Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED IN PART: October 31, 2002

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 and Jeremy Becker-Welts, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

DANIELS, Board Judge.

Parcel 49C Limited Partnership (Parcel 49C) claims additional payment, in the form of license fees, in exchange for its allowing the Government to install more than eight antennas on the roof of a building it owns and in which the General Services Administration (GSA) leases space.

In an interlocutory decision in this case, we denied the parties' cross-motions for summary relief as to entitlement. Parcel 49C Limited Partnership v. General Services Administration, GSBCA 15222, 00-2 BCA ¶ 31,073. We did reach some conclusions as to matters in dispute, however. We held that (a) Supplemental Lease Agreement (SLA) No. 4 limited the number of antennas the Government could place on the roof without charge; (b) the term "antenna" means a device that transmits or receives radio waves; and (c) it is clear from the lease that an antenna is something very different from a tower which supports or holds such devices. Id. at 153,406.

Subsequent to the issuance of the decision on the cross-motions for summary relief, there remain to be resolved three questions critical to this case: (1) How many antennas did the lease, as amended, allow the Government to install on the roof without making additional payment to the lessor? (2) How many antennas has the Government put on the roof at various points in time? (3) What is the fair value of a license to install an antenna on this rooftop? In this opinion, we address these questions.

Findings of Fact

The original lease

1. On August 12, 1994, GSA and Parcel 49C entered into a lease for office and related space in the Portals II Building in Washington, D.C. Under the lease, Parcel 49C was to construct the building for use as the headquarters of the Federal Communications Commission (FCC). Parcel 49C, 00-2 BCA at 153,403; Appeal File, Exhibit 1 at 1, 381-88.

2. The lease provided for the use by the Government of premises which included "rooftop space of at least 7,500 square feet of unobstructed roof space with no dimension of less than 60 feet." Appeal File, Exhibit 1 at 1. The lease incorporated the provisions of Solicitation for Offers (SFO) number 88-100. Id. at 2. SFO 88-100 included this clause regarding the Government's need for the rooftop space:

> Antenna 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 . . . .
>
> 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:
>
> - Horizontally polarized rotatable HF [high frequency] log periodic antenna (6-30 MHz [megahertz])

- Vertically polarized rotatable VHF [very high frequency] log periodic antenna

- Vertically polarized rotatable UHF [ultra high frequency] log periodic antenna

- VHF discone antenna

- UHF discone antenna

- Several wire HF dipole antennas strung between short towers (which may support other antennas)

- Stacked yagi 450 MHz communications link antenna

- 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. In such an event, the offeror must provide all hardware and installation services required to satisfy the antenna requirements.

Id. at 8-9.

Supplemental lease agreements

3. After execution of the lease, the parties executed several supplemental lease agreements which modified various provisions of the lease. 00-2 BCA at 153,404; Appeal File, Exhibits 2-11. SLA No. 1 and SLA No. 4 are the lease modifications which are important to this case.

Supplemental Lease Agreement No. 1

4. SLA No. 1 is dated January 3, 1996. It increased considerably both the amount of space covered by the lease and the amount of rent to be paid. 00-2 BCA at 153,404. Three portions of this SLA are of interest to us. The first is the very first page, which says:

> Notwithstanding any other provisions of the lease, or attachments thereto, this SLA No[.] 1 shall govern over any other provision of the lease, or attachments thereto, with respect to the following:

> 1. Amount of Space
>
> The Lessor leases to the Government, and the Government agrees to lease, the following described premises:
>
> A total of 449,859 NUSF [net usable square feet] of office and related space will be provided consisting of [a specified number of NUSF on each of the Maine Avenue, 12th Street Entrance, and Courtyard levels, and Levels 1 through 8, totaling 449,859]. (As shown on plans in Attachment A to this SLA No. 1). . . .
>
> See Continuation Pages 2-7 for additional terms and provisions of this SLA No. 1.
>
> All other terms and conditions of the lease shall remain in force and effect, except as specifically modified herein.

Appeal File, Exhibit 2 at 1.

5. The second portion of SLA No. 1 which has bearing on this case is Continuation Page 3, which includes this paragraph:

> 7. Acceptance of Plans
>
> The Government accepts the Lessor's plans as reflected on the attached schematics for the base building as satisfying the requirements of SFO 88-100. To the extent that any changes are made to the special and other elements of the building after the date of this SLA at the Government's request and such change increases the Lessor's cost or time of performance, then the Government shall provide the Lessor with an equitable adjustment in accordance with General Clause 17 of GSAF [GSA Form] 3517[1] for its reasonable costs and delays resulting from such changes.

Appeal File, Exhibit 2 at 3.

6. The third important part of SLA No. 1 is Attachment A. This attachment consists of computer assisted design drawings of each of the levels in the building, showing the portions allocated to the Government. Appeal File, Exhibit 2 at 8-24. The final drawing is entitled "Rooftop/FCC Antenna Level." It shows various straight and curved lines and contains the following antenna names: HF log periodic, dipole, FADF [fixed automatic

[1]Clause 17 of GSA Form 3517 is a standard Changes clause, specified in 48 CFR 552.270-21 (1985). Appeal File, Exhibit 1 at 392.

direction finding], VHF, 1M [one meter] dish, discone, 3M dish, and VHF/UHF. Id. at 24.

7. SLA No. 1 was negotiated between two representatives of Parcel 49C – Steven Grigg, the president of Republic Properties Corporation (the partnership's property manager), and Timothy Hutchens, a lawyer acting as counsel to the partnership – and one representative of GSA, contracting officer Anthony Pagonis. Transcript at 9, 11-12, 161-62, 235-36. None of these gentlemen is an electrical engineer or has any particular training in, or knowledge of, antennas. Id. at 58, 98-99, 182-84, 253. Mr. Grigg prepared the drawing entitled "Rooftop/FCC Antenna Level" which appears in Attachment A to SLA No. 1. Id. at 13, 79.

8. Messrs. Grigg and Hutchens both now state that they understood that this drawing showed six antennas on the roof of the building. Transcript at 13-14, 102, 166-68, 182-83, 186. Both men identified those antennas as HF log periodic, three-meter dish, VHF/UHF, one-meter dish, FADF, and discone-dipole. Id. at 90-93, 183. Mr. Grigg said that he had intended, in making the drawing, to reflect the FCC's plans (conveyed to him in a diagram prior to submission of offers) to install six antennas on the roof. Id. at 76-79.

9. Both Mr. Grigg and Mr. Hutchens also testified that they understood that SLA No. 1 eliminated several general requirements of the lease – including the requirement for at least 7,500 square feet of unobstructed roof space – and substituted specific requirements for them. Transcript at 86, 163, 189-90. Neither of the Parcel 49C negotiators thought that these understandings were conveyed to GSA, however. Id. at 80-82, 197. Mr. Pagonis testified that to the best of his recollection, the negotiators never discussed whether SLA No. 1 vacated the Government's rights to at least 7,500 square feet of unobstructed roof space. Id. at 241. Nor did the negotiators discuss, according to Mr. Pagonis, whether SLA No. 1 limited the number of antennas the Government could place on the roof. Id.

