

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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DENIED: July 17, 2001

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GSBCA 15259

BARCLAY PROPERTIES, L.L.C.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Sigurd Rudholm of Barclay Properties, L.L.C., Muskegon, MI, appearing for Appellant.

Joel Malkin, Office of Regional Counsel, General Services Administration, Chicago, IL, counsel for Respondent.

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

**NEILL**, Board Judge.

The parties in this case are in dispute regarding a credit to be provided in the rent charged by appellant, Barclay Properties, L.L.C. (Barclay), for office space leased to the General Services Administration (GSA). The lease required Barclay to have certain electrical work done on the premises. The parties, however, later agreed that GSA would arrange directly to have this work done. It was understood at the time that GSA would pay for the work and later be compensated for this expense by an appropriate reduction in the rent due under the lease. The parties are now unable to agree on the proper credit to be given to GSA for the work it had performed.

GSA previously filed a motion for summary relief. We denied the motion on the ground that there were still genuine issues of material fact that remained unresolved. Barclay Properties, L.L.C. v. General Services Administration, GSBCA 15259, 01-1 BCA ¶ 31,299. The parties have since supplemented the record. At their request, we have closed the record and now proceed to decide this case on the merits without benefit of trial.

Findings of Fact

1. On August 7, 1998, GSA and Barclay entered into a lease (the lease) of approximately 8500 square feet of office space in Muskegon, Michigan, with an estimated effective date of April 10, 1999. Appeal File, Exhibits 2-3.

2. Under the terms of the lease, the landlord was required, at its sole cost, to build out the premises to meet GSA's specifications. Among the various requirements was one to make ready a site for intelligent work stations and a local area network (IWS-LAN) in the space designated for the use of the Social Security Administration (SSA). Appeal File, Exhibit 3 at 36.

3. The landlord's representative, Mr. Sigurd Rudholm, states that in early March 1999, while the premises were still under construction, GSA's IWS-LAN coordinator for the Great Lakes region, Mr. Anthony Lillibridge, contacted him to discuss the electrical work to be done for the leased office space. Mr. Rudholm recollects that, at that time, Mr. Lillibridge was concerned that there should be no delays in completing this work. Mr. Rudholm understood him to say that the Census Bureau planned to make use of SSA's former offices and it was, therefore, important that the new site pass inspection the first time around so that SSA could take possession without delay. Mr. Rudholm states that it was accordingly suggested to him by Mr. Lillibridge that he seek a bid from a Classic Contracting Inc. (Classic) -- presumably a well-established contractor capable of doing a reliable job in the time available. Appeal File, Exhibit 12 at 1.

4. Acting on Mr. Lillibridge's suggestion, Mr. Rudholm obtained a bid from Classic. A letter dated March 10, 1999, from Classic estimated that the cost of the base electrical work would be \$58,250 and the cost of the required IWS-LAN work would be \$33,498.45. Appeal File, Exhibit 12 at 3.

5. On or about March 29, 1999, Mr. Lillibridge made a site visit to Barclay's building in Muskegon. The purpose of the visit was to have a pre-construction meeting with Mr. Rudholm and a representative of Classic, Mr. Sol Einhorn. Mr. Lillibridge states that Mr. Rudholm was late for the meeting and that, in his absence, Mr. Lillibridge and Mr. Einhorn walked the site to determine if the lessor had completed any electrical work and to see the layout of the space in order to plan for the installation of branch wiring. When Mr. Rudholm did arrive, the three men discussed the credit which would be due to GSA for Mr. Rudholm's "non-completion of the electrical/communications work, including IWS-LAN installation." Mr. Lillibridge states that he recommended that Mr. Rudholm send a letter to the contracting officer, who at the time was Ms. Lucille Piechota, outlining the work he would not do. This was said to include type 1A communications cabling and electrical branch wiring for outlets including branch panels. Finally, Mr. Lillibridge tells us that "Rudholm and I agreed that he would complete the electrical wiring for other building systems, including lighting." Affidavit of Anthony Lillibridge (Lillibridge Affidavit I) (April 10, 2001) ¶¶ 4-8.

