Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

CROSS-MOTIONS FOR SUMMARY RELIEF DENIED: December 14, 2004

GSBCA 16377

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 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) is a lessor of office space to the General Services Administration (GSA). The parties disagree as to the appropriate markups on the costs of installation of security bollards at the building in which the space is contained. (A bollard, for those not familiar with the landscape of Government buildings in the post-September 11, 2001, era, is "any of a series of short posts set at intervals to exclude motor vehicles from an area." Webster's Third New International Dictionary 248 (1986).) Each side has filed a motion for summary relief as to this matter, with Parcel 49C's motion being denominated one for partial summary relief only.

We deny both motions. The lease does not require that markups agreed to for "above SFO [solicitation for offers] standard work requested by the Government" be applied to the bollard installation work, as contended by Parcel 49C. Nor is the markup for the bollard work necessarily a single ten-percent markup, as contended by GSA.

Uncontested Facts

A. The following facts have been agreed to by the parties in their submissions.

On August 12, 1994, Parcel 49C and GSA entered into a lease for office space in the Portals II Building in Washington, D.C. Appellant's Statement of Uncontested Facts (Uncontested Facts) ¶ 1; Appeal File, Exhibit 1 at 1.

As part of the lease negotiation, the parties agreed on Special Requirements pricing for certain above SFO work on the project. Every item on the Special Requirements pricing included a markup of twenty-nine percent – eight percent for contractor's overhead, eight percent for contractor's profit, five percent for design fee, and eight percent for developer's overhead. Uncontested Facts ¶ 2; Appellant's Supplementary Appeal File, Exhibits 1, 2. All of the items on the Special Requirements pricing exhibits are related to a build-out of the leased premises. Respondent's Comments on Uncontested Facts ¶ 2 (not contested in Appellant's Opposition to Respondent's Cross-Motion, in which where Parcel 49C does take issue with some of GSA's asserted facts).

From time to time after execution of the lease, the parties negotiated and executed supplemental lease agreements (SLAs) which modified various lease provisions. Uncontested Facts ¶ 3; Appeal File, Exhibits 2-29.

On January 3, 1996, the parties executed SLA No. 1. Paragraph 6 of this SLA reads in pertinent part as follows:

> Performance Specifications, Unit Costs for Adjustments, and Alternates
>
> Pricing for the Special Requirements Performance Specifications shall be adjusted by multiplying the amount in question by the percentage of change in the Cost of Living Index. The percentage change shall be computed by comparing the index figure for March of 1993 with the index figure for the month in which the work containing the units are [sic] accepted, or the Lease[']s Commencement Date, whichever is later. The Contractor, A/E [architect/engineer] and Lessor's markups for any other above SFO standard work requested by the Government shall be as set forth in the pricing or the Special Requirements Performance Specifications.

Uncontested Facts ¶ 4; Appeal File, Exhibit 2 at 3 (emphasis added).

In or about the spring of 2002, GSA requested that Parcel 49C submit a proposal to install security bollards around the exterior perimeter of the building and two hydraulic security bollard systems outside specified entrances. These bollards were not required under the original solicitation for offers. Uncontested Facts ¶ 5; Respondent's Comments on Uncontested Facts ¶ 9 (not contested in Appellant's Opposition to Respondent's Cross-Motion).

On August 1, 2002, Parcel 49C submitted a proposal for installation of the security bollards. The proposal amount included successive markups of eight percent for contractor's

overhead, eight percent for contractor's profit, and eight percent for developer's profit.[1] Uncontested Facts ¶ 6; Appeal File, Exhibit 43.

On December 12, 2002, a GSA contracting officer sent Parcel 49C an award letter accepting the proposal for the bollard work, with the exception of the markups. In the award letter, the contracting officer allowed only a single markup – ten percent for "lessor profit." He told Parcel 49C that if it disagreed with his unilateral reduction of the markups, it would have to proceed with the work, but could file a claim for the amount in dispute. Uncontested Facts ¶ 7; Appeal File, Exhibit 48.

Parcel 49C thereafter installed the bollards in accordance with its proposal. GSA paid Parcel 49C $1,028,722 for the work. The lessor submitted a certified claim in the amount of $157,203.40, which represented the difference between the markups included in the proposal and the markup included in the award letter.[2] Uncontested Facts ¶ 8; Appeal File, Exhibit 60. The contracting officer denied the claim. Appeal File, Exhibit 63.

