Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION FOR SUMMARY RELIEF DENIED;
PARTIAL CROSS-MOTION FOR
SUMMARY RELIEF DENIED: February 8, 2002

GSBCA 15674

HPI/GSA-3C, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Scott M. Heimberg and Andrea T. Vavonese of Akin, Gump, Strauss, Hauer & Feld, L.L.P., Washington, DC, counsel for Appellant.

Gerald Schrader and David M. Smith, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **GOODMAN,** and **DeGRAFF.**

BORWICK, Board Judge.

In this appeal, appellant, the Government's landlord of a building in Kansas City, Missouri, seeks summary relief on its claim for overtime utility charges under its lease, as well as payments allegedly due under the Prompt Payment Act (PPA). The Government opposes appellant's motion for summary relief on the overtime utility claim, but has filed its own cross-motion for partial summary relief, arguing that because the overtime utility invoices are in dispute, the Government does not owe PPA interest. We deny appellant's motion since there are material issues of fact in dispute on the overtime utility claim which make summary relief inappropriate. We deny the Government's cross-motion for summary relief on the PPA issue because the validity of the invoices is intertwined with the disputed issue of contract interpretation.

Background

Appellant has submitted the following statement of undisputed facts; for the purposes

of this motion respondent disputes paragraph three of appellant's statement.

1. The GSA awarded lease No. GS-06P-79048 (the "Lease") to Golub-WEGCO Kansas City I (LLC) ("Golub") on April 19, 1998, which required Golub to provide 327,865 rentable square feet of office and related space in a six-story building and related parking areas located in Winchester Center, Tract 2 on Beacon Road and Winchester Road, Kansas City, Missouri (the "Winchester Center Building"). Pursuant to the Lease, the GSA took occupancy of the Winchester Center Building on March 1, 2000. The leased property contained approximately 314,675 usable square feet.

2. Section 6.6 of the Lease, entitled "Heating and Air Conditioning (JUL 1994)", states as follows:

> e. ZONE CONTROL
>
> Individual thermostat control shall be provided for office space with control areas not to exceed 2000 occupiable 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 photocopying 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.

3. Based on the definition of Section 6.6 of the Lease, there are 366 zones in the Winchester Center Building, each of which has an individual thermostat control with a control area that does not exceed 2000 square feet.

4. Paragraph 13, Sheet 2A of the Lease states:

> As provided for in the Services, Utilities and Maintenance Section, Paragraph 7.3 Overtime Usage, if heating and cooling is needed on an overtime basis, it shall be paid at a rate of $80.00 hourly base rate plus $40.00 cost per zone.

5. On June 1, 2000, the GSA requested in writing that HVAC [heating, ventilating, and air conditioning] be provided to certain areas in the Winchester Center Building for certain overtime hours usage on June 2, 3, 9, 10, 23, 24, 2000 and July 7 & 8, 2000.

6. On August 11, 2000, the GSA contracting officer issued a decision denying Golub's request for payment under a July 27 invoice, stating that the GSA

would reimburse Golub only $4,000.[1]

7. On August 17, Golub filed a Notice of Appeal with the Board, which became GSBCA No. 15387.

8. On October 17, 2000, Golub sold the Winchester Building to HPI [HPI/GSA-3C, LLC]. Accordingly, HPI replaced Golub as the lessor under the Lease.

9. On April 20, 2001, counsel for HPI sent a letter to the contracting officer explaining that GSA owes HPI $54,240 for overtime. By this letter, [appellant] revised downward the amount claimed by the landlord from the $151,200 originally invoiced by Golub.

10. On August 3, 2001, this Board dismissed GSBCA No. 15387 for lack of jurisdiction.

11. On August 8, 2001, HPI resubmitted its certified claim to the Contracting Officer.

12. On September 7, 2001, the Contracting Officer issued a final decision denying HPI's claim.

13. On September 13, 2001, HPI filed its Notice of Appeal. The appeal was docketed on September 14, 2001 as GSBCA 15674.

Appellant's Statement of Undisputed Facts (appeal file and document citations omitted).

In an amended statement of undisputed facts, appellant asserts that the purpose of the overtime utilities provision was to provide temperature control. Appellant's Amended Statement of Undisputed Facts § III, ¶ 14. Appellant states that the parties understood the term "zone" to mean a small area of the building that was temperature controlled and relies upon the deposition testimony of contracting officer Ms. Cynthia Jackson-Kiley, in which she stated that the whole point of the overtime utility provision of the lease was to get to the point where the Government did not have to turn on the entire building to provide overtime utilities for a portion of the building. Id. ¶ 15.