6. On return from his site visit, Mr. Lillibridge sent a report to the contracting officer. The report states in part:

I explained to [Mr. Rudholm] that we will do all of the branch wiring and data communication for the space including all of the outlets (isolated and convince

[sic] data and phone)<sup>[1]</sup> in the walls. [sic] and all the wiring to the systems furniture. He is still responsible for all the lighting (including switches) any access control and life safety equipment and HVAC [heating, ventilation and air conditioning] and its controls.

The same report concludes:

[Mr. Rudholm] should be sending you a letter detailing a credit for him not installing outlets. This credit should include the cost. [sic] for the following Electrical branch wiring, IA data cable, 2 electrical panels and phone outlets in the walls.

Appeal File, Exhibit 5.

7. Mr. Rudholm's recollection of the meeting with Mr. Lillibridge on or about March 29 is as follows. He states that, at that time, he and Mr. Lillibridge reviewed a blueprint to determine what Barclay would be charged if Classic did the IWS-LAN work. The number of "openings"<sup>2</sup> shown on the blueprint were counted. He further states that Mr. Lillibridge then proposed, as a method for estimating the credit to be given to GSA for this work, that the unit prices in the lease for installing fewer or additional outlets than those specified in the solicitation for offers (SFO) be used. Sworn Declaration of Sigurd Rudholm (Rudholm Declaration) (Apr. 4, 2001).

8. The unit costs in the lease to which Mr. Lillibridge allegedly referred read as follows:

The following costs will be used to make adjustments specified in the SFO paragraph entitled "Unit Costs for Adjustments" for installing fewer or additional outlets than those specified in the SFO:

Telephone Outlets, Floor Mounted	\$ 157.50 each
Telephone Outlets, Wall Mounted	\$ 75.00 each
Duplex Electrical Outlets, Floor Mounted	\$ 232.50 each
Duplex Electrical Outlets, Wall Mounted	\$ 40.00 each
Quadraplex [sic] Electrical Outlets, Floor Mounted	\$ 412.50 each
Quadraplex [sic] Electrical Outlets, Wall Mounted	\$ 60.00 each
Dedicated 115V.20A. Electrical Outlets, Floor	\$ 265.00 each
Dedicated 115V.20A Electrical Outlets, Wall	\$ 95.00 each

Appeal File, Exhibit 3 at 4.

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<sup>1</sup>In speaking of "isolated" Mr. Lillibridge was referring to outlets with isolated grounding. By "convinced" outlets, he undoubtedly meant "convenience" outlets. See Appeal File, Exhibit 3 at 48-49.

<sup>2</sup>We assume that Mr. Rudholm in speaking of "openings" intended to refer to outlets.

9. Mr. Rudholm further states that he understood Mr. Lillibridge to be proposing use of the unit costs in the lease for additional outlets as the basis for calculating the credit for GSA because these were the prices which the lessor itself would have charged for the work. Mr. Rudholm states that he initially objected to this proposed method because the unit prices in the lease also contained profit which obviously would not have been paid if the lessor had done the work. Nevertheless, Mr. Rudholm explains that, after counting the outlets and calculating the cost of the work using the unit prices in the lease, he saw that the cost would be within a few thousand dollars of what he had budgeted for this work. He states that he, therefore, agreed to this method for determining the credit to be given GSA for doing the work -- it being understood that GSA would contract directly with Classic. He explains that this latter part of his agreement was particularly important since he did not want to get involved with Classic on the question of pricing since he knew that Classic planned to do the work for a price much higher than the lessor itself had planned to pay. Rudholm Declaration at 1.

10. Mr. Lillibridge, after reading Mr. Rudholm's sworn declaration and the account it contains of the discussion in late March 1999 regarding the credit to be given to GSA, writes in a reply affidavit:

At no time did I discuss with and/or agree with Rudholm on a price for the work that he was not to complete as aforesaid.

