Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

CROSS-MOTIONS FOR SUMMARY RELIEF DENIED: August 17, 2000

GSBCA 15222

PARCEL 49C LIMITED PARTNERSHIP,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Richard J. Conway and Robert J. Moss of Dickstein Shapiro Morin & Oshinsky, LLP, Washington, DC, counsel for Appellant.

Catherine C. Crow, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **HYATT**.

DANIELS, Board Judge.

The General Services Administration (GSA) leases from Parcel 49C Limited Partnership (Parcel 49C), for use by the Federal Communications Commission (FCC), space in, around, and on top of the Portals II Building in Washington, D.C. On January 5, 1998, GSA and Parcel 49C amended the lease to include the following paragraph:

> The Lessor hereby grants to the Government a license to install two additional antennas on the roof of the building. The license fee for such antennas shall be deemed included in the annual rental . . . . For any additional antennas, the Government shall pay the Lessor an annual license fee to be mutually negotiated by the Lessor and the Government for the right to install and maintain such antennas . . . .

Later, GSA informed Parcel 49C that the Government wanted to install a considerable number of antennas on the roof of the building. The lessor submitted to a GSA contracting officer a claim that the Government was obligated to pay, in accordance with the cited

paragraph, an annual license fee for each of the antennas other than the eight whose fee was included in the rent. The contracting officer denied this claim, and the lessor appealed his decision.

The parties have now filed cross-motions for summary relief as to entitlement. We cannot resolve the issue presented on these motions. Facts relevant to an important aspect of the dispute remain contested and unclear; we must gather evidence on these matters before reaching any conclusions on the subject addressed in the motions. Even if these facts support GSA's position, we think the lease may entitle the lessor to some payment for the Government's installation of antennas on the roof, provided that the number of antennas installed is greater than the number of antennas which were there as of a certain date. We have no information as to the last figure, however. Because neither party has suggested this reading of the lease, as long as the record is open for presentation of relevant evidence, we request further argument before deciding whether our understanding is correct. We deny both motions at the present time.

Background

The lease was entered into on August 12, 1994. Appellant's Statement of Uncontested Facts ¶ 1; Respondent's Statement of Genuine Issues ¶¶ 1-2; Respondent's Statement of Uncontested Facts ¶ 1 (uncontested). It said, in its original form, that each of several described areas, including "rooftop space of at least 7,500 square feet of unobstructed roof space with no dimension of less than 60 feet," were "to be used for such purposes as determined by the Government." Appeal File, Exhibit 1 at 1; see also Respondent's Statement of Uncontested Facts ¶ 3 (uncontested).

The lease further provided, initially, that "[a]ntenna installation and space requirements are as follows:"

> 1. Rooftop space designated by the offeror as the area for the FCC antenna array must provide a minimum of 7,500 square feet of unobstructed roof space for antennas and towers. . . .
>
> 2. The offeror must provide and install pads and anchor points for four (4) antenna towers which are required for mounting the antennas on the roof area. Three of the antennas have a vertical load of 1,000 pounds and guy anchor loads of 5,000 pounds each and one has a vertical load of 5,000 pounds and guy anchor load of 15,000 pounds. The position of the tower supports will be determined by the FCC. The FCC will install the antennas and towers. . . .
>
> 3. The offeror must provide a diagram of the rooftop area designated for installation of FCC antennas and an elevation diagram showing the proposed location of the towers and antenna array. The antenna types to be installed are as follows: [Eight are specified; one is "several wire HF dipole antennas strung between short towers (which may support other antennas)"; another is "2.5 meter satellite communications dish antenna".]

> 4. If FCC antennas cannot be mounted on commercially available short, fixed towers, the lessor must describe the installation method to be used. Any alternate methods of installation must be approved by the contracting officer. If alternative antenna tower installation methods are proposed, the offeror must submit detailed plans for FCC approval. . . .

Appeal File, Exhibit 1 at 8-9; see also Respondent's Statement of Uncontested Facts ¶ 4 (uncontested).