10. In February 1997, Parcel 49C asked GSA and the FCC about the FCC's antenna requirements. Transcript at 18-20; Appellant's Exhibits 7, 9. In gathering information for a response, an FCC space planner, Joyce Bein, wrote two notes to her supervisor, Jeffrey Ryan, who was responsible for his agency's move to the building. Both notes demonstrated an understanding that the FCC's right to install antennas on the roof without additional cost was limited. The first note said, "If we stick with the current amount of antennas that were part of the lease attachment, we will not have to pay anything extra. If we start adding things, there may be an additional lease cost." Appellant's Exhibit 11; Transcript at 204, 212. The second note said, "Does anything exist in the SFO for the AV [FCC Audio Visual Center] equipment on the roof? So far, I've only seen allowances for the CIB [FCC Compliance Information Bureau] equipment. If nothing exists, Lessor may be looking for some additional lease money to accommodate these additional items." Appellant's Exhibit 14. Mr. Ryan did not consider either of these messages exceptional. Transcript at 212-15. After the FCC had provided some information, Mr. Grigg responded on March 27 by demonstrating that he, too, understood that the FCC's right to install antennas without extra cost was limited; he expressed to GSA a concern that "FCC 'documents' appear to indicate added antennas and appurtenances beyond Lease requirements." Appellant's Exhibit 16; Transcript at 21-23. Ultimately, on April 1, Mr. Ryan provided to Mr. Pagonis, and the latter forwarded to Mr. Grigg, a list of the antennas the FCC planned to install on the roof. The antennas were six in number: HF-log periodic, UHF-VHF #1, UHF-VHF #2, discone, FADF, and satellite dish. Appellant's Exhibits 18-19; Transcript at 30-33.

11. On April 23, 1997, Republic Properties Corporation sent to GSA "sketches . . . which outline [Republic's] interpretation of the Government structural, architectural, and electrical requirements for their antenna/satellite installation." Appeal File, Exhibit 71 at 1. Included among the package is an electrical sketch marked "partial roof plan." Id. at 13, 28. According to Vineet Singhal, a project manager and facilities coordinator for contractors to GSA and the FCC on this building, this sketch shows at least fourteen antennas on the roof. Transcript at 548-53. Mr. Singhal had nothing to do with this drawing at the time it was made, however. Id. at 561. He acknowledged that the drawing is an electrical sketch, not an antenna drawing. Id. at 587. Mr. Grigg, who was involved in the preparation and transmission of the package, explained that this drawing shows a number of electrical items which were to be available if needed for future antenna installations. Id. at 144-50.

12. According to Mr. Grigg, the FCC's right to install antennas on the roof without payment to the lessor was at that time limited to six antennas. "The six was a number that was widely viewed internally within the people that were doing the project and certainly in '97, '98 kind of timeframe. . . . Everybody was talking about the six." Transcript at 111; see also id. at 24, 40. By "the people that were doing the project," he meant Mr. Pagonis, GSA construction manager William Potterton, and "a number of FCC employees," in addition to persons associated with Parcel 49C. Id. at 111.

13. Dan S. Emrick, the director of the National Operations Group of the FCC's Enforcement Bureau, is responsible for his bureau's installation of antennas on the roof. Transcript at 401-04; see Findings 27-28. Mr. Emrick is a registered professional engineer with training and responsibility relating to antennas. Id. at 403. Mr. Emrick reviewed the drawing in Attachment A to SLA No. 1 in preparing a letter from the FCC to the National Capital Planning Commission, which work he began at the end of 1998. Transcript at 433-34, 442-44, 449. According to Mr. Emrick, the drawing shows eight different antennas. Id. at 454-55.

Supplemental Lease Agreement No. 4

14. During the spring of 1997, the parties began lengthy negotiations which culminated in the execution of SLA No. 4. Transcript at 38. This SLA, like SLA No. 1, increased considerably the amount of space covered by the lease and the amount of rent to be paid. Also like SLA No. 1, SLA No. 4 spoke to the antenna issue which is the subject of this case. 00-2 BCA at 153,404. The three gentlemen who negotiated SLA No. 1 were also the key players in the negotiation of this SLA. Transcript at 11, 165, 190, 235, 242.

15. By July, the FCC had told Parcel 49C that it wanted to install two additional antennas on the roof of the building. Mr. Grigg testified that he understood that by "two additional," the agency meant two more than were stated in the April 1, 1997, letter. (See Finding 10.) The FCC asked how much it would have to pay for the privilege of installing the two additional antennas. Transcript at 39-40, 111-12. On July 11, Mr. Hutchens sent to Mr. Pagonis a draft SLA which included this paragraph:

> D. The Lessor hereby grants to the Government a license to install two additional antennas on the roof of the building. The Government shall pay the Lessor an annual license fee of

> $24,000.00 for the right to install and maintain such antennas, which fee shall be payable in equal monthly installments in arrears commencing on February 1, 1998. . . .

Appellant's Exhibit 26 at 4. Mr. Grigg testified that he had inserted the figure of $24,000 to represent $1,000 per month per antenna. Transcript at 39.

16. Negotiations on SLA No. 4 continued, but they addressed issues other than the one with which we are concerned here. An August 2 draft contained no changes to the paragraph on antenna rights. Appellant's Exhibit 27 at 887; Transcript at 41-42, 174.

17. On August 15, the FCC's Mr. Ryan asked Mr. Pagonis to "provide the FCC with a written lease rate estimate for rooftop antenna space for antennas which are not currently covered under the Lease." Appellant's Exhibit 29. The contracting officer responded with the latest draft of SLA No. 4, noting that "it includes . . . additional licensing fees for additional antennas on the roof." Appellant's Exhibit 30.

18. After evaluating the draft, Mr. Ryan on October 3 expressed great concern to GSA about the antenna rights paragraph. He maintained, "This provision is not consistent with the terms of the lease and should be deleted." Appellant's Exhibit 37 at 4. Mr. Ryan made two contentions in support of his conclusion: (1) The original lease granted to the Government, without additional charge, "[r]ooftop space of at least 7,500 square feet of unobstructed space." The drawing of the roof in SLA No. 1 was consistent with that provision in that it showed more than 7,500 square feet being occupied by FCC antenna equipment. (2) Under a provision in the original lease,[2] if the Government is the sole occupant of the building, it may erect structures on the premises – including the entire roof. Under SLA No. 4, the Government would have the right to occupy all the office space in the building.[3] "Therefore, the Government should only be liable for the installation costs associated with antennas that cannot be mounted on one of the four towers required by the lease." Id. at 4-5.

19. Mr. Ryan's concerns were not reflected in the next draft of SLA No. 4. That draft, dated December 15, contained no substantive changes to the antenna rights paragraph; the draft modified the paragraph merely by redesignating it as "E," rather than "D." Appellant's Exhibit 38 at 778; Transcript at 46, 175-76.

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[2]Paragraph 14 of rider #2: "Subject to the Lessor's consent, the Government may during the existence of this lease, make alterations, attach fixtures, and erect structures or signs in or upon the premises hereby leased. The Lessor shall not unreasonably withhold consent. . . . . If the lease contemplates that the Government is the sole occupant of the building, for purposes of this clause, the leased premises include the land on which the building is sited and the building itself." Appeal File, Exhibit 1 at 375.

[3]The Government occupies all the office space in the building – approximately ninety-eight percent of the total space. Retail operations occupy the remainder of the building. Transcript at 743, 755-56.

20. The final draft of SLA No. 4 was dated January 3, 1998. It includes this revised paragraph regarding antenna rights:

> E. 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 set forth in Paragraph A above. 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, which fee shall be payable in equal monthly installments in arrears. . . .

