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

JOINT MOTION TO MODIFY DECISION GRANTED: September 14, 2004

GSBCA 16071

1120 VERMONT AVENUE ASSOCIATES,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Brett D. Orlove of Grossberg, Yochelson, Fox & Beyda, LLP, Washington, DC, counsel for Appellant.

Gerald L. Schrader, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **PARKER**, **NEILL**, and **HYATT**.

PARKER, Board Judge.

ORDER

On September 3, 2004, the parties filed a joint motion to modify the Board's decision in this appeal, 1120 Vermont Avenue Associates v. General Services Administration, GSBCA 16071 (Aug. 30, 2004). The joint motion stated, in pertinent part:

> WHEREAS, prior to August 30, 2004, the Appellant and GSA [General Services Administration] have agreed that the part of the appeal that deals with Appellant's costs for special equipment after Supplemental Lease Agreement Number 17 (SLA 17) will be resolved by payment in the amount of Forty Thousand Dollars ($40,000) for such costs; and
>
> WHEREAS, the August 30, 2004 Decision expressly recognizes, on page 7 thereof, that the parties have resolved the part of the appeal that deals with Appellant's costs for special equipment installed after SLA 17; and

WHEREAS, the parties desire that the Board modify the Decision to expressly award the agreed amount as part of the Decision;

NOW THEREFORE, Appellant and GSA hereby respectfully request the Board of Contract Appeals to modify the Decision dated August 30, 2004 to increase the amount awarded by the total sum of Forty Thousand Dollars ($40,000), from One Hundred Forty-seven Thousand One Hundred Twenty-five and 69/00 Dollars ($147,125.69) to One Hundred Eighty-seven Thousand One Hundred Twenty-five and 69/00 Dollars ($187,125.69).

The parties' joint motion to modify the Board's decision is **GRANTED**. The Board's amended decision increasing the amount awarded from $147,125.69 to $187,125.69 is issued herewith.

ROBERT W. PARKER
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

CATHERINE B. HYATT
Board Judge

Board of Contract Appeals
General Services Administration
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AMENDED DECISION: September 14, 2004

GSBCA 16071

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Before Board Judges **PARKER**, **NEILL**, and **HYATT**.

PARKER, Board Judge.

The issue in this appeal is whether a supplemental lease agreement (SLA) executed by the parties bars appellant's claims for additional energy and maintenance costs for certain equipment installed in the leased premises prior to the SLA. For the reasons discussed below, we hold that the SLA does not bar appellant's claims, and we award appellant's claimed costs.

Findings of Fact

The Lease

On or about October 1, 1992, the General Services Administration (GSA or respondent) entered into a ten-year lease with appellant, 1120 Vermont Avenue Associates. The lease provided that appellant would lease to the Government a total of 154,597 net usable square feet consisting of the entire eighth, eleventh, and twelfth floors, and portions of the ninth and tenth floors, of a building located at 1120 Vermont Avenue, N.W., in Washington, D.C. Appeal File, Exhibit 1.

The lease was a so-called "full service" lease, requiring appellant to provide as part of the rental consideration "all services, maintenance, alterations, repairs, and utilities . . . ." The amount of the rent was based, among other things, on the configuration of equipment that existed at the time the lease was entered into. Appeal File, Exhibit 1.

During the lease period, the Government asked appellant to purchase and install various additional pieces of heating, ventilation, and air conditioning (HVAC) equipment. The new equipment, referred to by the parties as "special equipment," was used for additional cooling for two computer rooms and one courtroom. The Government paid for the special equipment, but no immediate adjustments were made to cover appellant's additional costs for utilities and maintenance of the equipment. Appeal File, Exhibit 10.

At that time, GSA regarded after-hours (non-lease-hours) energy costs as the obligation of the tenant agency; they were not considered costs under the lease. Transcript at 27, 134. For the first several years of the lease, a separate GSA entity known as Metro Property Management Center, or Metro PMC, handled payment of these costs, as well as certain preventive maintenance costs. Metro PMC issued separate purchase orders to appellant and later paid appellant from funds received from the tenant agency. Id.

SLA 17

Because appellant was not being paid for additional costs related to the special equipment, appellant approached Metro PMC and sought recovery for (1) after-hours energy costs for the special equipment, (2) preventive maintenance costs for the special equipment, (3) regular lease-hours energy costs for the special equipment, (4) additional preventive maintenance costs for the building's central plant related to the special equipment, and (5) additional energy costs for the building's central energy plant related to the special equipment. Metro PMC was willing to negotiate with appellant for items (1) and (2), but referred appellant to GSA's contracting officer for the lease for the other three items. Transcript at 16.