From time to time after execution of the lease, GSA and Parcel 49C negotiated and executed Supplemental Lease Agreements (SLAs) which modified various provisions of the lease. Appellant's Statement of Uncontested Facts ¶ 2; Respondent's Statement of Uncontested Facts ¶ 3. SLA No. 1 and SLA No. 4 are the lease modifications which are important to this case. Each of these documents contains on its first page, immediately above the signature block, the statement "All other terms and conditions of the lease shall remain in force and effect, except as specifically modified herein." Appeal File, Exhibits 2, 5.

SLA No. 1, dated January 3, 1996, made several changes to the lease. Among them, it increased by fifty-six percent the amount of space covered and by fifty-five percent the rent to be paid. Compare Appeal File, Exhibit 1 at 1 with id., Exhibit 2 at 1-2. SLA No. 1 says that the space covered by the lease is "[a]s shown on plans in Attachment A to this SLA." Id., Exhibit 2 at 1. Attachment A to SLA No. 1 includes a computer assisted design drawing (CADD) of "Rooftop/FCC Antenna Level." Id. at 24. According to Parcel 49C, this CADD "showed six antennas to be installed on the roof." Appellant's Statement of Uncontested Facts ¶ 3. According to GSA, the CADD "depicts at least eight different antenna types and at least nine antennas." Respondent's Statement of Genuine Issues ¶ 4; Respondent's Exhibit 8 (Declaration of Vineet Singhal (May 17, 2000)) ¶ 3; Respondent's Exhibit 9 (Declaration of Dan S. Emrick (May 16, 2000)) ¶ 5.

SLA No. 4, dated January 5, 1998, like SLA No. 1, made several changes to the lease. Among them, it increased (from SLA No. 1) by nineteen percent the amount of space covered and by twenty-seven percent the rent to be paid. Compare Appeal File, Exhibit 2 at 1-2 with id., Exhibit 5 at 2. SLA No. 4 also altered the Government's rights as to parking, making the Government responsible for the operation of the garage in the building and giving the Government control over enlarged parking areas. Appeal File, Exhibit 5 at 6-11. SLA No. 4 says that it was "[i]ssued to [among other things] . . . reflect the granting of a license to the Government to allow the Government to install certain additional antenna's [sic] on the roof of the building." Id. at 2. This SLA contains the paragraph we set out at the beginning of this opinion:

> The Lessor hereby grants to the Government a license to install two additional antennas on the roof of the building. The license fee for such antennas shall be deemed included in the annual rental . . . . For any additional antennas, the Government shall pay the Lessor an annual license fee to be mutually negotiated by the Lessor and the Government for the right to install and maintain such antennas . . . .

Id. at 5.

SLA No. 4 was drafted by an attorney engaged by Parcel 49C (not counsel of record in this case). Respondent's Statement of Uncontested Facts ¶ 9 (uncontested). Anthony Pagonis, a GSA contracting officer, participated in the negotiations leading up to this SLA. Respondent's Exhibit 10 (Declaration of Mr. Pagonis (May 16, 2000)) ¶¶ 1, 4. Mr. Pagonis states that he intended "in forming SLA No. 4 that the United States Government be allowed to have installed additional antenna towers, rather than simple antenna components or protrusions, on antenna pads." Id. ¶ 5. He also states that he understood that "the term 'antennas' as used in SLA No. 4 referred to antenna towers, rather than simple antenna components or protrusions, on antenna pads." Id. ¶ 6.

Parcel 49C has submitted to the Board a declaration of Jules Cohen, a professional engineer who has over fifty years of experience in electronics and broadcasting engineering. Appellant's Exhibit A (Declaration of Mr. Cohen (June 22, 2000)) ¶ 1. According to Mr. Cohen, "an antenna is a device that transmits or receives radio waves." Id. ¶ 6. "[T]he antenna is distinct from the tower upon which it is mounted: . . . the tower is a passive device which supports or holds the antenna." Id. ¶ 8. "A single tower may support multiple antennas. When multiple antennas are mounted on a single tower, each antenna retains its identity as a separate antenna distinct from both the tower on which it is mounted and the other antennas mounted on the same tower." Id. ¶ 9.

