Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: October 18, 2005

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.

To what markups is Parcel 49C Limited Partnership (Parcel 49C) entitled on the installation of security bollards at a building most of whose space was leased to the General Services Administration (GSA)? GSA's contracting officer allowed 10% as "lessor profit." Parcel 49C, the lessor, maintains that it should receive an additional 23%; the reasonable markups, according to that party, are 25% for general contractor overhead and profit and 8% for lessor's overhead and profit, or a total of 33%. The parties have submitted this case for a decision on the basis of a written record. We are not persuaded that the lessor should receive more than the contracting officer allowed and therefore deny the claim.

Findings of Fact

Earlier, we denied cross-motions for summary relief which had been filed by the parties. We determined that Parcel 49C was not entitled to a markup of 24% simply because a markup with elements totaling that percentage had been added to the cost of work previously performed to build out the space to suit the tenant. We also determined that the markup was not 10% simply because that percentage is specified in a clause which is a part of some GSA contracts but not this one, as urged by GSA. *Parcel 49C Limited Partnership v. General Services Administration*, GSBCA 16377, 05-1 BCA ¶ 32,835 (2004). The facts which were uncontested at that time remain uncontested, and we incorporate them by reference into this opinion. We also summarize them in the next two paragraphs for the convenience of the reader.

The parties entered into the lease, for office space in a Washington, D.C., building, in 1994. The lease required Parcel 49C to build out the space to suit GSA, with GSA's payment for these "special requirements" to include a markup of 29% – 8% for contractor's overhead, 8% for contractor's profit, 5% for design fee, and 8% for developer's overhead.

In 2002, GSA asked Parcel 49C to perform work separate from the build-out project, which by then had been completed – installation of security bollards around the exterior perimeter of the building and two hydraulic security bollard systems outside specified entrances. GSA paid the lessor $1,028,722 for this work. This amount included a markup, unilaterally imposed by the contracting officer, of 10% for "lessor profit" on subcontractor costs of $984,293. Parcel 49C submitted a claim for an additional markup of 14%, contending that the appropriate markup was 24% – the elements of the markup on build-out costs, except for the design fee. The contracting officer denied the claim.

The following facts are also relevant to this dispute:

In its claim, Parcel 49C sought a markup of 24% on "all current and future awards for additional work and services requested by the Government in connection with the Lease," as well as the bollard installation work. Appeal File, Exhibit 60 at 4.

In his decision, the contracting officer said that if Parcel 49C would supply information regarding its "overhead, general conditions, contractor[']s fee, and Lessor's supervision[] and management of the work," he would "be glad to consider the same, and perhaps will award the amount sought." Appeal File, Exhibit 63 at 2. The record does not contain any evidence that Parcel 49C ever presented, to the contracting officer or the Board, any of the information noted by the contracting officer.

Parcel 49C has included in the record a declaration of David A. Spiegel, the director of property services of Republic Properties Corporation, the property manager for the building in question. According to the declaration, "All general contracting services and general contractor functions relating to the construction of the security bollards was performed by Parcel 49C." Appellant's Appeal File Supplement, Vol. II, Exhibit 13 at 2. The declaration does not explain what its maker means by the phrase "general contracting services and general contractor functions."

GSA included in the record a declaration of Subhash Capoor, its DC Service Center's realty coordinator. Mr. Capoor compiled, and provided as an exhibit to his declaration, a list of GSA leases in the Washington, D.C., metropolitan area which became effective between January 2004 and May 2005. Thirteen of these thirty-four leases are shown as having been amended to include construction work for which GSA paid a markup to the lessor. The markups ranged from 10% to 26%. The average markup, as calculated by GSA, was 18.46%. Respondent's Exhibit A; Respondent's Brief at 4.

GSA provided to Parcel 49C in discovery exemplar change orders under GSA leases in the Washington, D.C., area. (These leases are apparently some of the ones on the list appended to Mr. Capoor's declaration.) The parties have included in the record seven of these change orders, all of which were issued between April 2004 and June 2005. Appellant's Appeal File Supplement, Vol. II, Exhibits 7-12; Respondent's Exhibit B. The following information is encompassed in the change orders:

– The markup on the Lease No. 1 change order is a "lessor's markup" of 21%.