B. The following provisions of the lease are also of relevance to this decision:

The term "tenant build-out," "for the purposes of this Lease, is defined as all the work and initial space alterations required by the SFO, as amended, to prepare the space for occupancy by the Government." Appeal File, Exhibit 1 at 373 (Rider Number 1 to SFO 88-100, ¶ J).

Per Attachment A to SFO 88-100:

> The base solicitation for offers defines the tenant build out requirements for the space under lease that are standard to this project. There are certain areas that will have above standard alterations that are defined in the following section titled "Specials." . . . All components of the base lease build out and the above standard alterations must function together to meet the base lease

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[1] Although the last markup is called "developer's profit" in the proposal, Parcel 49C says that it should have been called "developer's overhead," and GSA says that for the purpose of its motion, it is willing to stipulate that "developer's overhead" is the correct term. Appellant's Motion for Partial Summary Relief at 4 n.3; Uncontested Facts ¶ 6 n.1; Opposition to Appellant's Motion for Partial Summary Relief and Respondent's Cross-Motion for Summary Relief at 4.

[2] In its motion, Parcel 49C notes that the claim also seeks payment of markups for work performed on the sixth floor of the building. The lessor states, "That work relates, however, to a different lease . . . and is therefore not subject to the parties' agreement concerning markups set forth in SLA No. 1. The sixth floor work is accordingly not the subject of this Motion nor the arguments set forth herein." Appellant's Motion for Partial Summary Relief at 4 n.2. Parcel49C should make clear, before the case progresses further, whether it is withdrawing from this appeal – as well as withholding from the motion – the matter of the sixth floor work.

> requirements as well as the above standard minimum performance requirements for specified areas.

Appeal File, Exhibit 1 at 109.

Per paragraph A of Rider Number 1 to SFO 88-100:

> The Tenant Improvements shall consist of the improvements to the Leased Premises that will result from the performance of the work and the installation of the materials (1) specified in the basic requirements of the SFO, (2) specified as additional requirements in those sections of the SFO titled "Special Requirements", and (3) requested by the Government which are in addition to or in lieu of the basic requirements and the "Special Requirements" of the SFO.

Appeal File, Exhibit 1 at 366.

The lease contains a Changes clause (552.270-21 (Jun 1985)), which permits the contracting officer, at any time, to make changes within the general scope of the lease and, if such a change has a cost impact on the lessor, to make an equitable adjustment in the rental rate, make a lump-sum price adjustment, or revise the delivery schedule. Appeal File, Exhibit 1 at 392.

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. 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. The fact that both parties have moved for summary relief does not dictate that the Board grant one of the motions. Rather, each party's motion is to be evaluated independently on its own merits, with all reasonable inferences being resolved against the party whose motion is under consideration. Parcel 49C Limited Partnership v. General Services Administration, GSBCA 15932, 03-1 BCA ¶ 32,207, at 159,284; Parcel 49C Limited Partnership v. General Services Administration, GSBCA 15222, 00-2 BCA ¶ 31,073, at 153,405.

Parcel 49C's motion, the parties agree, involves an issue that may be resolved through contract interpretation alone: Does the term "above SFO standard work," as used in paragraph 6 of SLA No. 1, mean "any work that is not required by the SFO"?

Parcel 49C answers that question in the affirmative. Appellant's Motion for Partial Summary Relief at 7. It maintains:

> The Lease, as amended by SLA No. 1, plainly requires GSA to pay Parcel 49C Contractor, A/E and Lessor's markups set forth in the Special Requirements Performance Specifications for any above SFO standard work requested by

> GSA. This is clear because SLA No. 1 references "Special Requirements Performance Specifications" as containing the agreed upon markups. SLA No. 1 therefore must be referring to some pricing or other specifications that contains markups, and the only pricing or other specifications relating to the Special Requirements that contains markups is the Special Requirements pricing. Thus, SLA No. 1 can only be interpreted as incorporating that pricing for the purposes of any future above SFO standard work requested by GSA. . . . It is equally clear that the security bollard work is above SFO standard work requested by GSA.

Id. at 8-9.