On May 11, 1999, the day after learning that the Government wanted to install more antennas on the roof of the Portals II Building, Parcel 49C asked GSA to pay a monthly license fee of $1,000 for each additional antenna (other than the first two) which would be installed. Appeal File, Exhibit 17; see also id., Exhibit 16. The lessor wrote: "Under the terms of the Lease Agreement [SLA No. 1], it was provided that the Government could install five (5) antennas or antenna systems, which included four (4) antennas mounted on pads together with a satellite dish which did not require a mounting pad." Id., Exhibit 17 at 1. In SLA No. 4, the lessor continued, "the parties, as part of the negotiation and resolution of a number of outstanding issues, agreed that the Government would have the right to install the additional two (2) antennas or antenna systems on the roof, bringing the total to seven (7), with the understanding that the Government would be obligated to pay a license fee to the Lessor for any additional antennas installed by the Government." Id. at 1-2.

After receiving no satisfaction from GSA on the matter, Parcel 49C submitted a claim in the amount of $1,000 per month per antenna. Appeal File, Exhibit 20. The claim explained: "SLA No. 1 . . . incorporated various floor plans of the building into the lease agreement, including a roof plan which showed roof locations for four (4) antennas and two (2) satellite dishes." Id. at 1. As a result of SLA No. 4, Parcel 49C said in its claim, the Government was allowed to install eight antennas. Id. at 2. "In accordance with the recent roof plan delivered by the Government to the Lessor . . . , it appears the Government now desires to install a total of twenty-six (26) antennas and/or satellite dishes on the roof of the building. Under the terms and conditions of SLA No. 4, the Government must pay a license fee for each additional antenna and/or satellite dish installed beyond the eight (8) allowed by the Lease Agreement as amended." Id. at 3.

The contracting officer's decision denying this claim asserts that the lease "in no way limits the amount of antennas allowed to be installed by the Government . . . on the roof," and that SLA No. 1 did not alter this situation. Appeal File, Exhibit 22 at 1-2. The

contracting officer wrote further, "I do not concur in your conclusion that [the rooftop plan attached to SLA No. 1] showed roof locations for specifically four antennas and two satellite dishes. . . . The attached schematic you refer to merely is a sketch of the types of platforms to be used to house the various antennas and satellite dishes." Id. at 2. Additionally:

> In 1997, around the time of SLA No. 4, the FCC concluded that the 7,500 square feet they were entitled to on the rooftop for the purpose of locating antennas and/or satellite dishes could only contain 4 platforms, and that, to comply with its needs, an additional two platforms were required. As part of the negotiations for the Government to lease the garage to be built at Portals II, which was needed by the FCC for security purposes, GSA also obtained the right to build two additional platforms to hold antennas and/or satellite dishes. . . . [T]here was never any need to include language in the SLA granting the Government a license to install two additional antennas, as the Government already had the right to install as many as it desired in its allowed 7,500 feet of rooftop space. Mr. Pagonis [the contracting officer for GSA at the time] indicated that he had negotiated the right of the Government to install two additional pads, not only two additional antennas. When the draft was presented to him for signature, he did not notice this error.

Id.

Discussion

Summary relief is appropriate where no genuine issue exists as to any material fact and the moving party is entitled to prevail as a matter of law. In considering motions for summary relief, all reasonable inferences are drawn in favor of the non-movant. Executive Construction, Inc. v. General Services Administration, GSBCA 15224 (June 9, 2000) (citing Vehicular Technologies Corp. v. Titan Wheel International, Inc., 212 F.3d 1377, 1381 (Fed. Cir. 2000); McKay v. United States, 199 F.3d 1376, 1380 (Fed. Cir. 1999)). When both parties move for summary judgment, each party's motion must be evaluated on its own merits. In reviewing each motion, all reasonable inferences are resolved against the party whose motion is under consideration. Little Six, Inc. v. United States, 210 F.3d 1361, 1363 (Fed. Cir. 2000); McKay. "[T]he making of such inherently contradictory claims does not establish that if one is rejected the other is necessarily justified." Pacificorp Capital, Inc. v. United States, 25 Cl. Ct. 707, 715 (1992), aff'd, 988 F.2d 130 (Fed. Cir. 1993).