On November 18, 1997, appellant sent a letter to the contracting officer for the lease requesting reimbursement for the three costs that Metro PMC had refused to address. Appellant's Exhibit 1. The costs were broken down as follows:

		TOTAL 8 YEAR COST	ANNUAL COST	MONTHLY COST
1a)	Preventive Maintenance of GSA Owned "Special":	Contracted by Metro PMC		
1b)	Energy (non Lease hours) A/C Equipment within space:	To be Contracted by Metro PMC		
2)	Energy of GSA Owned "Special" A/C Equipment within space (During Lease Hours):	$ 69,839.76	$17, 459.94	$1,455.00
3)	Preventive Maintenance of Owner's "Special" Central Plant (Dedicated to GSA):	$156,900.00	$39,225.00	$3,268.75
4)	Energy of Owner's "Special" Central Plant:	$ 50,055.83	$12,513.96	$1,042.83
	Grand Total Energy & Maintenance Costs:	$276,795.59	$69,198.90	$5,766.58

The letter also explained that "Metro PMC has accepted responsibility and contracted for the GSA owned units. They have also accepted and will agree at a future date to an amount to reimburse us for energy used after Lease hours of the 24 hour units." Id.

Following some negotiations with the contracting officer, appellant sent another letter on November 25, 1997. Appeal File, Exhibit 8. This letter contained two related proposals, each of which featured a total eight-year cost of $295,424. One of the proposals listed the costs in the same manner as appellant's letter of November 18:

		TOTAL 8 YEAR COST	ANNUAL COST Over 4 yrs.	MONTHLY COST Over 4 yrs.
1a)	Preventive Maintenance of GSA Owned "Special":	Contracted by Metro PMC		
1b)	Energy (non Lease hours) A/C Equipment within space:	To be Contracted by Metro PMC		
2) [ ]	Energy of GSA Owned "Special" A/C Equipment within space (During Lease Hours):	$ 31,773.45	$ 7,943.36	$ 661.95
3)	Preventive Maintenance of Owner's "Special" Central Plant (Dedicated to GSA):	$120,015.00	$30,003.75	$2,500.31
4) [ ]	Energy of Owner's "Special" Central Plant:	$143,635.57	$35,908.89	$2,992.41
	Grand Total Energy & Maintenance Costs:	$295,424.02	$73,856.00	$6,154.67

The other proposal, presented in a text format, was for the same total amount and differed from the first only in that it separated the amounts that would be due in the future from the amounts past due. This calculation resulted in an annual rent increase of $55,681.22 and a lump sum payment of $72,699.04 for past due amounts.[1] Appellant proposed applying the $72,699.04 past due amount toward an unspecified sum that appellant owed GSA for a vacant space credit. Appeal File, Exhibit 8.

Appellant did not include in either of its proposals after-hours energy or preventive maintenance costs for the special equipment because those costs were either being paid or were going to be paid separately by Metro PMC. Transcript at 22, 94-95. The contracting officer, on the other hand, did not understand that appellant's proposals excluded these costs, and he intended that any resulting lease amendment dispose of all issues connected with the special equipment. Id. at 158-166.

No negotiations were held after submission of appellant's letter of November 25, 1997. Transcript at 61-62. On April 17, 1998, SLA 17 was signed by both parties. In addition to disposing of other issues that are not relevant to this dispute, SLA 17 incorporated to the penny the amounts detailed in the textual proposal contained in appellant's November 25, 1997, letter. The amendment provided in relevant part:

> The purpose of this Supplemental Lease Agreement (SLA) is to: (1) adjust the rent for vacant premises; (2) increase the base cost of services for special equipment subsequently installed after initial alterations; (3) increase the annual rent; and (4) pay the Lessor operating cost escalations for 1992, and 1994 through 1996.
>
> . . . .
>
> 2) For settlement purposes only, effective **October 1, 1997**, the government agrees to increase the base cost of service by $254,924.12. The new base cost of services is established at **$1,367,517.00**. This increase is to cover additional maintenance and energy consumption for "Special" equipment installed after initial space alteration and aligning the base to the current year. **Based upon this increase the base for determining all future operating costs adjustments shall be aligned to September 1997.**

[1]There are differences of a few cents among the various amounts calculated in appellant's letter of November 25. We attribute these differences to rounding errors. For example, there is a $.10 difference between the grand total amounts in appellant's two proposals. In one proposal, appellant proposes an annual rent increase of $55,681.22, which, when multiplied by the four years over which it would be paid, yields a total of $222,724.88. That amount, plus the $72,699.04 past due amount, yields a grand total of $295,423.92. This is ten cents less than the grand total of $295,424.02 in the other proposal.