Appellant's Exhibit 39 at 731. At the same time, the parties in the January 3 draft increased by $24,000 the base rate for operating cost adjustments. Transcript at 177-78, 314; see Appellant's Exhibit 39 at 729. This base rate is subject to increases and decreases commensurate with changes in the consumer price index. Appeal File, Exhibits 1 at 17-18, 5 at 3. Thus, in exchange for a license to install two additional antennas on the roof, Parcel 49C would not receive rent in the amount of $24,000, but would receive inflation adjustments on that amount. Additional payments, in the form of license fees, would be made only for additional antennas in excess of two. Transcript at 48, 177-78, 313-14. Messrs. Grigg and Hutchens both testified that Mr. Pagonis had requested that the previous version be modified in these ways so as to avoid problems with payment by the FCC to GSA. Id. at 47, 198-99. Mr. Pagonis testified that he had a full opportunity to review the language of this paragraph, consider it, and obtain whatever advice he needed before signing it. Id. at 290-91.

21. The exact language of paragraph E of the January 3 draft, and the increase in the base rate for operating cost adjustments, are contained in the version of SLA No. 4 which was executed by the parties on January 5, 1998. Appeal File, Exhibit 5 at 3, 5.

22. Mr. Pagonis testified that during the time that SLA No. 4 was being negotiated, he had in mind securing for the Government the right to install two additional antenna towers and pads, rather than two additional antenna devices. Transcript at 243-44, 248, 319. He acknowledged that during the negotiations, however, Mr. Hutchens never communicated a similar understanding. Id. at 306-07. Mr. Grigg, on the other hand, testified that during the negotiations, the conversation was always about antennas, not pads or towers. Id. at 800-01. Mr. Hutchens testified more specifically that based on his conversations with Mr. Pagonis, he knew that both of them understood that SLA No. 1 allowed the FCC to install six antennas on the roof, and that by using the term "two additional antennas," SLA No. 4 would allow the FCC to install eight without paying a fee. Id. at 166-67, 179-80, 196. Mr. Pagonis, when asked whether such conversations occurred, said that he did not recall having had them but could not definitively deny that they took place. Id. at 325.

23. The record contains a document entitled "Meeting Notes" pertaining to a meeting said to have been held on May 5, 1999. Appeal File, Exhibit 14. The document lists Messrs. Grigg, Hutchens, and Pagonis as having been among the attendees at the meeting. Id. at 1. The following sentence is contained among the "Notes": "Tim Hutchens stated that it was understood that the original lease included seven (7) antennas and SLA #4 listed two

(2) in addition, therefore a total of nine (9) antennas could be installed per the lease." Id. at 2.

24. By letter dated May 11, 1999, Mr. Hutchens wrote to the GSA contracting officer for this lease (now Robert W. Reed) on behalf of Parcel 49C. Mr. Hutchens maintained in this letter that in SLA No. 4, the parties had "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." Appeal File, Exhibit 17.

Number of antennas installed by Government on roof

25. When SLA No. 4 was signed, the building was still under construction and there were no antennas on the roof. Construction was completed during 1998. Stipulation No. 2 (Aug. 14, 2001); Transcript at 25. The FCC's Audio Visual Center and the commission's Enforcement Bureau are the only entities which have installed antennas on the rooftop since then. Transcript at 404.

26. In October 1998, the Audio Visual Center had four antennas installed on the roof. They were a three-meter satellite dish which receives television signals, a UHF receiver, a microwave transmitter, and a microwave receiver. (The last two of these antennas were actually owned and maintained by George Mason University, under agreement with the Audio Visual Center.) Transcript at 339-42, 375, 390-91, 514. The microwave receiver was removed in August 2001. Id. at 342, 370-71. Thus, three Audio Visual Center antennas remain on the roof. Id. at 343-48; Appellant's Exhibit 2 at 6, 7.

27. The Enforcement Bureau began installing antennas on the roof in February or March 1999 and completed its installation in July 1999. Since that time, the number of Enforcement Bureau antennas on the roof has remained unchanged. Transcript at 404-05, 435-36, 468-69. The bureau's Mr. Emrick explained that these antennas are "[g]enerally . . . used for receiving in response to complaints of interference or other radio-related difficulties for [FCC] personnel to attempt to achieve a resolution of that interference problem." Id. at 422.

28. Mr. Emrick testified that the Enforcement Bureau has seven antennas on the roof of the building. Transcript at 404-05. He identified them as an HF log periodic antenna (one antenna with several hundred wires and lines); a VHF antenna installation for two-way radios for talking to investigative vehicles (two antennas, each with four elements that work together to provide coverage for an omnidirectional (360 degree) pattern); two omnidirectional discone antennas (one VHF and one UHF); a combined VHF-UHF directional antenna; and an FADF antenna. Id. at 411-20; Appellant's Exhibit 2 at 1-5.

29. Mr. Emrick said that he "count[s] antennas by the function that they perform and by the number of transmission lines or feed lines that actually run from that antenna to the device which it services." Transcript at 409. He explained that an antenna may consist of more than one element, with an element being "part of an antenna that performs part of the function for which the antenna is designed." Id. at 470. Each element of an antenna with

more than one element, in his view, "could be used or function as a device for receiving and/or transmitting; but in many cases there are a number of elements of that nature combined to perform one function." Id. at 407. For example, he said, an FADF antenna consists of a device with eight sides and a top, and although each panel "is in and of itself an antenna," the panels "will not perform a . . . valuable function unless they all function together to perform the purpose of this antenna" – direction finding. Id. at 407, 478-79. Similarly, the hundreds of wires and lines that constitute the HF log periodic antenna could each function as an antenna, but because they function together to perform a single purpose, he counts them as one antenna. Id. at 412. And the four elements of each of the VHF antennas for two-way radios could function as antennas, but because of the way in which they are joined, each set of four is counted as one antenna. Id. at 414-15.

30. According to Mr. Emrick, a "feed," or "lead," is a coaxial transmission line that carries a radio signal from an antenna to a receiver or transmitter. Transcript at 412-13. He testified that one lead goes from each of the seven antennas described in Finding 28, other than the FADF antenna, to the Bureau's control room. Id. at 411-18. The FADF antenna is a remote control device which is controlled by a telephone line, rather than a coaxial cable. Id. at 419-20, 422. On redirect examination, Mr. Emrick said that of the seven Enforcement Bureau antennas, only three require electrical power, and the other four do not. Id. at 483. Mr. Emrick also testified the Bureau has twelve leads running to the roof of the Building; six are connected to antennas and six are spares. Id. at 421. On cross-examination, he said that at one time, prior to the initiation of this case, he and Mr. Grigg had looked at leads together, and he had told Mr. Grigg that the Bureau had twelve leads on the roof, of which ten were connected to the communications room. He had told Mr. Grigg at that time, "[O]ne lead/one antenna." Id. at 481-82. Audio Visual Center management officer Dann Oliver testified that four leads and one ribbon cable go to the roof for the use of the Center's antennas. Id. at 379-80. Mr. Grigg testified that at some time, he inspected the roof in the company of Messrs. Emrick and Oliver and GSA counsel and at that time found fifteen leads, of which thirteen appeared to be connected to antennas. Mr. Grigg recalls that it was at this time that Mr. Emrick told him that each connected lead went to one antenna. Id. at 53-56.

31. With one exception, the counts of antennas made by Mr. Oliver and Mr. Emrick are consistent with the counts made in letters drafted in part by Mr. Emrick and sent by the FCC to the National Capital Planning Commission and the United States Commission on Fine Arts in the summer of 1999.[4] The exception is that in these letters, the two George Mason University antennas are listed as a single antenna. Appeal File, Exhibits 138 at 2A, 143 at 4-5; Transcript at 351-52, 434-36.