Lillibridge Affidavit I ¶ 9.

11. The record contains a bid prepared by appellant's electrical contractor, Erickson Electric Service, Inc. (Erickson). Barclay contends that this bid covers the IWS-LAN work it was required to perform. The bid bears the date April 30, 1999, and estimates that the cost of the work would come to \$10,274.75. Appellant's Complaint, Exhibit C.

12. Upon receiving appellant's complaint with Erickson's bid for the IWS-LAN work, a member of the contracting officer's team compared the line items in that bid to the actual requirements in the lease relating to this work. Of the twenty-five line items in the bid, he found deficiencies in eighteen. These deficiencies are described in detail and schematically, together with specific references to lease requirements in Exhibit 17 of the appeal file. Summarizing in general terms the results of GSA's comparative analysis, we note that at least seven items offered are not even required by the lease. This, in the opinion of the GSA analyst, reflects a fundamental lack of understanding of the actual requirements. An additional eight items fail to meet specific requirements set out in the lease. Principal among these requirements is the one for the cable to be used. The lease requires a specific IBM type 1A cable. Erickson does not propose using this type cable but rather a more common and cheaper type. Another item referred to in the bid as "grounding hardware" is questionable. The lease requires number six ground wire from the IWS-LAN rack to the LAN electrical panel. It is uncertain whether the hardware offered by Erickson meets this requirement. The GSA analyst is also of the opinion that three of the labor items in Erickson's bid are significantly understated and likewise reflect a basic misunderstanding of precisely what is required. Specifically, these items relate to time required for cable pulling, for the assembly

and installation of connectors at the end of each cable, and for the contractor's presence on site during the GSA testing process. Appeal File, Exhibit 17.

13. By letter dated August 31, 1999, GSA wrote to Mr. Rudholm to say that it had yet to receive a response from him concerning the dollar amount of credit due the Government for the installation of the "IWS-LAN electric and data." The credit was said to be due for work that was done by the Government but was originally to be the responsibility of the lessor. GSA reminded Mr. Rudholm that without this information a supplemental lease agreement (SLA) establishing the effective date, term, and rent for the lease could not be issued. Appeal File, Exhibit 7.

14. Shortly thereafter, on September 7, 1999, Mr. Rudholm responded to GSA. He indicated that he was prepared to grant a credit based upon GSA's installation of 194 outlets. Using the unit prices set out in the lease (Finding 8), he calculated a total credit of \$12,645. From this total he proposed subtracting \$4799.93 said to be due Barclay for other unrelated matters. The net credit he offered, therefore, amounted to \$7845.07. Appeal File, Exhibit 8.

15. In early October 1999, the question of just how much credit should be given by the landlord to GSA for the IWS-LAN and electrical work GSA had done on the landlord's behalf still remained unresolved. Although GSA had previously advised the landlord that, without this data, an SLA establishing the effective date, term, and rent for the lease could not be issued, it nevertheless, on October 5, 1999, issued an SLA doing precisely that. As to the credit due GSA, this SLA provides:

Lessor will reimburse the Government for IWS-LAN data and electrical work done by Government, which was originally to be done by Lessor. The reimbursement amount is presently being determined. Once that amount is determined, the Government will deduct a monthly amount from the rent paid to Lessor for a five (5) year period beginning on August 1, 1999[,] through July 31, 2004.

Appeal File, Exhibit 10.

16. In late November 1999, the contracting officer again wrote Mr. Rudholm regarding the credit due. He explained:

The records indicate that the Solicitation For Offers . . . required the landlord to install the IWS-LAN and related electric at the Landlord's cost. However, by mutual agreement reached in a meeting attended by you and GSA staff on March 30, 1999, it was decided that the Government would install the IWS-LAN and related electrical, and that the Landlord would issue a credit to the Government for the cost.