The Government disputes that the parties arrived at a common understanding of the term "zone." It states that the purpose of the overtime utility provision was to establish fair and reasonable prices for the provision of overtime HVAC services that would be less expensive to GSA than a flat rate that would apply without regard to the spaces for which GSA requested services. Respondent's Reply to Appellant's Amended Statement of Undisputed Facts at 1-2.

[1] By that invoice, Golub sought $151,200 for overtime utility services for June 2, 3, 9, 10, 23, 24, and July 7-8, 2000. Appeal File, Exhibit 14.

Appellant's claim is based on the following formula:

$80 base fee x number of overtime hours = Charge A

Number of zones x $40/hour x number of overtime hours = Charge B

Total Charge = Charge A + Charge B.

Appellant's Notice of Appeal, Exhibit 2. Application of that formula to overtime utilities provided the Government in the Winchester Building on June 2, 3, 9, 10, 23, 24 and July 7 and 8, 2000, resulted in a claim of $54,240. Id.

In his final decision denying the claim, contracting officer S. Dennis Clemons noted that, based on the lessor's annual cost statement, each hour of utilities for the whole building during normal working hours cost the Government an average of $167.28 per hour. Appellant's Notice of Appeal, Exhibit 1.

The lease provided that the lessor's annual cost statement, when negotiated and agreed upon, would be used to determine the base rate for an operating cost adjustment. Appeal File, Exhibit 1 at 104 (¶ 3.5a). The lessor's annual cost statement estimated a total annual electricity cost for light and power of $522,750 to operate the building during normal working hours. Respondent's Opposition to Appellant's Motion for Summary Relief, Exhibit 1. Respondent states that the hourly electricity cost for operating the building during normal working hours is $167.28, assuming the building is operated for normal hours 3125 hours per year. Respondent's Opposition to Appellant's Motion for Summary Relief at 1, n.3.

For overtime utilities appellant has invoiced the Government in the amount of $1,627,440 for 649 hours of overtime utilities from June 2, 2000 through March 31, 2001, or an average hourly overtime utility rate of $2507.61. Id. If the whole building were operated on an overtime basis and charged overtime rates according to the interpretation upon which appellant bases its claim, the hourly cost would be $14,720. Respondent's Opposition to Appellant's Motion for Summary Relief, Exhibit 3 (Declaration of Contracting Officer Cynthia S. Jackson-Kiley (Kiley Declaration) ¶ 5 (October 23, 2001)).

In his final decision, the contracting officer concluded that paying appellant's invoice would "be an unreasonable interpretation of the overtime utilities clause and would lead to an unconscionable result." Appellant's Notice of Appeal, Exhibit 1. The contracting officer stated:

> GSA believes that a reasonable interpretation of the word "zone," in the context of overtime utilities, is that it applies to the two (2) air handling units (AHUs) located in the Sixth Floor penthouse. Specifically, these AHUs serve [two] respective halves of the building. Each AHU has [two] fans, which in turn have 125 horsepower variable frequency drive speed motors. Each AHU could use almost $20 of electricity per hour if operated at maximum speed.
>
> Therefore, the Government hereby denies your claim and, in accordance with the Lease, will reimburse the Lessor for overtime usage on the basis of $80 per

> hour of use, plus $40 per zone (AHU) for start-up costs in accordance with information contained in Attachment A.

Id.

The Government also suggests, relying on deposition testimony of GSA's mechanical engineer Douglas Benton and exhibits introduced at that deposition, that at the very least, the term "zone" must mean each floor of the building rather than each thermostat, since that was how the HVAC system was designed. Respondent's Reply to Appellant's Amended Statement of Undisputed Facts at 10; Deposition of Douglas Benton (Benton Deposition) (Nov. 14, 2001), Exhibit 1.

Appellant disputes that the term "zone" must refer to the two air handling units or each floor of the building. According to appellant's expert Mr. Kenneth R. Karr of the Fagan Company, the HVAC system in the Winchester Center Building provides overtime utilities by operation of variable air volume boxes, each of which is individually controlled by its corresponding thermostat. Fagan Report at 8-9.

Discussion

Summary relief is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Buesing v. United States, 42 Fed. Cl. 679 (1999); Granco Industries, Inc. v. General Services Administration, GSBCA 14900-02, 99-2 BCA ¶ 30,568; Twigg Corp. v. General Services Administration, GSBCA 14387, 98-2 BCA ¶ 29,803. The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue. Vivid Technologies, Inc. v. American Science & Engineering, Inc., 200 F.3d 795, 806 (Fed. Cir. 1999); Executive Construction, Inc. v. General Services Administration, GSBCA 15224,00-2 BCA ¶ 30,977. The established facts, as well as any inferences of fact drawn from such facts, must be viewed in a light most favorable to the opposing party. Barmag Barmer Maschinenfrabrik AG v. Murata Machinery, Ltd., 731 F.2d 831, 835-36 (Fed. Cir. 1984).

