UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO COMPEL GRANTED IN PART: March 21, 2007

CBCA 395, 455

LFH, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Richard J. Conway, Scott Arnold, and Michael J. Slattery of Dickstein Shapiro LLP, Washington, DC, counsel for Appellant.

Robert M. Notigan, Torrie N. Harris, and David A. Leib, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

DANIELS, Board Judge (Chairman).

ORDER

We consider here a Motion to Compel Discovery which was filed by respondent, the General Services Administration (GSA), on February 7, 2007.

Background

The motion involves two cases before the Civilian Board of Contract Appeals, CBCA 395 and CBCA 455.[1] Both are appeals by LFH, LLC (LFH) of decisions by GSA contracting officers on claims submitted by LFH under a contract for the lease of a building in Birmingham, Alabama.

The lease was entered into in 1972. Under the original lease, the lessor was responsible for "maintain[ing] the demised premises, including the building and any and all equipment, fixtures, and appurtenances, furnished by the Lessor under this lease in good repair and tenantable condition, except in case of damage arising from the act or the negligence of the Government's agents or employees." Appeal File, Exhibit 1 at 4.

In 1985, the Government asserted against the lessor a claim for "certain alleged overpayments of operating cost escalation." Appellant's Response to Respondent's Motion to Compel Discovery (Appellant's Response), Exhibit Y at 2. The lessor appealed the contracting officer's decision which made this claim. The case was settled in 1989. The settlement agreement incorporated the terms and conditions of a proposed supplemental lease agreement (SLA), which became SLA No. 49. *Id.* at 4. The settlement agreement also recited:

> [The lessor] and the Government shall, effective on the date of this settlement, be deemed to have mutually released all claims that each has or may have as of the date of this settlement against the other arising out of the Lease (except for claims relating to the structural integrity of the building, latent defects and other Lessor obligations pursuant to Supplemental Lease Agreement No. 49.

Id. at 5.

Of particular importance to the cases now before the Board are paragraphs 5, 6, and 7 of SLA No. 49. These paragraphs provided:

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[1] The cases were filed at the General Services Board of Contract Appeals (GSBCA), where they were docketed as GSBCA 16464 and GSBCA 16893. On January 6, 2007, the GSBCA was terminated and its cases were transferred to the newly-established Civilian Board of Contract Appeals. Pub. L. No. 109-163, § 847, 119 Stat. 3136 (2006). The cases were assigned new docket numbers by the Civilian Board.

5. The Government will take over responsibilities for interior maintenance, repairs costing no more than $10,000 per any single repair, and operation of the building in accordance with paragraph 7 herein and the responsibilities of the Lessor and Lessee are as follows:

(a) The Lessor will continue to have the entire responsibility for structural integrity of the building and shall be responsible for the repair of malfunctioning Lessor owned equipment and systems including, but not limited to, heating, ventilation, air conditioning, electrical, elevator, plumbing, costing more than $10,000 for any single repair.

(b) The Lessor will continue to have responsibility for the replacement of all Lessor owned equipment and systems, including but not limited to, HVAC [heating, ventilation, and air conditioning] heating, ventilation, air conditioning, electrical, elevator, and plumbing.

. . . .

6. . . . .

e. The Lessor shall install fire-rated doors, flames, enclosures, ceiling, and provide a two hour fire rating of the electrical closets in accordance with the National Fire Protection Association or other applicable codes such as the Southern Building Code or local city codes. This shall not in any way be construed to give the Government the right to require the Lessor[] to make other improvements to comply with upgraded building codes not in existence at the time of construction of the building.

. . . .

7. This lease is amended as follows:

The Lessor relinquishes the responsibility for interior maintenance and for those repairs costing no more than $10,000 per single repair and for operating costs and the Government accepts responsibility commencing at any time after this Supplemental Lease Agreement has been executed by Lessor and the Government, but not later than 120 days after execution of this Supplemental Lease Agreement.

Appeal File, Exhibit 2 at 2-4. The settlement agreement specified that the date 120 days after execution of the SLA was February 16, 1990. Appellant's Response, Exhibit Y at 2.