To the extent that the issue in dispute may be resolved through contract interpretation alone, it is appropriate for decision on motion for summary relief, since contract interpretation is a matter of law. Olympus Corp. v. United States, 98 F.3d 1314, 1316 (Fed. Cir. 1996); P. J. Maffei Building Wrecking Corp. v. United States, 732 F.2d 913, 916 (Fed. Cir. 1984); S. A. Ludsin & Co. v. Small Business Administration, GSBCA 13777-SBA, 97-1 BCA ¶ 28,812, at 143,726, aff'd, No. 97-1249 (Fed. Cir. Apr. 3, 1998). In advancing their motions, both parties have asserted that resolution may be had on this basis. We discuss in this opinion the extent to which this is so. We also recognize, however, that the lessor's entitlement to be paid a license fee is dependent in part on facts which remain to be established, and may be in part dependent on an understanding of contract provisions which

neither party has suggested. We consequently leave for further proceedings a final determination on this matter.

Parcel 49C's motion is short and straightforward. According to the lessor, the language of the critical paragraph of SLA No. 4 is unambiguous and "open to only one interpretation: The Government may install two additional antennas on the roof of the Building at no extra charge and must pay Parcel 49C for each additional antenna that the Government thereafter installs." Appellant's Motion for Partial Summary Relief at 7. Since the meaning of the term "antenna" is clear, the lessor continues, the Board may not consider (per the parol evidence rule) any evidence that the term means something other than a device that transmits or receives radio waves, such as an "antenna tower." Since, according to Parcel 49C, the CADD within SLA No. 1 which depicts the building's roof shows six antennas, the SLA No. 4 paragraph allows the Government to install only eight antennas (six plus two) on the roof without charge; for each additional antenna installed, a license fee must be paid.

GSA summarizes its position in this way:

> [T]here are four reasons why the Board should grant Respondent's Motion for Summary Relief. The reasons are as follows: (1) the language of the lease does not limit the number of antennas the Government can place on the leased premises; (2) even if the Board is inclined to find that the lease, through modifications contained in SLA Nos. 1 and 4, limited the number of antennas which the Government can place on the rooftop, those modifications were without consideration and therefore have no effect, (3) even if the Board is inclined to find that the lease, through modifications contained in SLA Nos. 1 and 4, limited the number of antennas which the Government can place on the rooftop and such modifications did not need to be supported by consideration, such modifications are void because the contracting officer lacked authority to authorize those modifications, and (4) even if the Board is inclined to find that the language of the lease does limit the number of antennas the Government can place on the rooftop, Appellant has failed to establish that the Government has exceeded the number of antennas which can be placed on the rooftop without payment of additional license fees.

Respondent's Memorandum in Support of Its Cross-Motion for Summary Relief and in Response to Appellant's Motion for Partial Summary Relief at 7.

There is something to be said for both sides' arguments.

We agree with GSA that the original lease did not limit the number of antennas the Government could put on the roof of the building. The lease allowed the Government to have at least 7,500 square feet of unobstructed rooftop space, to be used for whatever purposes the Government wished. Although the lease required Parcel 49C to provide and install pads and anchor points for four antenna towers, and contemplated that the FCC would install antennas on the roof, it did not contain any restriction on the number of antennas (or antenna towers, for that matter) the FCC could install.

We agree with Parcel 49C, however, that SLA No. 4 does limit the number of antennas the Government could put on the roof without paying a license fee to the lessor. There can be no dispute about the meaning of the term "antenna." Parcel 49C has provided an expert's declaration that an antenna is a device that transmits or receives radio waves, and that such a device is something distinct from a tower which supports or holds it. We reject GSA's challenge to the expert's qualification to make such a statement. The statement is so elementary that anyone with many years of experience as a broadcast engineer should be qualified to make it. Furthermore, the expert's statement is consistent with a dictionary definition of the term "antenna" (which GSA has conveniently provided in Respondent's Exhibit 11). And the original lease contains several provisions, set out at the beginning of the "Background" section of this opinion, which make clear that an antenna is something very different from a tower. GSA contracting officer Pagonis's declaration that he intended and understood SLA No. 4 to restrict the Government's ability to install antenna towers, not antennas, is of no use as interpretive of the key paragraph because the declaration addresses a term with unambiguous meaning and the testimony contains only the unexpressed, subjective intent of one party. Computer Network Systems, Inc. v. General Services Administration, GSBCA 11368, 93-3 BCA ¶ 26,233, at 130,527; Real Estate Management Services, Inc., GSBCA 10238, 90-2 BCA ¶ 22,870, at 114,866; Pacificorp Capital, 25 Cl. Ct. at 715-16.