Here, appellant's motion is bottomed on an alleged "plain meaning" of the term "zone" as applied to the contract's overtime utilities clause:

> When the language of a contract is unambiguous, the Board should look to the four corners of the document to determine the meaning and should not look to parol evidence. The analysis is applicable to the present appeal. Here, the parties dispute the meaning of the term "zone." The term is defined in the lease. Section 6.6(e) of the Lease states as follows: "Zone Control: Individual thermostat control shall be provided for office space with control areas not to exceed 2000 occupiable square feet." Accordingly, the Lease defines a zone as an area "not to exceed 2000 occupiable square feet" in which an individual thermostat control is provided. The term "zone" is not given any other meaning in the Lease. Indeed, aside from the provision providing the rate for overtime utilities, discussed below, the term does not appear elsewhere in the lease.

Appellant's Memorandum in Support of Motion for Summary Relief (Appellant's Memorandum) at 2. Appellant argues that the alleged definition of the term "zone," read together with the clause allegedly establishing the overtime utility rate of $40 per hour, leads to the inescapable conclusion that when overtime utilities are provided, the Government must pay $40 per hour for each 2000 occupiable square feet area in which an individual thermostat control is provided. Appellant's Memorandum at 3. In other words, appellant argues that under this lease, whenever an employee uses overtime utilities in 2000 occupiable square feet of office space, the Government owes appellant $40 per hour for use of those utilities, plus the $80 per hour base.

Respondent disputes ¶ 3 of appellant's statement of undisputed facts, i.e., that the building has 366 zones, and disputes much of appellant's amended statement of undisputed facts. Respondent questions the reasonableness of appellant's interpretation of the term "zone."

Respondent's position, as stated by contracting officer Clemons, is that for the purpose of charging for overtime utilities, there are two zones in the Winchester Center building. Respondent's alternative position is that the term "zone" means each floor of the building. As to appellant's view that there are 366 zones, respondent states:

> Section 6.6(e) [of the lease] is not definitional. It merely specifies the method for controlling temperature conditions in the building; namely, by subdividing the building zones (however defined) into smaller spaces of 2,000 occupiable square feet, each having its own thermostat.

Respondent's Memorandum in Opposition to Appellant's Motion for Summary Relief (Respondent's Memorandum) at 5.

Respondent argues that appellant's interpretation of the term "zone" is unreasonable, based upon what it views as the gross disparity between appellant's actual cost of providing utilities during normal hours and the hourly cost to the Government of the overtime rate based on appellant's interpretation. Respondent's Memorandum at 5, 6. Respondent also argues, based upon the submitted declaration of contracting officer Jackson-Kiley and the contracting officer's price negotiation memorandum (PNM), that she never interpreted the term "zone" in a way that would mean the Winchester Building had 366 zones for the purpose of applying overtime utility charges; as she interpreted the contract, the charge for overtime HVAC would be between $40 and $75 per hour. Respondent's Memorandum at 4 and Exhibits 3, and 4.

Finally, respondent disputes appellant's interpretation of the formula for assessment of the overtime charges. Respondent notes that the formula in the lease is "$80 hourly base plus $40 cost per zone." Respondent takes issue with appellant's interpretation that the phrase "$40 cost per zone" (however zone is defined) implies an hourly charge per zone for overtime utility charges. Respondent's Memorandum at 7.

Appellant has not established that we should interpret the contract as it does. The purpose of contract interpretation is to ascertain the intention of the parties, which is to be gathered from the instrument as a whole from the perspective of a reasonably intelligent

person acquainted with the contemporary circumstances. Alvin Ltd. v. United States Postal Service, 816 F.2d 1562, 1565 (Fed. Cir. 1987). A contract is ambiguous when it is susceptible to more than one reasonable interpretation. Metric Constructors v. National Aeronautics and Space Administration, 169 F.3d 747, 751 (Fed. Cir. 1999).

At this stage of the proceedings, appellant has not established that paragraph 6.6(e) of the lease has a plain meaning. Appellant's argument would be more attractive if paragraph 6.6(e) had stated: "For the purpose of application of the $40 rate per zone specified in the overtime utilities clause: there shall be 366 zones." The paragraph, of course, does not so state. Instead, its heading is "zone control," not "zone definition," and the paragraph specifies what type of control (thermostat) shall be provided for each 2000 occupiable square feet. Paragraph 13, sheet 2A of the lease is also unclear since it does not explicitly state that the zone charge is to be an hourly charge.