GSA contends that Parcel 49C's interpretation of the lease provisions is "tortured" in that it "seek[s] to apply [a six-year-]old provision specifically intended for use during the tenant fit-out construction phase of the leased premises rather than the Changes and Equitable Adjustment Clauses of the Lease." Opposition to Appellant's Motion for Partial Summary Relief and Respondent's Cross-Motion for Summary Relief (Respondent's Opposition and Cross-Motion) at 1. Further, according to GSA:

> By their very nomenclature, these markups [referenced in paragraph 6 of SLA No. 1] were clearly intended to be applied to the type of work anticipated in tenant build-out activities: the Developer was required to (and, in fact, did) submit cost proposals for specific items of work which clearly anticipated the need to engage a designer and contractor to accomplish the work.

Id. at 4.

In interpreting a lease or any other contract, we follow the precept that "an 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." Parcel 49C, 00-2 BCA at 153,407 (quoting Hol-Gar Manufacturing Corp. v. United States, 351 F.2d 972, 979 (Ct. Cl. 1965)); see also Parcel 49C, 03-1 BCA at 159,286. A close reading of the lease brings us to conclude that GSA's understanding is correct and Parcel 49C's is not. "[A]bove SFO standard work requested by the Government," as that term is used in paragraph 6 of SLA No. 1, must be read in context with other provisions of the lease – including the provisions of Attachment A and Rider Number 1 to the SFO set out at part B of this decision's Uncontested Facts. Those other provisions make clear that the term refers to a component of tenant build-out requirements. Above SFO standard work is a tenant improvement which must function together with basic SFO components to meet the lease requirements as a whole. Because the security bollard work was not part of the tenant build-out requirements, it is not "above SFO standard work," even though it was requested by the Government.

We note – though this observation is not necessary to our ruling – that Parcel 49C's pricing proposal for the bollard work appears to indicate that the lessor understood this work to be different from "above SFO standard work." The above standard tenant build-out work required design effort – and consequently, a markup for a design fee. The bollard work

evidently did not require design effort, for Parcel 49C has not even requested a design fee markup on this work. See Appellant's Motion for Partial Summary Relief at 8 n.4.

Like Parcel 49C's motion for partial summary relief, GSA's motion for summary relief is not sound. GSA believes that "[i]n evaluating Appellant's cost proposal for the security bollards, the contracting officer . . . correctly applied the criteria of GSAR [General Services Administration Acquisition Regulation] 552.243-70 (Pricing Adjustments) and 552.243-71 (Equitable Adjustments)." Respondent's Opposition and Cross-Motion at 5. GSAR 552.243-70 and 552.243-71 are contract clauses which, as Parcel 49C points out, are not present in the lease at issue in this case. We therefore cannot conclude that these clauses govern markups on work performed by the lessor.

Even if these clauses did govern the markups, GSA would not prevail on its motion. Clause 552.243-71, in the form in which it appeared in the GSAR when the lease was entered into and when the bollard work was performed, provided that "[t]he percentages for profit and commission shall be negotiated and may vary according to the nature, extent and complexity of the work involved." For work performed by other than a contractor's own forces (such as the bollard work), the contractor's commission may exceed ten percent if "the contractor demonstrates entitlement to a higher percentage." 48 CFR 552.243-71 (1993 & 2001). Parcel 49C contends that it "performed two distinct, significant roles in connection with the construction work here at issue, both as the developer and as the general contractor, and accordingly earned both . . . developer and contractor markups." Appellant's Opposition to Respondent's Cross-Motion for Partial Summary Relief at 2; see also id. at 6. To the best of our knowledge at this point in the proceedings, the contracting officer has not even considered whether this argument merits a commission of greater than ten percent.[3]

The cross-motions for summary relief do not advance us along the road to a resolution of the matter of an appropriate markup or markups on the cost of the bollard work. We are persuaded that GSA is correct in maintaining that the total price for the bollard work should be governed by the lease's Changes clause. Beyond that, however, both parties will have to provide us with new guidance as to the controlling law, as well as reasonable implementation of it, as to the markups.

Decision

Both cross-motions for summary relief are **DENIED**.

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[3]GSAR 552.243-71 does not provide for any profit or overhead as markups on the cost of work performed by other than a contractor's own forces. It is therefore not clear why, if GSA believes that this clause governs markups on the bollard work, the contracting officer awarded a markup for profit. Nor is it clear why GSA now says it "remains ready, willing, and able to award Appellant a markup for its overhead once such an overhead rate can be determined." See Respondent's Opposition and Cross-Motion at 6.

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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