32. Mr. Grigg believes, based on his review of photographs of antennas on the roof, that the Government has placed between thirteen and eighteen antennas there. Transcript at 57-59; see Appellant's Exhibit 2.

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[4]Mr. Singhal's testimony does not agree with this statement. According to Mr. Singhal, the FCC's letter to the National Capital Planning Commission lists twelve antennas. Transcript at 578-59.

33. According to the complaint filed by Parcel 49C in another case, "In or about February 2002, the Government installed thirteen Nextel antennas on or in the Building." Complaint, GSBCA 15932, ¶ 3. This case does not involve the Nextel antennas, the license fee for which is covered by a separate claim and case. Transcript at 556-59.

Value of a license to install an antenna on the roof

34. The Public Buildings Service (PBS) is the bureau within GSA which manages federally-owned and -leased buildings. United States Government Manual 2002-2003 at 439. PBS has issued a Pricing Desk Guide which "sets policy for the entire PBS-owned and leased portfolio, and provides pricing direction for both general cases and special circumstances." Appellant's Exhibit 3 at 2366. Among the "special cases" is "[a]ntenna site pricing." Id. at 2365. PBS is to "follow this Desk Guide's policies for all future PBS real estate transactions." Id. at 2366. One of those policies is "PBS pricing policy is to apply commercially equivalent rent charges for antenna sites." Id. at 2438.

35. Both contracting officer Reed and GSA expert witness Thorne, see Finding 40, concede that the Portals II Building has a long, clear vista across the Potomac River from Washington, making it an especially valuable site for the installation of antennas. Transcript at 715, 758.

36. Immediately adjacent to the Portals II Building is the Portals I Building. Portals I is owned and leased by Parcel 49B Limited Partnership (Parcel 49B), an entity which has some common ownership with Parcel 49C. In August 1999, Parcel 49B and GSA executed a license agreement allowing GSA to install on the Portals I Building for $1,000 per month, plus annual increases based on increases in the consumer price index, a single antenna (according to Parcel 49C) or a minimum of two antennas (according to GSA). Transcript at 60-63, 137, 180-81; Appellant's Exhibit 48; Appellant's Post-Hearing Brief at 32; Respondent's Post-Hearing Brief at 44. In March 2002, Parcel 49B and GSA executed three license agreements, each allowing GSA to install an antenna on the Portals I Building, for the benefit of a specific agency, also for $1,000 per month plus increases to account for inflation. Appellant's Exhibit 60. Parcel 49C states, and GSA does not contest, that the import of these license agreements is to increase the fee from $1,000 per antenna per month to $3,000 per antenna per month. Appellant's Post-Hearing Brief at 17. (Evidently, the three agencies use a single antenna.)

37. In October 1999, Parcel 49C executed a license agreement with Washington, D.C. SMSA Limited Partnership under which Bell Atlantic Mobile, Inc. (now Verizon Wireless) might install "three sets of three antennas (9 total)" on the roof of the Portals II Building and wires running through the building "for in-building service." Under this agreement, Washington, D.C. SMSA Limited Partnership initially paid Parcel 49C $108,000 per year, and that fee escalates annually by the increase in the consumer price index or 2.5 percent, whichever is larger. Appellant's Exhibit 51, especially at 540, 549-52, 581; Transcript at 63-65.

38. Mr. Emrick, who has inspected the Verizon Wireless rooftop installation, testified that it consists of nine antennas, each of which contains two elements – a receiving element and a transmitting element. Transcript at 409-11, 472-74. Government contract

project manager Singhal testified that Verizon Wireless has nine antennas on the roof and forty-seven antennas inside the building. Id. at 503-04. Mr. Grigg explained that the internal antennas were installed for the benefit of Parcel 49C and its tenants, so that building management employees and FCC personnel could have cell phone service within the building. Consequently, he stated, Parcel 49C did not charge for the installation of the internal antennas; the entire charge is for the rooftop antennas. Id. at 790-91.

39. Mr. Grigg testified that Parcel 49C is negotiating with Cingular Communications a license agreement under which that firm would pay the lessor $1,100 per month, plus adjustments for inflation, for the installation of each antenna Cingular might place on the roof of the Portals II Building. Transcript at 65-66.[5]

40. At hearing, GSA tendered Oakleigh J. Thorne as an expert witness in the field of market rental pricing of office space within the Washington, D.C., area where rooftop antenna devices are present. Transcript at 655. The presiding judge accepted Mr. Thorne as an expert in this area, but questioned whether his expertise is relevant to the pricing of antenna licenses themselves. Id. at 658-59. Mr. Thorne is a highly experienced and distinguished real estate appraiser, but his appraisals are to estimate the market value of buildings, not antenna licenses. Id. at 630-37. He has never been proffered as an expert in the valuation of antenna licenses, has not written any articles on the subject, has no training regarding antennas, and has never been involved in the business valuation of an antenna license. Id. at 642-51, 669-70.

41. Mr. Thorne's opinions regarding the value of rooftop antenna licenses are based on a telephone survey of forty people who lease office buildings in the Washington, D.C., metropolitan area. Transcript at 663; Appeal File, Exhibit 149 at 3. Only eight of those people provided substantive responses to him, and none of them provided documentation regarding their responses. Transcript at 719. He ultimately concluded, on cross-examination, "Not only is the leasing of rooftops not very standard, but also the practice of how landlords deal with the wireless communication industry and the satellite industry, has no standards." Id. at 720-21.

42. Mr. Thorne testified that in his opinion, the fair market value of an antenna license on the Portals II Building, without any discounts, is between $1,000 and $2,000 per month. He believes, however, that the Government should be entitled to an eighty to ninety percent "market discount" on that amount. Transcript at 701-02, 726; Appeal File, Exhibit 149 at 27. Such a discount theory is appropriate, Mr. Thorne said, as an inducement to a prospective tenant to rent in a building, as an inducement to a tenant to stay in a building, or

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[5]The parties have included in the record, subject to a protective order, documents which recite the prices GSA pays for rooftop antenna licenses on other buildings, some of them in the Washington metropolitan area. Appellant's Exhibits 41, 50, 52 (especially at 131-32). We do not print here the specific prices cited in these documents, but do note that the prices paid by GSA for antenna licenses on the Portals I Building and by Washington, D.C. SMSA Limited Partnership for antenna licenses on the Portals II Building, and the prices assertedly agreed to by Cingular Communications for antenna licenses on the Portals II Building, are within the range of the prices cited in the documents.

as good partnering. Transcript at 709. The witness was unable to identify a single instance, however, in which the landlord of a tenant which is committed to a twenty-year lease (as GSA is here[6]) has licensed antenna installations by that tenant at a highly discounted rate. Id. at 727. Further, he acknowledged that in such a situation, the lessor does not need to provide an inducement to the tenant to rent or stay in a building. He knew of only two examples of discounts due to "good partnering," and could not show that partnering was the true cause of the discounts in either of those instances. He acknowledged that as a function of supply and demand, if few rooftops are available for antennas and a tenant needs to install an antenna on a roof, the landlord can charge whatever the market will bear for an antenna license. Id. at 712-18.

43. Mr. Thorne agreed that what the Government is paying for communication devices on various buildings would be highly relevant to his analysis. Transcript at 677. Nevertheless, he did not consult the PBS Pricing Desk Guide, or documents regarding rooftop antenna license fees being paid by GSA generally, or even the fees being paid by GSA for antenna licenses at the Portals I Building, in preparing his expert report. Id. at 670-71, 676-91; see Findings 34, 36, 39 n.5. Nor did he review the license agreement for the Verizon Wireless antennas on the Portals II Building. Id. at 692-93; see Finding 37.