Appeal File, Exhibit 11. The contracting officer's letter went on to state that the cost of the installation was \$68,845.49. A copy of an invoice for that amount was provided with the letter. Allowing for the credit of \$4799.93 which Mr. Rudholm sought in his proposal of

September 7 (Finding 14), the contracting officer sought a credit of \$64,045.56 against the rent due under the lease. Id.

17. The electrical work for which the contracting officer sought a credit had, in fact, been done by Classic. The contract was awarded by GSA to Allied Building Service Corporation (Allied) but was then subcontracted to Classic by Allied. Appeal File, Exhibit 6; Affidavit of Anthony Lillibridge (Lillibridge Affidavit II) (Aug. 29, 2001) ¶ 4.

18. By letter dated December 2, 1999, Mr. Rudholm replied to the contracting officer's request for a credit in the amount of \$64,045.56. He strongly objected to the Government's claim. He did not deny that an agreement had been reached at the meeting with GSA's representative in late March. He contended, however, that the agreement was based upon the understanding that there would not be any increase in the landlord's own anticipated costs. He pointed out that earlier in the year he had, at Mr. Lillibridge's suggestion, sought a bid from Classic but elected not to use Classic because its bid was double the lessor's own planned costs. Appeal File, Exhibit 12.

19. By January 2000, an additional problem had surfaced in conjunction with the credit GSA sought for electrical work done by Classic. It had become apparent that there was a discrepancy between the number of outlets called for in the construction plans for the SSA office area and those actually installed. On January 7, 2000, a GSA representative, a representative of Classic, and Mr. Rudholm, representing the landlord, undertook a walk-through of the area. They made a list of all wall outlets, both those shown on the construction plan and those confirmed as actually installed. The list was initialed by the three men and provided to the contracting officer's staff. Appeal File, Exhibit 16 at 8-10.

20. This list of outlets, upon which the three representatives agreed, states that a total of fifty-six convenience outlets, thirty-nine phone outlets, forty-one data outlets, and 48 duplex dedicated outlets with isolated grounding were actually installed.<sup>3</sup> Appeal File, Exhibit 16 at 8-10.

21. By letter dated February 22, 2000, the contracting officer issued a final decision regarding the credit due GSA. His letter advised appellant that he considered a reimbursement of \$33,498.45 to be a fair and reasonable settlement amount. This amount was said to be based upon the original cost estimate provided by Classic to the lessor (Finding 4) and on the Government's desire to maintain a good landlord-tenant relationship and to avoid the expense of further legal action. Appeal File, Exhibit 15.

22. By letter dated March 1, 2000, Barclay filed a timely appeal of the contracting officer's decision. In that letter, Mr. Rudholm insisted that at the pre-construction meeting in late March 1999, it had been agreed that the credit to be given to GSA was to be based upon the unit prices contained in the lease for additional outlets. Using these prices and the

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<sup>3</sup>While the list of outlets simply identifies this last type of outlet as "duplex orange," we assume, based upon the definition of terms in the lease, that these orange outlets are in fact those used for dedicated lines which, by definition, have isolated grounding. Appeal File, Exhibit 3 at 48-49.

list of outlets actually installed on which representatives of GSA, Classic, and Barclay had agreed, he proposed the following credit:

Description	Cost	Total
56 Convenient [sic] Outlets	\$40	\$2,240
27 Phone Outlets	\$75	\$2,025
27 Data Outlets	\$75	\$2,025
30 Duplex Opening	\$40	\$1,200
Subtotal		\$7,490

To this amount, he proposed adding the following items from Classic's original bid to him in early March 1999:

Electrical Panel	\$ 861
Permit	\$ 300
IWS-LAN Data w/Magnetic Box PLAT	\$4,180
Total	\$12,831

Appeal File, Exhibit 16.