– Two change orders issued under Lease No. 2 are included. The markup on the first was 18.77% – a "contractor's fee" of 11% and a "lessor's administration fee" of 7% on both subcontractor costs and the contractor's fee. The markup on the second change order was a "lessor's fee" of 7%.

– On Lease No. 3, GSA issued a "partial award" for construction of tenant alterations. The lessor's pricing proposal, in the total amount of $3,164,737, included a 25% markup for general conditions, overhead, profit, and fees. GSA authorized the lessor to make expenditures up to $832,380, "pending [its] submission of a detailed cost proposal and the negotiation of a firm fixed price." Whether the negotiation resulted in payment of any particular markup is not revealed in the record.

– The markup on the Lease No. 4 change order, 23%, was specified in the lease.

– The markup on the Lease No. 5 change order, 25%, was specified in the lease.

– On Lease No. 6, GSA issued a change order which includes markups of nearly 21.8% for the general contractor's general conditions, 6% for the general contractor's fee, and 8% of the total general contractor's amount as a "lessor's markup." The combined markup on the direct costs is nearly 39.6%.[1]

Discussion

The issue posed in this case – to what markups is the lessor entitled on the bollard work – is an issue of business far more than law. Markups are generally negotiated, as they should be, between parties to a contract. Parcel 49C and GSA did not negotiate markups on the bollard work prior to the performance of that work, however, and despite our urgings after the filing of the case, they have not been able to negotiate markups successfully in the context of litigation, either. Thus, we are forced to resolve through legal analysis what the parties should have resolved as a business matter.

The parties agree that as stated by the Court of Claims in *Bruce Construction Corp. v. United States*, 324 F.2d 516, 518 (Ct. Cl. 1963), "Equitable adjustments . . . are simply corrective measures utilized to keep a contractor whole when the Government modifies a contract." The parties also agree that recovery of both profit and overhead is generally reasonable to keep a contractor whole. *See Bennett v. United States*, 371 F.2d 859, 863-64 (Ct. Cl. 1967); *Derek & Dana Contracting, Inc. v. United States*, 7 Cl. Ct. 627, 639 (1985). As to the specific markups to be applied to the direct costs of the bollard work, however, the parties remain in disagreement, with Parcel 49C maintaining that it should receive 33% and GSA insisting that the contracting officer's allowance of 10% is appropriate. Parcel 49C's

[1] Each party has calculated the markups on this change order as being different from the numbers we find to be correct (as well as being different from the numbers that the other parties considers correct). Our calculations, based on our interpretation of the difficult-to-understand backup materials for the change order, are as follows: The general contractor's direct costs, as shown by trade, were $367,225. The amount for the general contractor's general conditions, $80,000, is almost 21.8% of the costs. The amount for the general contractor's fee, $26,834, is 6% of costs plus general conditions. The general contractor's worksheet also shows an amount of $6,977 for performance and payment bond. The lessor's markup of $38,485 is 8% of the total shown for the general contractor (costs plus general conditions plus fee plus bond). The total markup on the direct costs is almost 39.6%. Appellant's Appeal File Supplement, Vol. II, Exhibit 12 at 7.

figure includes a markup of 25% for its performance of general contractor functions on this job and 8% for its performance of lessor functions.

GSA suggests a simple way of resolving this dispute. Under a contract clause contained in the General Services Administration Acquisition Regulation, 48 CFR 552.243-71 (1993)[2] (GSAR 552.243-71), "Equitable Adjustments (Apr 1984)," markups for overhead, profit, and commission on changed work are limited. The markup "to Contractor on work performed by other than his own forces" – such as the bollard work – "in no case shall exceed" a commission of 10% "unless the Contractor demonstrates entitlement to a higher percentage." As we noted in our earlier decision in this case, GSAR 552.243-71 is not present in the lease at issue in this case. *Parcel 49C v. GSA*, 05-1 BCA at 162,457. GSA contends that the clause should be read into the lease through the Christian Doctrine, however, and that because Parcel 49C has not demonstrated entitlement to a higher percentage markup than 10%, the contracting officer's allowance of that percentage should stand (even if the contracting officer called the markup "profit" rather than "commission").