44. Mr. Thorne found on the Internet in November 2000 an article entitled "Revenues from the Rooftops," which states, "Exactly how much revenue a property owner or manager can make renting out rooftop sites depends somewhat on the market and mostly on the type of devices a company wants to erect. . . . On average, you can count on $10,000 to $25,000 per system per annum." Appellant's Exhibit 58 at 120. An article which appears in the same issue of a publication that contains one of Mr. Thorne's articles says, "Too often, owners and their agents give tenants rooftop antenna rights . . . for little or no rental, giving up the right to significant future revenue streams from that space during the lease term." Appellant's Exhibit 60 at 64. The witness said that he has no basis on which to formulate an opinion as to the correctness of either of the statements in either of these articles. Transcript at 732, 736.

The claim and the contracting officer's decision

45. By letter dated September 21, 1999, Parcel 49C submitted to GSA's contracting officer for this lease, Mr. Reed, a certified claim in the amount of $1,000 per month for each antenna in excess of eight that the Government installs on the building. The claim was signed by Mr. Hutchens; attached to it is a certification by Mr. Grigg. Appeal File, Exhibit 20. In the claim, Parcel 49C maintained that SLA No. 1 "eliminated the specific demise (lease) of 7,500 square feet of rooftop space . . . and instead incorporated . . . a roof plan which showed roof locations for four (4) antennas and two (2) satellite dishes." Id. at 1. In SLA No. 4, Parcel 49C continued, the parties agreed that the Government could install two more antennas, for a total of eight, without paying a license fee. Id. at 2.

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[6]The original lease provided for a twenty-year term, to begin at a future "composite lease commencement date" reflecting the dates on which GSA accepted the various phases of the premises. Appeal File, Exhibit 1 at 1, 372. The parties ultimately set the lease commencement date as October 17, 1997. Id., Exhibit 11.

46. The contracting officer said on November 18 that he had received the claim on November 15. Appeal File, Exhibit 21; see id., Exhibit 20 at 1 (showing date stamp). By letter dated January 12, 2000, the contracting officer denied the claim. Notice of Appeal, Attachment. According to the decision, the original lease "in no way limits the amount of antennas allowed to be installed by the Government in the 7,500 square feet on the roof," and SLA No. 1 "did not eliminate the Government's right to the rooftop space." Appeal File, Exhibit 22 at 1-2. According to Mr. Reed, the rooftop drawing in Attachment A to SLA No. 1 "merely is a sketch of the types of platforms to be used to house the various antennas and satellite dishes." Id. at 2. Through SLA No. 4, he continued, "GSA obtained the right to construct two additional platforms, not two additional antennas." Id. Further:

> [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 [square] feet of rooftop space. Mr. Pagonis 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

The three questions we consider in this decision are: (1) How many antennas did the lease, as amended, allow the Government to install on the roof without making additional payment to the lessor? (2) How many antennas has the Government put on the roof at various points in time? (3) What is the fair value of a license to install an antenna on this rooftop?

(1) The original lease allowed the Government to use "rooftop space of at least 7,500 square feet of unobstructed roof space with no dimension of less than 60 feet." Finding 2. Although the original lease listed various types of antennas which might be installed on the roof, id., it did not limit the number of antennas which the Government might place there.

When the parties executed Supplemental Lease Agreement No. 4, they provided that the Government might "install two additional antennas on the roof of the building" without paying a license fee. Findings 20-21. As we said in our interlocutory decision, the phrase "two additional" begs the question, Additional to what? 00-2 BCA at 153,407. Something must have transpired between the signing of the original lease and the date of SLA No. 4 which created a basis from which the "two additional antennas" may be counted. Parcel 49C has consistently maintained that the basis is found in SLA No. 1, and in particular, in the "Rooftop/FCC Antenna Level" drawing included in Attachment A to that SLA. In the interlocutory decision, we said that on the basis of the limited record then available, we did not have enough information to reach the conclusion proposed by the lessor. We suggested that one possible basis was the number of antennas on the roof at the time SLA No. 4 was executed. Id. We now know that there were no antennas on the roof when SLA No. 4 was

executed, Finding 25, so that number makes no sense as a basis from which "two additional" might be taken. We turn elsewhere in a search for that basis.

Our inquiry begins with the import and contents of SLA No. 1, about which, thanks to a full exposition through hearing testimony and an extensive documentary record, we now have considerably more information than we did when we ruled on the cross-motions for summary relief. That SLA included, in its Attachment A, a drawing of the rooftop level. Finding 6. We agree with Parcel 49C that the depictions on this drawing define the space leased to the Government. GSA's suggestion that the drawing merely fulfills the original lease's requirement that the lessor "provide a diagram of the rooftop area designated for installation of FCC antennas" (see Finding 2, ¶ 3) is not persuasive. The Attachment is definitively part of SLA No. 1. It may be possible to read paragraph 1 of that SLA, standing alone, to say that the rooftop drawing does not define the Government's space on the roof, so as to supersede the original lease's requirement for the provision of at least 7,500 square feet of unobstructed space. This is because the rooftop space is not included in the number of net usable square feet which the SLA provides will be leased to the Government and shown in Attachment A. See Finding 4. It is not possible to read the entire SLA as conveying this understanding, however, because paragraph 7 of the SLA includes all drawings within the attachment as satisfying the requirements of the lease, and says that by accepting those drawings, the Government agreed that any future changes which increased the lessor's cost would be compensable. See Finding 5.[7]

The rooftop drawing in Attachment A to SLA No. 1 clearly contains the names of eight antennas – HF log periodic, dipole, FADF, VHF, one-meter dish, discone, three-meter dish, and VHF/UHF. Finding 6. While we are comforted in making this conclusion by the testimony of the FCC's Mr. Emrick, the only witness at our hearing with extensive experience with antennas, see Finding 13, we need only our own eyes, as informed by the knowledge we have gained through our hearing in this case, to reach the conclusion.[8] The testimony of Messrs. Grigg and Hutchens, that the drawing shows six antennas, is not credible. These individuals have no particular knowledge of antennas, Finding 7, and their count is obviously flawed in two ways. First, it disregards completely the VHF antenna shown clearly on the

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[7]By accepting this drawing, the Government received more space than the minimum provided in the original lease. The original lease required the lessor to provide "at least 7,500 square of . . . roof space." Finding 2. By the Government's own admission, the drawing shows that Parcel 49C will provide more than 7,500 square feet of such space. Finding 18.

[8]Parcel 49C insists that we consider Mr. Emrick's testimony on this point to be "inadmissible or, at the very least, without any evidentiary weight" because he "had no involvement in the negotiation or execution of SLA No. 1, and has no knowledge of the parties' intent in executing SLA No. 1." Appellant's Post-Hearing Reply Brief at 2 n.1 (citing Federal Rule of Evidence 701 and Belber v. Lipson, 905 F.2d 549, 551 (1st Cir. 1990)). The contention is inapposite because the testimony was not offered for the purpose of illuminating the parties' intent; instead, it simply recounts the witness' understanding of the drawing at the time he used it for a different purpose. Even if we were to disregard the testimony, however, our conclusion as to the number of antennas shown on the drawing would not change because the conclusion is not based on the testimony.

drawing. Second, it considers the discone and dipole antennas to be a single antenna. See Finding 8. The labels "discone" and "dipole" are shown a distance from each other on the drawing, rather than being joined (as is "VHF/UHF"). Further, while it is conceivable that a "discone/dipole" antenna might exist (Mr. Emrick admitted of this possibility, though he said he had never heard of such an antenna, Transcript at 437, 477), a discone antenna and a dipole antenna look completely different from each other. A discone is an omnidirectional antenna, shaped like a partially-opened umbrella (without cloth covering) held vertically, whereas a dipole is a long wire antenna, shaped like a clothesline with the transmission line coming from about the middle. Id. at 416, 436; Appellant's Exhibit 2 at 3. Also, in listing types of antennas which might be installed on the roof, the original lease showed discone and dipole as distinct from each other. Finding 2 (¶ 3).