### Discussion

The parties to this dispute do not deny that an agreement was reached at the end of March 1999 regarding GSA's assuming responsibility for some of the electrical work required for the SSA work area. Rather, their dispute concerns the particulars of that agreement. Contemporaneous documentation in the record, as clarified and confirmed by the sworn declarations of Mr. Lillibridge and Mr. Rudholm, sheds some light on this matter.

First, it is apparent that, from an early juncture, GSA was intent on having at least some of the electrical work done by a contractor of its choice rather than by any electrical contractor whom the lessor might hire. Even before his pre-construction meeting with Mr. Rudholm at the site in late March, Mr. Lillibridge had suggested to Mr. Rudholm that he get an estimate from Classic. Findings 3-4. The presence of Mr. Einhorn, as a representative of Classic, at the preconstruction meeting with Mr. Rudholm serves to confirm this fact. Finding 5.

It is also clear that, by the time Mr. Lillibridge and Mr. Einhorn met with Mr. Rudholm at the site in late March, the scope of the work which GSA wanted Classic to do was fairly well defined. In his memorandum to the contracting officer, Mr. Lillibridge wrote:

I explained to [Mr. Rudholm] that we will do all of the branch wiring and data communication for the space including all of the outlets (isolated and convince [sic] data and phone) in the walls. [sic] and all the wiring to the systems furniture. He is still responsible for all the lighting (including switches) any access control and life safety equipment and HVAC and its controls.

Finding 6. This statement and subsequent references in GSA correspondence to "IWS-LAN electric and data," "IWS-LAN data and electrical work," and "IWS-LAN and related electric" convince us that the work which the parties agreed would be arranged for directly by GSA was that involving the IWS-LAN and electrical work related to it. See Findings 13, 15-16.

Mr. Rudholm contends that any agreement reached in late March 1999 regarding the work to be done by GSA's contractor was based upon the understanding that this would not result in any significant increase in the landlord's own anticipated costs. Finding 18. We have no reason to doubt this assertion. We do not believe that any lessor confronted with a similar proposal would agree to pay more or to give the lessee carte blanche.

The principal difficulty in resolving this case is that Barclay is either unwilling or unable to provide us with reliable evidence of precisely what its anticipated cost for the IWS-LAN and related electrical work was. In responding in early December to the Government's initial demand for \$64,045.56, Mr. Rudholm complained that the claim made little sense. He noted that the bid he originally received from Classic for the IWS-LAN and related electrical work was for only \$33,498.45 and that he rejected it because it was double his own estimate for the cost of that work. He then went on to state -- somewhat incongruously -- that Barclay's own contractor, Erickson, had bid approximately \$70,000 "to install base electrical work and IWS-LAN." Appeal File, Exhibit 12. In a subsequent conference of the parties with the Board, Mr. Rudholm clarified his remark regarding Erickson's \$70,000 bid. He explained that the bid had three basic components. The first was exterior electrical work, the second was interior electrical work, and the third was the IWS-LAN and related electrical work. It was his recollection that the cost covering the IWS-LAN work came to approximately \$16,000. Conference Memorandum (Mar. 14, 2001).

The Board urged Mr. Rudholm to provide a copy of Erickson's \$70,000 bid with its three divisions for the record, but he failed to do so. Instead he advised the Board by letter dated April 4, 2001, that he stood by the position taken in his notice of appeal, namely that the credit was to be based upon the unit prices in the lease for additional outlets. He also confirmed this position in a second conference of the parties with the Board on May 23, 2001. Conference Memorandum (May 23, 2001).

Although Barclay has failed to provide a copy of Erickson's complete bid, it did provide with its complaint a bid of \$10,274.75 prepared by Erickson, dated April 30, 1999, and said to cover IWS-LAN work. Finding 11. GSA's detailed analysis of this estimate, however, convinces us that it cannot serve as the basis for any credit we might award to GSA. We agree with GSA that it is an unreliable estimate, based upon a poor understanding of the actual requirements, and in all probability unduly low. See Finding 12.