The Christian Doctrine was promulgated by the Court of Claims in *G. L. Christian & Associates v. United States*, 312 F.2d 418, 425 (Ct. Cl. 1963), *reargument denied*, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963), *rehearing denied*, 376 U.S. 929, 377 U.S. 1010 (1964). The Court of Appeals for the Federal Circuit has explained, "Under the so-called Christian Doctrine, a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law." *S. J. Amoroso Construction Co. v. United States*, 12 F.3d 1072, 1075 (Fed. Cir. 1993) (citing *General Engineering & Machine Works v. O'Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993)). Thus, a clause may be deemed to be included in a contract only if it is both mandatory and "expresses a significant or deeply ingrained strand of public procurement policy."

As Parcel 49C points out, GSAR 552.243-71 cannot be read into our lease through the Christian Doctrine because it fails the first of these tests – it is not a mandatory clause. By its very terms, and by the terms of the GSAR provision which directs its insertion into certain contracts, GSAR 552.243-71 is to be included in "solicitations and contracts for (1) dismantling, demolishing, or removing improvements; or (2) construction, when the contract amount is expected to exceed the small purchase limitation and a fixed-price contract is contemplated." 48 CFR 543.205(b), 552.243-71. The contract between GSA and Parcel 49C is a lease for real property, not for dismantling or constructing improvements to a building.

---

[2] We cite to the version of the regulation in effect at the time the lease between GSA and Parcel 49C was entered into. That version remains in effect today.

Thus, the clause was not required to be included in this contract. Even if GSA is correct in asserting that the clause meets the second test for inclusion through the Christian Doctrine – "express[ion of] a significant or deeply ingrained strand of public procurement policy" – it cannot be considered to be a part of the contract.[3] Whether GSA is correct in maintaining that Parcel 49C has not demonstrated entitlement to a higher percentage markup than 10% will have to be determined in another context.

Because GSA's Christian Doctrine thesis is wanting, we proceed to examine the other arguments made by the parties. Parcel 49C contends that once it established the direct costs of installing the bollards, the burden shifted to GSA to prove that the claimed markups were unreasonable. The lessor says that the agency has not met that burden. To the contrary, according to Parcel 49C, the reasonableness of the claimed markups may be shown by reference to the markups allowed on build-out work under this lease, construction work generally, construction work under GSA leases in the Washington metropolitan area, and construction work involved in cases before boards of contract appeals. GSA asserts (in contradiction to its Christian Doctrine argument) that Parcel 49C may be entitled to additional markups on the bollard work, but that because the lessor has never provided any evidence of direct or indirect costs it incurred on this project, no basis exists for allowing any particular percentage in excess of what the agency already paid.

Parcel 49C's contention as to burden of proof derives from its understanding of a passage contained in *Blake Construction Co.*, GSBCA 1176, 66-1 BCA ¶ 5589, at 26,119: "[I]f an equitable adjustment is to be accomplished retroactively, . . . if an appellant establishes its actual costs . . . it would be entitled to recover that amount, plus appropriate factors for overhead and profit, unless the Government is successful in sustaining the burden of proving that such costs were unreasonable." We do not read this passage as shifting the burden of proof, as the lessor urges. Ordinarily, "the law places the burden of proof upon the party asserting a contention and seeking to benefit from the contention." *United States v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728, 733 (8th Cir. 2001). In other words, the burden of proof is on the party that wants to alter the status quo – the party that would lose if no evidence were presented. *Binder v. Bristol-Myers Squibb Co.*, 184 F. Supp. 2d 762, 768 (N.D. Ill. 2001). A leading treatise makes clear that these standard principles apply to government contract cases: "In establishing the total amount of an equitable adjustment" –

---

[3] In a cogent concurrence in *Amoroso*, Judge Plager urged that application of the doctrine be "limited to the special circumstances that called it forth . . . , protect[ing] the Legislative Branch from encroachment by the Executive Branch." 12 F.3d at 1079. Under this formulation, GSA's argument would also fail, for no statute requires the inclusion of GSAR 552.243-71 in a lease contract.

not just the direct costs involved in an equitable adjustment – "the burden of proof is allocated to the party that is claiming the benefit of the adjustment." John Cibinic, Jr. & Ralph C. Nash, Jr., *Administration of Government Contracts* 698 (3d ed. 1995). The passage from *Blake*, consistent with these principles, shifts to the Government not the burden of proof, but rather, the burden of presenting evidence as to the reasonableness of "costs" – and even as to that burden of going forward, only after the appellant has presented evidence which establishes actual "costs." It does not say that a contractor is entitled to whatever markups it claims unless the Government can prove that those markups are unreasonable.[4] The burden remains with Parcel 49C to prove that it should receive the markups it claims.

