there is more than one interpretation that a reasonable person could ascribe to the contract, while viewing the contract in context of the circumstances surrounding its making, the contract is ambiguous. The choice among reasonable interpretations of an

[2] The Chief Procurement Officer does not explain his difference in computation from the Contracting Officer. The Contracting Officer stated "The rent of $5,250/month for the remaining period of 236 months after the initial construction period is the "gross rent less commissions" allowed under the lease . . . . Accordingly, [Transwestern} is eligible for payment of commission of up to a maximum of $37,290." [In making that computation, the contracting officer actually allowed for the 236 months plus $4,000 for the construction period.] The Chief Procurement Officer copied the same statement "The rent of $5,250/month for the remaining period of 236 months after the initial construction period is the "gross rent less commissions allowed under the lease" but does not explain how he then computed "the total commission of $34,915 previously paid by [DCPS] for leasing Woodson is considered as full amount due [Transwestern] for their brokerage services for this transaction."

ambiguous contract is for the factfinder to make, based on the evidence presented by the parties to support their respective interpretations." *Gryce v. Lavine*, 675 A.2d 67 (D.C. 1996). The first step in contract interpretation is determining what a reasonable person in the position of the parties would have thought the disputed language meant. *Intercounty Constr. Corp. v. District of Columbia*, 443 A.2d 29, 32 (D.C. 1982). Where the court is faced with an integrated agreement which contains ambiguous terms, the standard of interpretation is "what a reasonable person in the position of the parties would have thought it meant." *Minmar Builders, Inc. v. Beltway Excavators, Inc.*, 246 A.2d 784, 786 (D.C. 1968) {quoting Samuel Williston, *A Treatise on the Law of Contracts*, §94:294 (3d ed. 1961, Supp. 1967)). "The presumption is that the reasonable person knows all the circumstances before and contemporaneous with the making of the integration. The reasonable person is also bound by all usages -- habitual and customary practices -- which either party knows or has reason to know. The standard is applied to the circumstances surrounding the transaction and to the course of conduct of the parties under the contract, both of which are properly considered when ambiguous terms are present." *1901 Wyoming Ave. Cooperative Asso. v. Lee*, 345 A.2d 456, 461-62 (D.C. 1975). If the ambiguity is still not resolved, the Board will apply the rule construing the contract against the drafter. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 328 (D.C. 2001).

The common meaning of "concession" is "to concede," that is, to "give or grant as a privilege or right." (*Webster's II, New Riverside University Dictionary*, Riverside Pub. Co. 1984). The term "concession" generally connotes a give-back without quantifiable consideration, such as a month's free rent for signing a longer term lease, or a payment made to release a new tenant from a prior lease. It clearly does not include a "set-off," which is a counterdemand held by one party against another, extrinsic to the obligation. (*Black's Law Dictionary* (4th ed.), 1951). The capital improvement credits in the instant matter appear to be closer to a set-off than free rent. The capital improvement credits may only be earned for approved projects that "(1) have been completed, (2) have been fully paid for . . . , and (3) satisfied applicable inspection and certification requirements, prior to the credit being taken against rent due." (Lease, Art. 4(B)). Since such improvements "become and remain the property of DC upon expiration of the lease" (*Id.*, Art. 12), DCPS is exchanging value for the capital improvement, that is, setting off the cost of construction of what will become DCPS property, rather than giving up a concession.

The Board also notes that interpreting the capital improvement credits as deductible concessions would result in uncertainties in payments under the contract if the improvements were made after the first four years of the lease term. Although the Woodson lessee seems to have made the improvements for which the credits are granted at the beginning of the lease term, the lease permits the lessee, subject to approval, to make creditable improvements at any time during the lease term. By the Public School's interpretation, including capital improvement credits as concessions, if the building was occupied, but no improvements made in the first year, the leasing agent would be paid the full leasing fee from the rent, but be obligated to repay most of the commission in future years when the "concession" is granted. There is no indication that a recomputation and repayment of leasing fees already paid is contemplated in the contract. Such a result would be the equivalent of requiring a leasing agent to repay commissions if a lessee defaults after the leasing fee is paid. In either case, the total rent paid to DCPS would be less

than the amount on which the lease fee was computed.[3] The Board finds that the reasonable common interpretation of the term "concession" is that it does not include credits for capital improvements.

Contract appeals boards have "long recognized that as an interpretative device custom and trade usage is a not only a valuable tool for explaining undefined terms . . . but is also useful in analyzing the reasonableness of the parties' respective positions . . . . [P] arties draw their agreement in light of the trade customs and practices of the relevant business community." *Custom Printing Co.*, GPOBCA No. 28-94. Mar. 12, 1997, 1997 GPOBCA LEXIS 2, 74. "It is always appropriate, in explaining or defining contract terms, to consider the meaning attributed to those terms in the relevant trade or industry. Often, evidence of trade custom or usage is the means by which the connotation that would be accorded a contract term 'by a reasonably intelligent person acquainted with the contemporaneous circumstances' may be ascertained." *Equitable Life Assurance Society of the United States,* GSBCA No. 8909, 90-3 BCA ¶ 23,130 (citing *W.G. Cornell Co. v. United States, W. G. Cornell Co. v. United States*, 179 Ct. Cl. 651, 376 F.2d 299 (1967)). Transwestern submitted the affidavits of two expert witnesses to demonstrate customary practices in the real estate industry. (Motion, Ex. 16). DCPS acknowledges that each of the experts has extensive experience "in the lease and sale of commercial office buildings and properties." Opposition 4. DCPS does not challenge the analysis or conclusions of Appellant's experts, but rather challenge the expertise of the affiants on the basis that there is no showing that the experts have experience in the "type of lease in dispute in this case," namely, "special purpose zoning properties," (Opposition 4-5), apparently conceding that the experts' conclusions as to the industry practice are accurate for the lease of commercially zoned properties. DCPS gives no reason why the distinction as to zoning is at all relevant. Neither the subject contract, and specifically the fee provision, nor the leases in question refer to zoning in any way. School properties for which the Transwestern contract applies may be in various zoning categories, or unzoned. The Board is unaware of any such distinction in the real estate industry. To conclude that there is such a distinction would cause the fees pursuant to this contract to be computed differently depending on the zoning of the school building in question. Each of Appellant's witnesses concluded that, in the real estate leasing industry, the term concessions would not be expected to include capital improvement expenditures regardless of the zoning of the property. (Motion, Ex. 16).