Nor can we agree with Parcel 49C that the testimony shows conclusively that in drafting SLA No.1, the negotiators intended that the Attachment A rooftop drawing depict six antennas. We grant that Parcel 49C's Mr. Grigg said that he meant to put six antennas on the drawing, Finding 8, and that the lessor's attorney, Mr. Hutchens, said that during negotiations with GSA contracting officer Pagonis regarding SLA No. 4, both he and Mr. Pagonis understood SLA No. 1 to restrict to six the number of antennas on the roof without further charge, Finding 22.[9] Whether the parties ever reached this understanding is dubious, however. Though Mr. Pagonis did not deny Mr. Hutchens' version of the conversations, he could not corroborate it, either. Finding 22; see also Finding 9. More telling, positions later taken by Mr. Grigg and Mr. Hutchens themselves cast doubt on Parcel 49C's stance on this matter. The lessor has consistently maintained that the base number above which the Government could place "two additional" antennas on the roof free of charge was specified in SLA No. 1. Yet, during May 1999, the lessor asserted variously that the base number was either five or seven – not six. Findings 23-24.

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[9]During the hearing, Parcel 49C's trial counsel asked Mr. Grigg and Mr. Hutchens about discussions each of them had with Mr. Pagonis. When GSA's lawyer attempted to ask these witnesses about conversations they had with each other, Parcel 49C's trial counsel objected that the responses were privileged as conversations between attorney and counsel, and the Board sustained the objection. Transcript at 125-30, 184-85. GSA maintains that the Board committed error by prohibiting a full examination of these witnesses. The Government says, "The remedies available to rectify this error require affording Respondent the opportunity to explore all discussions and information exchanged between Mr. Grigg and Mr. Hutchens concerning the factual matters testified to or strike from the record all testimony relating to or provided by Mr. Hutchens concerning these areas." Respondent's Post-Hearing Brief at 48-49. We continue to believe that our ruling was correct, in that it precluded inquiry into conversations which were conducted for the purpose of discussing and developing negotiating positions. If the ruling was incorrect, however, it would make no difference to our analysis in this opinion. The only matter referenced in the decision on which Mr. Hutchens' testimony was not cumulative of Mr. Grigg's is the one in Finding 22 regarding Mr. Pagonis' understandings, and we do not accept this testimony as conclusive. Thus, if we were to follow GSA's advice and strike from the record all testimony relating to or provided by Mr. Hutchens concerning his discussions with Mr. Grigg, nothing contained in the opinion would change.

Although we cannot agree with Parcel 49C as to the number of antennas specified in SLA No. 1, we do hold that the lessor is correct in its position that the base number is the one prescribed in that SLA. After SLA No. 1 was executed, but before any further developments to which the parties have drawn our attention, the parties both indicated an understanding that the number of antennas which the Government could install on the rooftop without further charge was limited. An electronic mail message from an FCC space planner to her supervisor specifically tied the limitation to a "lease attachment." Finding 10. The only document or event in our record, between the date of the original lease and the date of SLA No. 4, which contains a finite number of antennas, is the FCC's letter of April 1, 1997, listing six antennas. Id. Although Mr. Grigg's testimony may be taken to mean that he at one point assumed that the letter established the base number, the FCC thought that something in the lease itself created this number, and a memorandum from Mr. Grigg himself, written before the list was created, supports the FCC's position. See Findings 10, 15, 17. We conclude that the rooftop drawing contained in SLA No. 1 is the best choice available as the source of the number. And that number, as we have found, is eight. We explain below why, in our view, all alternatives which have been suggested by the parties make no sense.

GSA has suggested several of these alternatives. One theory is that the base number refers to antenna towers or pads, rather than antennas themselves. As we held in our interlocutory decision, 00-2 BCA at 153,406, that theory is not convincing. The terms "antenna," "tower," and "pad" mean very different things – a device that transmits or receives radio waves, a structure on which an antenna may be placed, and a solid base on which a tower or antenna may be mounted, respectively – as is made clear in the lease. See Finding 2. We give the words of a contract their ordinary and commonly accepted meaning unless it is shown that the parties intended a different meaning. Andersen Consulting v. United States, 959 F.2d 929, 934-35 (Fed. Cir. 1992); Brunswick Corp. v. United States, 951 F.2d 334, 336 (Fed. Cir. 1991); Hol-Gar Manufacturing Corp. v. United States, 351 F.2d 972, 976 (Ct. Cl. 1965); American Commercial Contractors v. General Services Administration, GSBCA 11713, 94-3 BCA ¶ 26,973, at 134,351; cf. Texas Digital Systems, Inc. v. Telegenix, Inc., No. 02-1032 (Fed. Cir. Oct. 16, 2002) (in analyzing the terms used in a patent claim, the terms "bear a 'heavy presumption' that they mean what they say and have the ordinary meaning that would be attributed to those words by persons skilled in the relevant art"). GSA has not persuaded us that the parties intended the term "antenna," as used in this lease, to mean something other than its ordinary meaning. Even if Mr. Pagonis had towers or pads (he does not make clear which) in mind when he was negotiating SLA No. 4, he did not communicate that understanding to Parcel 49C. See Finding 22. We explained earlier that the unexpressed, subjective intent of one party may not overcome the unambiguous meaning of a contract term. 00-2 BCA at 153,407. We cannot rely on Mr. Pagonis' testimony on this point, any more than we could rely on the unexpressed views of Messrs. Grigg and Hutchens to find that SLA No. 1 eliminated various lease requirements. See Finding 9. Further, given the explicit cautions in a memo the FCC sent to Mr. Pagonis while negotiations were ongoing – including the strongly-worded advice that the SLA should be drafted to ensure that the Government is liable for costs associated only with certain antennas – the contracting officer was on notice that the application of an early version of the SLA was to antennas, not towers or pads. See Finding 18.

Another Government theory is that even if the base number is of antennas, that number is infinite. This idea is founded on four separate thoughts. Two of them involve

application of principles of contract law expressed in the Restatement of Contracts. Paragraph 20(1) of the Restatement says:

> There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to the manifestations and
>
> (a) neither party knows or has reason to know the meaning attached by the other; or
>
> (b) each party knows or each party has reason to know the meaning attached by the other.

Restatement (Second) of Contracts ¶ 20(1) (1981). Paragraph 153 says:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in ¶ 154 ["When a Party Bears the Risk of a Mistake"], and
>
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake.

Id. ¶ 153.

These principles cannot be applied successfully in this case. As to the first principle, mutual assent to an exchange is not found where the parties attach materially different meanings to key contract terms and one of two conditions has occurred. Neither of the conditions occurred here. GSA should have known, from the language of the SLA and from the FCC's cautionary memorandum, that Parcel 49C attached the usual meaning to the term "antenna." There is no evidence that Parcel 49C knew or had reason to know that GSA attached to the term any meaning different from the one Parcel 49C itself attached to it. See Finding 18. The parties engaged in lengthy negotiations regarding the SLA that contains this term, and by Mr. Pagonis' own admission, he never conveyed to the lessor the thought that "antenna" might mean something different to him from the usual meaning. Finding 22. And as we have just explained, if Mr. Pagonis did not understand that the SLA applied to antennas themselves, he should have had such an understanding.