Parcel 49C's "proof" goes only to the reasonableness of allowing markups in a percentage greater than GSA has paid. It is of course true that the parties agreed to a markup three of whose elements equaled 24% on build-out work under this lease. As to construction work generally, the lessor has presented an affidavit of Stephen J. Kiraly, a director with Navigant Consulting, Inc., who has many years of experience in the construction industry and government contracting. Mr. Kiraly states in his affidavit that a combined general contractor markup of between 16% and 21% "is within a range of percentages [he] would consider reasonable." Appellant's Appeal File Supplement, Vol. II, Exhibit 1 at 8. Mr. Kiraly also notes that RSMeans, *Building Construction Cost Data* 521-22 (63d ed. 2005) shows that average rates for contractor overhead and profit range from 21% to 26%. *Id.* at 9.

The markups on construction work under recent GSA leases in the Washington metropolitan area, as shown in the exemplar change orders provided by the parties, range from 7% to 39.6%. As calculated by GSA, markups on change orders for construction on similar leases average 18.46%. In the board of contract appeals decisions cited by Parcel 49C, the markups on construction work range from 10% to 30%. *Staff, Inc.*, AGBCA 96-112-1, et al., 97-2 BCA ¶ 29,285, at 145,711 (25% for overhead and profit); *Granite Construction Co.*, ENG BCA 5849, 93-1 BCA ¶ 25,450, at 126,768-69, 126,771 (1992) (14.79% for field office overhead, 4.75% for home office overhead, and 10% for profit); *Olsberg Excavating Corp.*, DOT CAB 1288, 84-1 BCA ¶ 16,931, at 84,223 (1983) (15% for general and administrative overhead and 10% for profit); *Hensel Phelps Construction Co.*, ASBCA 15142, 71-1 BCA ¶ 8796, at 40,874 (30% for overhead and profit of both prime

---

[4] Parcel 49C also cites, in support of its thesis as to burden of proof, a decision of another board of contract appeals which references *Blake*, *Wayne L. Grist, Inc.*, AGBCA 89-135-3, 89-3 BCA ¶ 22,073. We read the relevant passage in *Grist*, 89-3 BCA at 111,018, the same way that we read *Blake*. If this understanding is incorrect, we do not believe that *Grist* correctly interprets the law.

contractor and subcontractor); *Blake*, 66-1 BCA at 26,129 (10% for prime contractor's commission).

Parcel 49C's proof shows that markups within a very wide range – between 7% and almost 40% – have been approved by government agencies for construction work. The relevance of this information to markups on this lessor's bollard work is questionable, however. As to the markups on the build-out work on the building at issue, we agree with the Court of Federal Claims that "[t]he fact that [a contractor] was once successful, in conjunction with a separate [matter], in negotiating a higher percentage commission has no bearing upon the contractor's burden of proof in this matter to demonstrate the nature, extent and complexity of th[is] [p]roject also warranted the application of a higher commission rate." *North American Construction Corp. v. United States*, 56 Fed. Cl. 73, 83 (2003). As to the markups on construction work generally, these are helpful in establishing a zone of reasonableness, but not of assistance in determining the extent of Parcel 49C's costs which would be encompassed within markups on the bollard work.