> 3) Effective April 1, 1998, the annual rent is increase [sic] by $55,681.22 to cover the costs of maintenance and utility consumption of all "Special" equipment. . . .
>
> . . . .
>
> Based on the aforementioned events a one-time lump sum payment to the Lessor of $14,073.38 represents a full and final settlement for all costs related to past due adjustments for vacant premises, Lessor's claim for preventive maintenance and energy consumption for "Special" equipment, and CPIs [Consumer Price Index adjustments] past due.[2]

Appeal File, Exhibit 1.

GSA's Metro PMC continued to make payments for preventive maintenance and after-hours energy costs on special equipment until March 1999, when GSA reorganized the entity out of existence. Transcript at 23, 26, 28, 30. After the payments stopped, appellant filed a claim.

The Claim

By letter dated October 3, 2002, appellant submitted to the contracting officer a certified claim for unreimbursed costs of energy and preventive maintenance on special equipment located in the leased space. The claim was divided into several categories, as follows:

HVAC (Non-Lease Hours)	Totals	
Installed After SLA-17 (11/97)	$6,459.94	
Installed Before SLA-17 (11/97)	65,054.25	
TOTAL NON-LEASE HOURS COSTS		71,514.19
ENERGY COSTS DURING LEASE HOURS (After SLA 17)[3]		75,301.03
PREVENTATIVE MAINTENANCE COSTS		
Installed After SLA-17 (11/97) PM Costs	$21,197.16	

[2]The $72,699.04 described in appellant's proposal for amounts past due was applied to amounts owed to GSA for a vacant space credit, as appellant had suggested in the proposal.

[3]Unlike the other cost categories, this one related only to special equipment installed after SLA 17.

Installed Before SLA-17 (11/97) PM Costs	$61,103.95	
TOTAL PREVENTATIVE MAINTENANCE COSTS		82,301.11
TOTAL OWED		$229,116.33

Appeal File, Exhibit 10.

The contracting officer denied the claim by letter of November 22, 2002. In doing so, he stated that, as to special equipment installed before SLA 17, the lease amendment constituted a full and final settlement of all costs related to appellant's claim for energy and preventive maintenance costs. With respect to the claimed costs for post-SLA 17 special equipment, the contracting officer requested additional information. Appeal File, Exhibit 11. The Board docketed appellant's appeal of the decision on February 19, 2003. Id., Exhibit 13.

On November 10, 2003, while the appeal was pending, appellant submitted a revised calculation of its claimed costs. Appellant's Supplemental Appeal File, Exhibit 15. The overall amount of the claim was lowered to $193,340.47, after correcting minor errors, substituting actual electrical data for estimates, and adding $16,387.19 in regular lease-hour costs incurred after SLA 17 for a piece of special equipment that had been installed before SLA 17.[4] The piece of equipment, known as Unit 11.2, had been changed from a standby unit to a full-time unit in May 2000. Appellant did not realize until refining the amount of its claim during the appeal process that the regular lease-hour costs for Unit 11.2 had been omitted in the original claim.

The parties informed the Board that they have settled the part of the appeal that deals with appellant's costs for special equipment installed after SLA 17 and have asked the Board to award $40,000 for those costs.[5] The following costs, totaling $147,125.69, are still in dispute:

> Lease-Hour Energy Costs [for Unit 11.2]. Unpaid Lease-Hour energy costs incurred after SLA-17 for the energy consumption of Pre SLA-17 [special] Equipment. $17,013.76
>
> Non-Lease-Hour Energy Costs. Unpaid Non-Lease-Hour energy costs incurred after SLA-17 for the Pre SLA-17 [special] Equipment. $71,041.27

[4]This amount was eventually increased to $17,013.76.

[5]The $40,000 award is included in the total award of $187,125.69.

> Preventative Maintenance Costs. Unpaid Preventative Maintenance costs incurred after SLA-17 for the Pre SLA-17 [special] Equipment. $59,070.66

Appellant's Reply Brief at 8; Appellant's Supplemental Appeal File, Exhibit 16.

The accuracy of appellant's claimed costs is supported by credible cost data and calculations, as well as the testimony of Jerry D. Carson, an expert professional engineer, whom the Board finds to be a very credible witness. Appeal File, Exhibits 15, 16; Transcript at 110-29. Although appellant's preventive maintenance work was performed by a company owned by one of the principals in appellant's limited partnership, Transcript at 40, 43; Appeal File, Exhibit 1, appellant provided a detailed explanation of how the hourly rates were derived and showed that the rates were lower than those used by GSA in similar situations. Appellant's Exhibits 3, 16; Transcript at 75-79.