At this early stage of the proceedings in this appeal, we can identify several disputed issues regarding the meaning of the lease: (1) whether paragraph 6.6(e) of the lease defines the term "zone" for the purpose of applying the $40 per hour overtime utility rate or whether paragraph 6.6(e) simply delineates the occupiable square feet of space to be controlled by thermostats; (2) if there are not 366 zones in the building, how many zones there are for the purpose of applying the overtime utility clauses and (3) whether the $40 per hour charge is to be an hourly charge. Although appellant may eventually prevail on its claim, a favorable ruling on these issues is premature because of the disputed issues of fact--the number of HVAC zones in the building contemplated by the parties in entering into and administering the lease, and whether the zone charge was to be an hourly charge.

In deciding whether the lease provisions are ambiguous, we will first have to determine whether appellant's interpretation is reasonable. The lessor's annual cost statement regarding utilities for normal working hours was part of the offer and made part of the lease, at least for determining the base rate for operating cost adjustment. See Garber-Sugarman v. General Services Administration, GSBCA 14361, 98-2 BCA ¶ 29,946. While the lessor's cost statement is for that purpose, respondent points to the disparity between the $167 hourly cost revealed by lessor's annual cost statement and the $14,720 hourly cost to the Government to run the whole building on an overtime basis if appellant's zone theory is accepted as the meaning of the lease. Respondent posits that it should not cost significantly more to run the HVAC on an overtime basis than it does to run the HVAC during normal working hours. The lessor's annual cost statement may serve as one guide in determining both the intent of the respondent and appellant's predecessor as to anticipated overtime utility costs in entering into the lease, and whether appellant's proffered interpretation of the overtime utilities clauses is reasonable.

In response to respondent's argument that appellant's interpretation overstates appellant's actual costs as reflected on the lessor's annual cost statement, appellant states that "Even if [appellant] negotiated a favorable rate for overtime utilities, it negotiated other provisions that are less favorable to it and more favorable to the Government." Appellant's Memorandum at 7. In this regard, to evaluate the reasonableness of appellant's interpretation, it will be necessary to take evidence on the favorable provisions the appellant gave to the Government and whether the Government reciprocated by allegedly granting appellant the favorable $40 per hour overtime rate for the operation of the supposed 366 zones on an

overtime basis.

The intent of the parties before the onset of the controversy will be important in interpreting paragraph 6.6(e) and paragraph 13 of sheet 2A of the lease. Alvin, 816 F.2d at 1566; Julius Goldman's Egg City v. United States, 697 F.2d 1051, 1058 (Fed. Cir. 1983), cert. denied, 464 U.S. 814 (1983). According to the materials presented by respondent's opposition to appellant's motion, the overtime utility hourly rate was mentioned in the contracting officer's PNM. The Board will take evidence on whether GSA and appellant's predecessor considered the overtime utility rate as part of the lease negotiations, whether the parties agreed to the meaning of the term "zone" for the purpose of overtime utilities during lease negotiations, and whether the charge per zone was to be hourly.

The Board will expect each party to present evidence on trade custom and practice as to whether the meaning of the term "zone" in the world of HVAC validates the party's interpretation of paragraph 6.6(e). Metric Constructors, 169 F.3d at 751. The configuration and operation of the HVAC system and the parties' knowledge and understanding of the design intent and operation of the HVAC system is also relevant to resolving the appeal, particularly the question of how many HVAC zones are in the building if there are not 366 zones.

The Prompt Payment clause in the contract requires the Government to pay on the later of either the thirtieth day after the designated billing office has received a proper invoice from the contractor or the thirtieth day after the Government has accepted the work or service. Appeal File, Exhibit 1 at 248 (¶ 22(a)2(i), (ii)). Respondent's cross-motion for summary relief on the PPA issue is also denied and will be considered with the remaining issues. The present record is not sufficient for us to be able to determine whether or not appellant's invoices for the overtime utility services are proper invoices within the meaning of the PPA, 39 U.S.C. § 3901(a)(4)(A)(i) (1994), and the Prompt Payment clause in the contract.

Decision

Appellant's motion for summary relief is **DENIED**; respondent's partial cross motion for summary relief on the PPA issue is **DENIED**.

_____
ANTHONY S. BORWICK
Board Judge

We concur:

_____
ALLAN H. GOODMAN
Board Judge

_____
MARTHA H. DeGRAFF
Board Judge