Application of the second Restatement principle, regarding mistake, is not appropriate, either. Under this principle, a contract can be voidable if a party's mistake in entering into the contract went to "a basic assumption on which he made the contract" and the mistake "has a material effect on the agreed exchange of performances that is adverse to him." In this situation, the contract is voidable if one of two conditions has occurred. Here, the mistake

(if any) did not go to a basic assumption and did not have a material effect on the exchange of performances. The main purpose of SLA No. 4 (like SLA No. 1) was to increase considerably the space to be rented and the rent to be paid, see Findings 4, 14; the antenna issue was relatively minor in importance when the lease was amended. Further, neither of the specified conditions occurred. There is no basis for concluding (and GSA has not even suggested one) that enforcement of the contract against the Government would be unconscionable. And as we explained with reference to the first Restatement principle, Parcel 49C had no reason to suspect that GSA had made any mistake.

GSA's third justification for holding that the contract does not restrict the number of antennas the Government may place on the roof free of charge is based on paragraph 14 of rider #2 of the original lease. GSA reads this paragraph to allow the Government, as the sole occupant of the building, to attach an unlimited number of fixtures to and erect an unlimited number of structures on any part of the premises. Respondent's Post-Hearing Brief at 33; see Finding 18 n.2. As Parcel 49C observes, there are two significant problems with this approach. First, the Government may have occupied all the office space in the building, but it was not the sole occupant; retail establishments were present, too. Finding 18 n.3. Second, paragraph 14 must be read in context with the supplemental lease agreements, and SLA No. 1 (by limiting the rooftop space available to the Government) and SLA No. 4 (by requiring payment of a license fee when a finite number of antennas is exceeded), both of which were executed subsequent to the original lease, constrain any rights granted to the Government in paragraph 14.

GSA's fourth and last attempt to convince us that it should not have to pay for installing any number of antennas on the roof is that the term "additional antennas" is ambiguous, and that under the rule of contra proferentem, it should be construed against the drafter – Parcel 49C, through its counsel Mr. Hutchens. See Finding 15. Even if the term is ambiguous, this rule does not help the Government in this case. The principle of contra proferentem is intended to apply to contracts of adhesion, so where a contract is fully negotiated and bargained for, the principle does not apply. Prince George Center, Inc. v. General Services Administration, GSBCA 12289, 94-2 BCA ¶ 26,889, at 133,847 n.9 (citing Tulelake Irrigation District v. United States, 342 F.2d 447, 453 (Ct. Cl. 1965)). Although Mr. Hutchens may have created the first draft of SLA No. 4, this supplemental lease agreement went through several drafts, over several months, before it was accepted by both parties. Findings 16, 19-20. After being advised of the FCC's concerns about the initial draft, GSA's Mr. Pagonis ultimately objected to the paragraph regarding antenna license fees, and at his insistence, the paragraph was significantly rewritten. Findings 18, 20. The two parties shared responsibility for the final product.

In addition to rejecting GSA's theories in support of an unlimited right to install antennas on the roof without charge, we also reject the two suggestions as to finite numbers other than eight which might serve as the base from which "two additional" should be calculated.

GSA suggests that the number could be the fourteen antennas contractor employee Singhal counted on a construction drawing produced in April 1997, after SLA No. 1 had been executed but before negotiations toward SLA No. 4 began. See Finding 11. This idea is insupportable. The construction drawing was made only to depict where electrical items

should be installed; those items were to be placed on the roof so that an unknown number of antennas might be installed and connected to them in the future. Finding 11. Thus, the drawing tells us nothing about any specific number of antennas which might be installed at any particular time. Further, Mr. Singhal's counts are suspect. In reviewing this drawing, he counted antennas using the same approach he used in counting antennas listed on another document, Transcript at 580, and that approach yielded an excessive number as to that other document. Finding 31 n.4; see also discussion below regarding question (2), as to the number of antennas on the roof.

Parcel 49C contends that the number should be six. Some of the evidence to which the lessor points in support of this number we have already found wanting – the testimony of Mr. Grigg that he intended the SLA No. 1 rooftop drawing to reflect FCC plans to install six antennas on the roof; the understanding of Messrs. Grigg and Hutchens that the drawing depicts six antennas; and the perception by those two individuals that Mr. Pagonis shared their views on this matter. See Findings 8, 22. Parcel 49C also notes that in April 1997, the FCC listed six antennas as constituting its plans for a rooftop antenna installation, and that during the next year or so, according to Mr. Grigg, "Everybody was talking about the six." Findings 10, 12. We do not find the additional evidence compelling, either. The FCC list was simply a planning document; there is no indication that it was ever considered by anyone as constraining the number of antennas which could be installed without extra payment to the lessor. And if everybody was talking about six, that number could well have represented nothing more than the FCC's intended installations at the time.

(2) We have concluded, in answering the first question posed by this case, that when SLA No. 4 allowed the Government to install "two additional antennas" on the roof without paying a license fee, it effectively allowed the Government to install ten (eight plus two) antennas without fee. We now turn to the second of our three questions, How many antennas has the Government put on the roof at various points in time? According to Parcel 49C, the answer to this question is twenty-four until the FCC's Audio Visual Center removed one of its antennas, Finding 26, and twenty-three thereafter. According to GSA, the answer is eleven until the removal and ten afterwards.

The parties count antennas differently, based on their distinct understandings of the meaning of the term "antenna." An "antenna," as we said earlier, is a device that transmits or receives radio waves. Parcel 49C would have us interpret this definition strictly, such that any device on the roof which transmits or receives radio waves is itself an antenna. GSA would have us interpret the term more practically, such that elements which function as parts of a whole are not themselves considered antennas; instead, the combination of elements is an antenna.

We agree with GSA on this issue. In counting antennas functionally, rather than by element, we are not reconsidering or modifying our prior definition of the term "antenna." We are instead simply giving to that definition a logical interpretation which avoids the need to dissect each and every transmitter and receiver of radio waves to determine which of its parts is capable of transmitting or receiving on its own. See Finding 29. This is, in effect, the same interpretation which Parcel 49C gives to the term in evaluating the SLA No. 1 rooftop drawing and the Verizon Wireless configuration on the roof. When viewing the rooftop drawing, Parcel 49C counts the FADF antenna, for example, as one antenna, even

though that antenna actually has nine separate panels, each of which is individually capable of transmitting and/or receiving radio waves. See Findings 8, 29. As to the Verizon Wireless configuration, Parcel 49C allowed the installation of nine rooftop antennas, and though each of the installed antennas has two separate elements, the lessor counts the total number as nine rather than eighteen. See Findings 37-38.[10]

Parcel 49C would have us count some objects (such as the FADF antenna) as one antenna for the purpose of determining how many antennas may be placed on the roof without extra charge, but as multiple antennas for the purpose of determining how many antennas have actually been installed. As GSA points out, counting in this inconsistent way is illogical. Further, Parcel 49C does not follow the procedure at all times. Although the Enforcement Bureau's HF log periodic antenna has hundreds of elements, by the admission of the Bureau's Mr. Emrick, Finding 29, the lessor does not count it as hundreds of antennas. We do not accept Parcel 49C's counts of antennas on the roof.