Discussion

GSA maintains that SLA 17 disposed of all matters relating to energy and preventive maintenance costs for special equipment installed before SLA 17 and, thus, appellant's claims are barred by the doctrine of accord and satisfaction. In addition, GSA argues that the portion of the appeal relating to appellant's claim for lease-hour energy costs incurred after SLA 17 for Unit 11.2 should be dismissed for lack of jurisdiction because that issue has never been submitted to the contracting officer for decision.

As discussed below, we hold that SLA 17 does not bar appellant's claims for the costs at issue here. In addition, we deny GSA's motion to dismiss the portion of the appeal related to lease-hour energy costs for Unit 11.2. We discuss the jurisdictional issue first.

GSA's Motion to Dismiss

In its brief, GSA moves to dismiss for lack of jurisdiction the portion of the appeal related to lease-hour energy costs for Unit 11.2. These costs were not included in appellant's claim of October 2, 2002, to the contracting officer, but were added during the pendency of the appeal.

Under the Contract Disputes Act, 41 U.S.C. §§ 601-613 (2000), for the Board to have jurisdiction, there must exist both a claim and a contracting officer's decision on that claim. Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc). However, where a claim is before a board of contract appeals, "a contractor may increase the amount of his claim, but may not raise any new claims not presented and certified to the contracting officer." Santa Fe Engineers, Inc. v. United States, 818 F.2d 856, 858 (Fed. Cir. 1987). Whether a matter presented to a board is a new claim or part of the claim previously presented and decided "turns on whether the matter raised before the board differs from the essential nature or the basic operative facts of the original claim." Stroh Corp. v. General Services Administration, GSBCA 11029, 96-1 BCA ¶ 28,265, at 141,130 (quoting Trepte Construction Co., ASBCA 38555, 90-1 BCA ¶ 22,595, at 113,385). In Trepte, the Armed Services Board of Contract Appeals explained:

> The introduction of additional facts which do not alter the nature of the original claim, a dollar increase in the amount claimed before the Board, or the assertion of a new legal theory, when based upon the same operative facts as included in the original claim, do not constitute new claims.

Id. at 113,386-87.

Judged by the above standards, appellant's addition of lease-hours costs related to Unit 11.2 did not constitute a new claim. Appellant's claim is for energy and maintenance costs for special equipment installed during the lease period. For convenience and clarity, the claim is divided into various categories, including one for "Energy Costs During Lease Hours (After SLA 17)." During the appeal, appellant revised the original amount downward as a result of error corrections and substitution of actual electrical data for estimates. Appellant also realized that its claim did not include energy costs during lease-hours after SLA 17 for Unit 11.2, which, prior to SLA 17, had been a standby unit, but was put into use as a full-time unit in May 2000. The additional costs claimed, $16,387.19, were exactly the same type of costs included in the original claim -- energy costs during lease-hours after SLA 17.

GSA points out that, unlike the other costs contained in the original category for energy costs during lease-hours after SLA 17, Unit 11.2 was installed in the building before SLA 17. Although true, this fact does not alter the essential nature of the claim. The operative facts are the same -- appellant installed several pieces of special equipment after the lease commenced and has incurred energy and preventive maintenance costs which are as yet unrecovered. The theory for recovery for all claimed costs is the same -- energy and maintenance costs for special equipment are not covered by the original lease and, contrary to GSA's assertions, claims for such costs relating to special equipment installed before SLA 17 are not barred by the doctrine of accord and satisfaction. We view appellant's demand for unreimbursed lease-hours costs for Unit 11.2 as part of its overall claim for unreimbursed energy and maintenance costs for special equipment. Appellant did not submit a new claim; it simply increased the amount of its existing claim for "Energy Costs During Lease Hours (After SLA 17)" by adding a cost that it had inadvertently omitted. GSA's motion to dismiss for lack of jurisdiction is denied.

The Merits

Appellant maintains that SLA 17 was intended to compensate appellant only for the items requested in its proposal of November 25, 1997. According to appellant, the costs claimed here for after-hours energy and preventive maintenance of special equipment were to be paid (and were paid until March 1999) under separate contracts with a GSA entity known as Metro PMC. The other claimed costs, for regular lease-hours energy for Unit 11.2, also were not a part of appellant's proposal because, until May 2000, the unit had been used only as a standby device. None of these claimed costs were covered by SLA 17, according to appellant.

GSA agrees in theory that appellant is entitled to be paid for unreimbursed energy and preventive maintenance costs of special equipment, but maintains that SLA 17 disposed of all cost issues with respect to special equipment installed prior to the date of SLA 17.