We likewise are not prepared to use the unit prices in the lease as the basis for calculating GSA's credit. Firstly, it is not clear to us that Mr. Lillibridge and Mr. Rudholm ever reached agreement on this method. See Findings 9-10. Furthermore, in the proposal for settlement contained in his notice of appeal, Mr. Rudholm calculated that, using only these unit prices, GSA would be entitled to a credit of no more than \$7490. Finding 22. Quite apart from the fact that we can find no unit price in the lease for either data outlets or for duplex dedicated outlets with isolated grounding, we find this figure wholly unreliable



as a realistic statement of the lessor's anticipated cost since it is even less than Erickson's bid of \$10,274.75, which we have already rejected as unreliable.

The record does contain an estimate for the IWS-LAN work which Mr. Rudholm had in hand at the time of the pre-construction conference in late March 1999. We refer, of course, to the estimate of March 10, 1999, for \$33,498.45 which Classic provided to Mr. Rudholm. Finding 4. It is upon this estimate that GSA now bases its reduced claim. Findings 16, 21. As already stated, we are persuaded that, at the pre-construction meeting in late March, it was agreed that GSA would contract for the IWS-LAN and related electric work but without any significant increase in the landlord's anticipated cost. GSA alleges that the landlord's anticipated cost should be considered that which was stated by Classic in the estimate it provided to Mr. Rudholm earlier in the month.

Mr. Rudholm contends that he rejected Classic's estimate because it was double that which he planned to pay for the IWS-LAN work. It is hardly fair to limit the GSA's credit for the IWS-LAN work it had done simply because Mr. Rudholm, at the time of his meeting with GSA or afterwards, was of the opinion that this work could be done for half or less than half of Classic's estimate. Rather, we would expect him to refute the alleged reasonableness of Classic's estimate with something more than opinion. This, however, he has failed to do. The Erickson bid in the record is of course for considerably less than half of Classic's bid. The fact that it bears a date of one month *after* the preconstruction conference, however, deprives it of some credibility. More importantly, as we have already concluded, this estimate is inherently unreliable. As for the IWS-LAN portion of Erickson's \$70,000 bid, appellant, for reasons best known to itself, has not even made it a part of the record for this case.

GSA undoubtedly has the burden here of proving the reasonableness of any credit it claims for the cost of the IWS-LAN work it had done on appellant's premises. It contends that Classic's original estimate of the cost of the IWS-LAN and related electrical work can be used as a fair measure of the cost that appellant should have anticipated for this work. We find this contention a reasonable one -- particularly in view of the subsequent overrun which strongly suggests that, if anything, Classic's original estimate was understated.<sup>4</sup> In relying upon Classic's original estimate as the basis for its claimed credit, GSA has certainly met its burden of going forward. We have looked, therefore, to appellant to rebut the reasonableness of Classic's estimate with credible evidence. Given appellant's failure to do so, we conclude that the Government has met its burden of proof here. We find, therefore, that GSA is entitled to the credit sought. We make no adjustment, however, for those amounts discussed by the parties in earlier correspondence concerning the Government's claim. See Findings 14, 16. These are separate and, to the best of our knowledge, unrelated matters of contract administration and consequently not part of this appeal.

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<sup>4</sup>In this regard we note that during a conference of the parties with the Board on March 13, 2001, appellant's representative assured the Board that Barclay does not object to the credit sought because it covers electrical work over and above what was called for in the lease. This, we were told, was not an issue in the case. Conference Memorandum (Mar. 14, 2001). We conclude, therefore, that the overrun was with regard to items included in Classic's original estimate and not to additional requirements later added by GSA.

Decision

Barclay's appeal is **DENIED**. The contracting officer's decision is affirmed. GSA is entitled to a credit \$33,498.45 against rent due under its lease of appellant's premises.

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EDWIN B. NEILL  
Board Judge

We concur:

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STEPHEN M. DANIELS  
Board Judge

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MARTHA H. DeGRAFF  
Board Judge