The FCC installed four Audio Visual Center antennas on the rooftop in October 1998. Finding 26. In February 1999, the FCC began installing Enforcement Bureau antennas on the roof. The Enforcement Bureau installation was completed in July 1999 with the placement of a seventh antenna. Findings 27-28. The number of antennas remained constant until August 2001, when one of the Audio Visual Center antennas was removed. Findings 26-27, 31. Thus, the number of antennas installed by the Government on the roof reached the no-charge limit of ten in July 1999, was eleven from July 1999 to August 2001, and has been back at the limit of ten since August 2001.[11]

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[10]Mr. Emrick testified that antennas may be counted not only functionally, but also by the number of coaxial transmission lines (or "feeds" or "leads") that run from antennas to devices they serve. Finding 29. The testimony about leads is so muddled, however, that we cannot follow it to any soundly-based conclusion. Mr. Emrick testified that the Enforcement Bureau has twelve leads going to the roof. Finding 30. Of these, he said initially that six are connected to antennas and one of the Bureau's antennas does not need electricity to operate. Id. This would account for seven antennas, but show that counting by the number of leads is inappropriate because it necessarily ignores antennas that do not need electricity to operate. Later, he said that only three of the Bureau's antennas need electrical power. Id. If that is so, one wonders why leads would be connected to six, rather than three, of the antennas. He also acknowledged having said that ten of the leads are connected to antennas. Id. We cannot reconcile all these statements. The Audio Visual Center's Mr. Oliver testified that four leads go to the roof for the use of the Center's antennas, but that the Center has only three antennas on the roof. Findings 26, 30. The discrepancy between four leads and three antennas may be explained by the fact that the number of Center antennas has been reduced from four to three, such that one lead is no longer used. Mr. Grigg's count of fifteen leads differs from the FCC witnesses' count of sixteen (twelve for the Bureau, four for the Center), and his count of thirteen connected to antennas can be reconciled with the FCC witnesses' testimony only if we accept one of Mr. Emrick's alternative statements. We have no reason to accept this statement rather than either of the other two.

[11]These counts do not include any Nextel antennas. Those antennas are the subject of a (continued...)

(3) Through our answers to the first two of the three questions posed in this case, we have concluded that the Government owes Parcel 49C a license fee for having installed one antenna more than the no-charge limit of ten during the months of July 1999 through August 2001. Under SLA No. 4, the license fee was to be "mutually negotiated by the Lessor and the Government." Findings 20-21. The parties have not been able to negotiate a license fee. It remains for us to set the fee.

Parcel 49C suggests that the fee should be $1,000 per antenna per month, beginning in July 1999, with that number to be escalated by five percent in November of each year. GSA maintains that the value of the Government's installing an antenna on the roof of the building is no more than $200 per month per antenna.

In support of its position, Parcel 49C points to the following facts: GSA's pricing policy for leasing properties, including antenna sites, "is to apply commercially equivalent rent charges for antenna sites." Finding 34. The building in question, Portals II, has a long, clear vista across the Potomac River from Washington, making it an especially valuable site for the installation of antennas. Finding 35. The value of a license to install an antenna on the adjacent Portals I Building has at all times since August 1999 been accepted by GSA as between $500 and $3,000 per month per antenna, plus increases to account for inflation. Finding 36. The value of a license to install an antenna on the Portals II Building itself has at all times since October 1999 been at least $1,000 per month per antenna, plus inflationary adjustments, as accepted by private businesses which have installed or plan to install antennas there. Findings 37-39.

GSA bases its position on the testimony of its expert witness, Oakleigh J. Thorne. Mr. Thorne opined that the fair market value of an antenna license on the building is $1,000 to $2,000 per month per antenna, less a "market discount" of eighty to ninety percent. Finding 42. This yields a range of $100 ($1,000 discounted by ninety percent) to $400 ($2,000 discounted by eighty percent).

In our judgment, Parcel 49C has far the better of this argument. The valuations it advances are for licenses closely comparable to the one GSA seeks for the roof of the Portals II Building. These valuations are also within the range of license fees paid by GSA for rooftop antenna licenses on other buildings in the Washington metropolitan area and elsewhere. Finding 39 n.5. In addition, the figure of $1,000 per month per antenna is consistent with the increment to the base on which operating cost adjustments are made, as agreed to by the parties for the "two additional antennas" which SLA No. 4 allowed the Government to place on the roof without extra charge. Finding 20; see also Finding 15.

GSA's suggestion that the prices of licenses to commercial entities are not comparable because those entities use antennas for financial gain, but the Government does not, is not persuasive. Not only is the Government treated (with rare special exceptions) like any other participant when it enters the commercial marketplace, see, e.g., Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604, 607-08 (2000); United States v.

(...continued)
separate case. Finding 33.

Winstar Corp., 518 U.S. 839, 895 & n.39 (1996) (plurality opinion) (citing cases), but GSA's own policy mandates that this principle be followed in pricing antenna site licenses, Finding 34. We also reject GSA's contention that the license fee paid by one of the commercial entities (for Verizon Wireless antennas) should be divided among fifty-six antennas rather than nine. We credit Mr. Grigg's testimony that all but nine of the Verizon Wireless antennas were installed for the benefit of Parcel 49C and its tenants, so the license fee paid for the Verizon Wireless antennas should not be considered to encompass those other antennas. Finding 38.

The basis for GSA's position is weak. Its expert witness, Mr. Thorne, is experienced in appraising the market value of office buildings in the Washington area, but has no expertise in appraising the value of licenses to install antennas on those buildings. Finding 40. His opinions were based on a telephone survey which yielded only eight substantive responses, and he had no documentation of any of those responses. Finding 41. Mr. Thorne did not consult documents which he conceded were highly relevant to the subject he was asked to address, and he had no opinion on articles he found which spoke directly to the subject. Findings 43-44. His belief that the market value of an antenna license to a building tenant should be deeply discounted was premised on the existence of three conditions, none of which apply to the situation presented by GSA's tenancy in the Portals II Building. Finding 42. In short, we ascribe no significance to Mr. Thorne's testimony other than to note, as Parcel 49C does, that his base valuation of a license fee as $1,000 to $2,000 per month per antenna supports the valuation proposed by the lessor.

We make only a slight modification to the fee proposed by Parcel 49C. We think that an escalation of five percent per year is out of keeping with the inflationary adjustments provided generally in the lease between the two parties. The lease's base rate for operating cost adjustments, which per SLA No. 4 applies to the base which includes an increment for the Government's installation of "two additional antennas," provides for adjustments commensurate with changes in the consumer price index. Findings 20-21. Like adjustments are included in the license agreements for the Government's installation of antennas on the roof of the Portals I Building, Finding 36, and in the proposed agreement for the installation of antennas on the roof of the Portals II Building by Cingular Communications, Finding 39. This is a more appropriate escalation factor for the license fee for additional Government antennas on the roof of Portals II.

Decision

The appeal is **GRANTED IN PART**. GSA shall pay to Parcel 49C a license fee for the Government's installation of one antenna more than the ten permitted by the lease (as amended by SLA Nos. 1 and 4) without additional charge, during the months beginning in July 1999 and ending in August 2001. The license fee shall be $1,000 per month, with adjustments commensurate with changes in the consumer price index. The adjustments shall be made in the same manner, and at the same times, as the adjustments made under the lease

for operating costs. Interest is due on these payments, at the rates referenced in the Contract Disputes Act, from November 15, 1999, to the date of payment. 41 U.S.C. § 611 (2000); see Finding 46.

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STEPHEN M. DANIELS
Board Judge

We concur:

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EDWIN B. NEILL
Board Judge

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CATHERINE B. HYATT
Board Judge