The meaning of the term "additional" in the critical paragraph of SLA No. 4 is not susceptible to resolution without greater development of the factual record, however. As both parties effectively agree, the term "additional" begs the question, Additional to what? Parcel 49C is correct in observing that a CADD of the building's rooftop area is a part of SLA No. 1. It is not apparent from the record developed for decision on the cross-motions for summary relief, however, precisely what is depicted on that CADD. Are the squiggles on the drawing antennas, "antenna arrays" (a term used in the original lease, but whose meaning has not been explained to us), "antenna systems" (a term used by the lessor in its May 11, 1999, letter, but whose meaning has not been explained to us), or antenna towers? If they are antennas, how many are there? (At different times, Parcel 49C has thought the answer to this question was either five or six,[1] and GSA thinks it is at least nine.) Most important, we cannot tell whether the CADD is intended to restrict the Government's ability to install antennas or towers to the items specifically depicted (as Parcel 49C maintains), or whether the drawing merely represents the sort of objects which had already been placed on the roof (as GSA contends). On cross-motions for summary relief, we must find for the non-movant on each party's motion. We need a more complete record to serve as a basis for answering the questions posed in this paragraph.

Both parties suggest that without a prior limit on the number of antennas the Government could install on the roof, SLA No. 4's reference to "additional" antennas is meaningless. Appellant's Opposition to Cross-Motion for Summary Relief at 8; Respondent's Reply to Appellant's Opposition to Cross-Motion for Summary Relief at 5. The parties suggest different alternatives for dealing with this problem. Parcel 49C effectively advances the theory that the SLA No. 1 CADD must create a limitation, since a prior limit is a

[1]Or possibly seven, if meeting notes contained in the Appeal File (at Exhibit 14) are accurate.

necessity. GSA employs the doctrine of contra proferentem to conclude that since Parcel 49C drafted an ambiguous term, the paragraph should be construed against that party as being meaningless. We doubt that a choice between these alternatives will prove necessary. Even if the SLA No. 1 CADD did not establish a limit on the number of antennas, the SLA No. 4 paragraph which includes the term "additional" does not appear to be meaningless. "[A]n interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous." Hol-Gar Manufacturing Corp. v. United States, 351 F.2d 972, 979 (Ct. Cl. 1965); see also Granite Construction Co. v. United States, 962 F.2d 998, 1003 (Fed. Cir. 1992); United States v. Johnson Controls, Inc., 713 F.2d 1541, 1555 (Fed. Cir. 1983). A more reasonable reading of the paragraph than those suggested would be that "additional," in the absence of any express statement of the basis from which the increment is to be measured, means additional to the number of antennas which the Government had installed on the roof as of the date SLA No. 4 was signed. Because neither party has briefed this resolution, we will hear argument on it as we proceed with further consideration of Parcel 49C's entitlement to recover for the Government's installation of antennas.

We find unavailing GSA's defenses that the SLA No. 4 paragraph dealing with antenna license fees (and SLA No. 1, to the extent that it addresses rooftop use) have no effect because these modifications to the contract were without consideration and the contracting officer lacked authority to enter into them. "A contract does not lack mutuality merely because a particular promise or obligation is not offset by a similar promise or obligation. The pertinent question is whether the agreement as a whole is supported by mutual consideration." Florida Keys Aqueduct Authority v. United States, 7 Cl. Ct. 297, 299 (1985), aff'd, 790 F.2d 95 (Fed. Cir. 1986). Each SLA encompasses a number of subjects, most importantly making tradeoffs of space leased and rent to be paid. To the extent that the agency gave up, in agreeing to each SLA, the right to unlimited use of the roof, that was just one of the many elements included in the package of tradeoffs. Clearly, consideration was given on both sides for both SLAs. See Brero Construction, Inc., LBCA 1997-BCA-4, et al., 99-2 BCA ¶ 30,578, at 150,996.