The markups on construction work under recent GSA leases in the Washington metropolitan area are at both extreme ends of the range shown by Parcel 49C's proof. The fact that they were agreed to does not help us understand why each of them was agreed to, and without that information, their relevance is uncertain. Further, the markup imposed by GSA on the bollard work and the markup claimed by Parcel 49C are both within the range, so the existence of the range does not make one markup more reasonable than the other. The cases cited by the lessor are not especially useful to us, either. In two of the cases, the markups were expressly tied to figures presented by the contractor – the markups with which the contractor bid the job (*Staff*) and percentages which were appropriate "under the standard and accepted business practice utilized consistently by the prime contractor" (*Granite*). In one of the cases, *Olsberg*, the markups were accepted by the board because the Government did not object to them. In the other two cases, the markups were assigned by the board without detailed explanation, but they were much lower than what Parcel 49C claims here – only 10% in *Blake* and 30% for the subcontractor as well as the prime contractor in *Hensel Phelps*.

Parcel 49C has told us neither precisely what it did on the bollard work, beyond the affidavit statement that it performed "[a]ll general contracting services and general contractor functions relating to the construction," nor, more importantly, how much those services cost. As to its activities, the lessor explains in its brief, at 14-15, what contributions general contractors and lessor/developers generically provide for construction projects under their purview, but it has not provided any specific evidence as to what it did here. It has similarly alleged in its brief that the work was "particularly complex," at 11, but has not provided any specific evidence in support of that assertion.

In response to GSA's demands for information on the basis of which overhead rates could be calculated – first in the contracting officer's decision and then in briefing this case – Parcel 49C has responded:

> It does not make sense to suggest that Parcel 49C must submit its electric and telephone bills, its canceled rent checks, its staff payroll and benefits payments, its insurance bills, and all of the other myriad data supporting the myriad costs that comprise overhead. Indeed, the *entire purpose* of indirect cost markups is to avoid the need for the contractor to prove each and every item of its overhead cost, as well as the portion of each cost allocable to the work in question, on a project-by-project basis. To do as GSA suggests would require Parcel 49C to submit thousands, if not millions, of pages of cost data *on each project*, no matter how small, simply to determine the appropriate overhead and profit markups to be applied to the direct costs of the project. This is not what the law requires. . . . Instead, a contractor need only submit cost data to support its direct costs. . . . Having proven those direct costs, Parcel 49C is entitled to reasonable and customary markups for overhead and profit on that amount without submitting any additional cost data.

Appellant's Reply Brief at 5-6.

In our view, this response demonstrates a misunderstanding of both legal and business principles. No one has ever suggested that the lessor produce all the information described in order to receive a markup on subcontractor costs on the bollard work. Without *any* supporting financial data, however, it is impossible for a contracting officer or a board of contract appeals to assign any particular percentage markup to these costs. Although we are confident that Parcel 49C did incur some overhead costs, we cannot even attempt to estimate their value where no basis for it, other than "everybody else gets some," has been presented. *See Raytheon Co. v. White*, 305 F.3d 1354, 1367 (Fed. Cir. 2002) (citing *WRB Corp. v. United States*, 183 Ct. Cl. 409, 425 (1968)) ("fair and reasonable approximation" of costs necessary to permit a jury verdict).

We conclude this opinion with comments on two minor issues raised by GSA. First, we do not agree with the agency's contention that if the Board awards any money to Parcel 49C, it may not award more than the 24% markup the lessor requested in its claim. This contention is contrary to the rule that on appeal to a board of contract appeals, a contractor may increase the amount of its claim as long as the essential nature of the claim remains the same. *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987); *Whiting-Turner/A. L. Johnson Joint Venture v. General Services Administration*, GSBCA 15401, 02-1 BCA ¶ 31,708, at 156,622-23 (2001). Second, if Parcel 49C's prayer that it be

granted a markup of not less than 24% or more than 33% on all future awards for additional work and services requested by the agency in connection with the lease is a claim, the Board could address the matter now because it was included in the lessor's request for a contracting officer's decision. We need not decide whether the prayer is a claim because even if it is one, we would not consider it favorably. As explained with regard to the bollard work, we will grant markups only where we have a basis for setting percentages. Parcel 49C's prayer as to markups on any additional work or services under the lease suffers from the same infirmity as the claim for an additional markup on the bollard work – it does not contain a basis for setting percentages.

Decision

The appeal is **DENIED**.

_____
STEPHEN M. DANIELS
Board Judge

We concur:

_____
EDWIN B. NEILL
Board Judge

_____
CATHERINE B. HYATT
Board Judge