DCPS submitted the opinion of one expert witness.[4] At the outset of his opinion, the expert refers to the construction credits as "'set-off'' concessions." (*Id.*, 1). As noted above, in standard usage a "set-off" is a "counterdemand" rather than a "concession." The expert proceeds to make a detailed analysis of the terms of the lease in order to compute what he refers to as the "cumulative value" and the "fair market value" of the lease. (*Id.*, 2). Neither of these concepts is referred to in the contract fee computation. Further, the Board is at a loss to understand the relevance of the expert's discussion of "implied debt service" or "the amortized cost of the

[3] The Board notes that, since the lessee may cease paying rent, the full fee might be reduced if a default occurred prior to the full fee being paid from the rent received.

[4] Appellant questioned the independence of the expert proffered by DCPS. DCPS does not deny that the expert offered is sharing in a brokerage commission for the lease of another school building. It is not necessary for the Board to decide whether the expert is, in fact, independent.

capital improvement allowance" which are also not referenced in the contract or lease agreement. The expert opinion does not controvert relevant facts in this matter, nor does it inform the Board of industry practice.[5] To the contrary, DCPS's expert, rather than expressing an opinion as to real estate industry practice, merely attempts to determine the "intent" of the parties. The opinion concludes:

> It therefore leads me to believe that the value of the capital improvement allowance was intended to offset the minimum rather than the maximum improvement set-off rather than vice versa and as such the corresponding minimum rather than maximum rent prevail.[6]

(*Id*., 3)

The Board is not persuaded by the proffered opinion of the DCPS expert. The Board accepts the opinions of Appellant's experts as indicative of the meaning of the fee provisions in the real estate industry. To adopt DCPS' position that the fee structure is dependent on the zoning of the property would be to conclude that, without any mention, the compensation term is to apply differently depending on the underlying use. There is no support for that position.

CONCLUSION

The Board finds that a reasonable person in the real estate industry would have concluded that the term "concessions" did not include credits for capital improvements. This position is also supported by the initial course of conduct of the parties. *See Fort Myer Construction Corporation,* DCCAB No. D-1195, 2003 DCBCA LEXIS 8, 14. The District paid Appellant a previous claim for lease fee which did not deduct capital improvement credits without objection.[7] Lastly, even if DCPS's interpretation were equally reasonable as Appellant's interpretation, an ambiguous clause will be read against DCPS as the sole drafter of the contract language. See *MCI Contractors, Inc*., CAB No. D-1056, Mar. 27, 2002, 50 D. C. Reg. 7412, 7417, 8236, 2002

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[5] DCPS argues that this motion is premature because "Appellee's expert has not been deposed in this case." (Opposition 4). While a party may be entitled to depose an opponent's expert witness prior to the Board's consideration of the opponent's expert witness, a party may not resist summary judgment on the basis that it is unaware of what its own expert witness will testify to.

[6] Even as to intent, the Board is at a loss to understand the expert's statement that "the value of the capital improvement allowance was intended to offset the minimum rather than the maximum improvement set-off rather than vice versa." The lease sets no "minimum" or "maximum improvement set-off." Since no capital improvements are required by the lease, the minimum improvement set-off would be 0.

[7] Certain documents produced in discovery (*e.g.* Memo from Joan E. McKenzie to Veronica L. Falwell, Deputy Director of Real Estate dated March 28, 2001, (Motion, Ex. 14)) indicate that DCPS relied, at least in part, on an assertion that Jones Lang LaSalle Americas, Inc. interpreted its similar commission agreement with DCPS as requiring it to deduct the cost of capital improvements made by the lessee of the Randall school from the gross rent and to calculate its commission on the reduced rent. The Board notes, however, that the capital improvement credit in the Randall lease was limited to $250,000, while the effective amount of the Woodson capital improvement credit was over $7 million. (*Id*,, 2) Although it appears that the Jones Lang LaSalle may never have been paid since the Randall tenant defaulted, (*Id.*), the maximum reduction in commission was $15,000 or less than 10% of the commission without deduction of the capital improvement credits. In the instant matter, the commission reduction claimed by DCPS resulting from the capital improvement credit is $211,396, or 85% of the total commission

DCBCA LEXIS 2, 15. Judgment is granted to Appellant in the amount claimed of $248,686.32, less any amounts previously paid to Transwestern as a lease fee for the Woodson School lease, payable as rent payments are received by the District from the lessee.

SO ORDERED

April 9, 2004

/s/ *Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge

CONCUR:

/s/ *Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Chief Administrative Judge

/s/ *Warren J. Nash*
WARREN J. NASH
Administrative Judge