GSA asks that the lease and its modifications be found divisible when evaluating the issue of consideration. In this regard, the agency cites Richard A. Lord, Williston on Contracts § 45 (4th ed. 2000). Williston says that although "the concept of divisibility is not authoritatively defined," generally, "a divisible contract has been defined as one where both the performance by each party is divided into two or more parts, and the performance of each part by one party is the agreed exchange for a corresponding part by the other party." Id. § 45:1. The treatise states:

> There is a presumption against finding a contract divisible, unless divisibility is expressly stated in the contract itself, or the intent of the parties to treat the contract as divisible is otherwise clearly manifested. The rationale is that without clear support in the contract document and in the intent of the parties, a contract that is written as a unitary package should not be severed into parts in order to favor the breaching party.

Id. § 45:4. GSA has not even suggested that either SLA mentions divisibility or that evidence might show an intent of the parties to treat either lease modification as divisible. The lease and each of its SLAs must therefore be presumed to be unitary packages.

The agency's lack-of-authority argument is based on a sentence written by the Court of Claims in Fansteel Metallurgical Corp. v. United States, 172 F.Supp. 268, 270 (Ct. Cl. 1959), and cited by the Armed Services Board of Contract Appeals in H. Z. & Co., ASBCA 29572, 85-2 BCA ¶ 17,979, at 90,182, and then by this Board in Florida East Coast Properties, Inc., GSBCA 7538, 86-3 BCA ¶ 19,070, at 96,320 (1985): "[A] contracting officer can change the terms of a contract to the benefit of the Government but is not given authority to make a change which would adversely affect the Government." The argument is that because prior to agreement to SLA No. 1, the Government had unlimited use of the roof, the contracting officer could not have agreed in either SLA that the Government would "pay additional sums for performance of a pre-existing duty." Respondent's Cross-Motion for Summary Relief at 14.

As Parcel 49C points out, we have already explained, "This argument is a variant of the one based on failure of consideration." Florida East Coast Properties, 86-3 BCA at 96,320. The proposition "extends at least as far as the actual holding in H. Z., which is that the contracting officer has no authority to agree to pay additional sums for performance of a pre-existing duty." Id. But the proposition does not allow "the Government [to] avoid an improvident bargain struck by a contracting officer simply by demonstrating that the bargain is improvident." Id. "The consideration the Government received suffices to sustain [contract modifications] not only against an attack for failure of consideration but against the argument based on the contracting officer's supposed lack of authority." Id. The words we used in Florida East Coast Properties fit like a glove the case now before us. In SLA No. 1 and again in SLA No. 4, the GSA contracting officer bargained away certain rights in exchange for others -- principally agreeing to pay more rent to receive use of more space. Roof rights were simply one of many elements involved in the exchange. Whether the swap was good or bad for the Government, it was one the parties agreed to, and there was consideration for it on both sides. The contracting officer had authority to enter into it.

GSA's last reason for granting the agency's motion for summary relief and denying the lessor's is that "Appellant has failed to establish that the Government has exceeded the number of antennas which can be placed on the rooftop without payment of additional license fees." Although it is true that Parcel 49C has not established that the Government has exceeded this number, that is not justification for ruling one way or the other on the cross-motions for summary relief. The motions address only entitlement. We will take evidence as to the number of antennas for which a license fee must be paid (if indeed there is such a number) during the quantum phase of this litigation.

Decision

Each party's motion for summary relief is **DENIED**. The parties shall jointly submit to the Board, within ten days of the date of this decision, a proposed schedule for further proceedings in this case.

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STEPHEN M. DANIELS
Board Judge

We concur:

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EDWIN B. NEILL
Board Judge

_____
CATHERINE B. HYATT
Board Judge