To resolve the issue of SLA 17's interpretation, we look first to the plain language of the agreement. See Foley Co. v. United States, 11 F.3d 1032, 1034 (Fed Cir. 1993). The intention of the parties is gleaned from all the agreement's clauses interpreted as a whole -- that is, from the four corners of the agreement. Dewey Electronics Corp. v. United States, 803 F.2d 650, 660 (Fed Cir. 1986).

SLA 17, among other things not here relevant, increased the rent and the base cost of services, and provided a one-time lump sum payment to appellant. The amount of each of these items matched to the penny appellant's proposal, which did not include any of the costs that are the subject of this appeal. As to the finality of the agreement, SLA 17 stated:

> Based on the aforementioned events a one-time lump sum payment to the Lessor of $14,073.38 represents a full and final settlement for all costs related to . . . Lessor's claim for preventive maintenance and energy consumption for "Special" equipment . . . .

By its very terms, SLA 17 links the rent increase, the corresponding increase in the base operating cost ("the aforementioned events"), and the lump sum payment to "Lessor's claim." The only "claim" made by the lessor was the series of proposals (the last of which was November 25, 1997) asking for costs associated with special equipment that Metro PMC refused to pay. There is no language in SLA 17, which GSA, as the drafter, could easily have included, that foreclosed other legitimate claims related to energy and maintenance costs of special equipment.

GSA argues that other language in SLA 17 makes it clear that the amendment was intended to foreclose future claims for energy and maintenance costs. The agency points to the fact that the paragraph providing for an increase in the base operating costs begins with the phrase "[f]or settlement purposes only." We do not agree that this leads to a different interpretation. The phrase "[f]or settlement purposes only" seems to relate the issue to a dispute, which is consistent with the idea that SLA 17 was intended to settle appellant's "claim."

This interpretation makes perfect sense in light of the events that surrounded it. Appellant approached Metro PMC, which had always been responsible for after-hours energy costs, and asked it to pay for (1) after-hours energy costs for the special equipment, (2) preventive maintenance costs for the special equipment, (3) regular lease-hours energy costs for the special equipment, (4) additional preventive maintenance costs related to the central plant, and (5) additional energy costs related to the building's central energy plant. Metro PMC was willing to negotiate with appellant for items (1) and (2), but referred appellant to GSA's contracting officer for the other three items.

Appellant did exactly what Metro PMC requested, asking the contracting officer to pay only those items that Metro PMC would not pay for under separate contract. Appellant's

proposal of November 25, 1997, clearly stated that after-hours energy costs and preventive maintenance costs for special equipment were currently being paid or would soon be paid by Metro PMC. SLA 17 incorporated to the penny appellant's proposal, indicating at least to appellant that the contracting officer had understood the situation. This is especially true given the lack of a clear indication in SLA 17 that all cost issues related to energy and maintenance of special equipment, including ones that were never the subject of appellant's proposal, were thereafter foreclosed.

Metro PMC continued to pay the after-hours energy and preventive maintenance costs claimed here until GSA reorganized it out of existence in March 1999. When the payments stopped, appellant sought reimbursement from the contracting officer, never imagining that the contracting officer had intended to foreclose all future claims. Although this may well have been the contracting officer's intent, we hold that this intent was never carried out, as SLA 17 provides otherwise. Accordingly, appellant's current claims for energy and preventive maintenance, which never were part of the "claim" settled by SLA 17, are not barred by the doctrine of accord and satisfaction.

We accept appellant's proof of costs. The accuracy of appellant's claimed costs are supported by credible cost data and calculations, as well as the testimony of Jerry D. Carson, an expert professional engineer, whom the Board finds to be a very credible witness.

GSA has asked us to reduce some of appellant's claimed costs. First, according to GSA, the costs for preventive maintenance were unreasonable and should be reduced by twenty percent to reflect the fact that the work was performed by a company owned by one of the principals in appellant's limited partnership. We disagree. Appellant provided a detailed explanation of how the hourly rates were derived and showed that the rates were lower than those used by GSA in similar situations. GSA also maintains that appellant's claim for after-hours energy costs should be reduced by twenty-five percent to reflect unreliable engineering estimates. Again, we disagree. Appellant's expert professional engineer testified credibly to the accuracy of the calculations and the formulas and factors used in making such calculations. In short, GSA's assertion that appellant's costs are unreasonable is not supported by the record and the agency's argument that the costs should be reduced unavailing.

Decision

The appeal is **GRANTED** in the amount of $187,125.69, plus interest in accordance with the Contract Disputes Act, 41 U.S.C. § 611 (2000).

ROBERT W. PARKER
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

CATHERINE B. HYATT
Board Judge