In CBCA 395, LFH seeks payment from GSA of $40,242,987.95 plus interest. Complaint ¶ 1. The lessor contends that "[t]he Government failed to fulfill its obligations under the Lease as amended to perform interior O&M [operations and maintenance] and to perform repairs under $10,000." *Id.* ¶ 14. As a consequence of this action, LFH alleges, GSA must pay it for three groups of costs. First, the lessor demands that GSA reimburse it for "$10,027,333.92 in repair costs in order to restore the building's [HVAC], elevator and electrical bus duct systems to proper working conditions." *Id.* ¶ 21. Second, LFH wants reimbursement, "as a direct and proximate result of the Government's breach of its O&M duties and its improper aggregation of single repair costs, [of] $836,417.19 in repair costs over the course of the Lease." *Id.* ¶ 49. Third, the lessor claims $29,492,849.76 in loss in market value of the building, "as a direct and proximate result of the Government's failure to fulfill its obligations under the Lease." *Id.* ¶ 115.[2]

In CBCA 455, LFH seeks payment from GSA of $22,539. The lessor contends that the Government improperly deducted this amount for rental payments "in order to install elevator door restrictors to comply with . . . upgraded building codes" which were not in existence at the time of construction of the building. Complaint ¶¶ 1, 4, 19.

On December 17, 2004, GSA served on LFH Respondent's Interrogatories and Requests for Production of Documents, First Set. Some of the interrogatories (27, 30, 33, 38, 41, 44, 47, and 50) and requests for the production of documents (5 and 10) sought information related to maintenance or repair performed on certain building systems from September 11, 1972, to February 16, 1990. Appellant's Response, Exhibit A. On January 3, 2005, LFH submitted objections to these discovery requests. As to each of the interrogatories in question, LFH stated:

> Appellant objects to this interrogatory as overly broad and unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The interrogatory relates to work performed between 15 and 33 years ago, during a timeframe that is irrelevant to the issues in this appeal.

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[2] We note that the sum of the three parts of the claim exceeds by $113,612.92 the total amount claimed. We expect that as the case progresses, LFH will explain this difference to us.

Id., Exhibit B. LFH repeated these objections on March 15, 2005, in its response to the interrogatories and requests for document production. *Id.*, Exhibit C.

In its December 17, 2004, requests for documents, GSA also asked (in number 6) for LFH's tax returns for the years 1972 to 2004. Appellant's Response, Exhibit A. The lessor objected to this request "as vague, overly broad, and unduly burdensome." *Id.*, Exhibit B. It later added "irrelevant" to the list of reasons for not providing the requested documents. *Id.*, Exhibit C.

For at least a year and a half after GSA received LFH's objections, it took no action regarding the interrogatories and requests for document production in question. The agency has cited no reason for not acting on the matter during this period of time. Motion to Compel Discovery (Motion) at 3; Appellant's Response at 4. Toward the end of 2006, GSA sent to LFH additional interrogatories and requests for document production. (GSA says it sent second, third, and fourth sets in October and November. Motion at 3. LFH has shown us that what GSA labeled its "Second Set" was transmitted on December 29. Appellant's Response, Exhibit D.) Several of these discovery requests concern the same matters to which LFH filed objections in January and March of 2005.

On December 29, 2006, GSA for the first time "raise[d] issues" with LFH's objections to GSA's December 2004 discovery requests. Agency counsel wrote to the lessor's attorney, "The idea that an eighteen-year period of maintenance and/or repair could be irrelevant to a case that largely concerns the useful lifespan of building systems is simply untenable." Motion, Exhibit D. Agency counsel also commented, as to the lessor's tax returns:

> As you know, Appellant has asserted that it signed SLA 118 under economic duress. To prove economic duress before the Board, Appellant must prove "stress of financial necessity." *See P. J. Dick Inc. v. General Services Admin.*, 94-3 BCA ¶ 27,266, GSBCA No. 11772 (*citing Systems Technology Associates, Inc. v. United States*, 699 F.2d 1383, 1387 (Fed. Cir. 1983)). Appellant's financial predicament at the time, as well as the information found in its tax returns for the period in question (1999-2001) are therefore clearly relevant.

Id.

On February 7, 2007, GSA filed its Motion to Compel Discovery. The motion states that the parties have attempted but failed to resolve informally the matters addressed above. There followed a lengthy response from LFH (supplemented by twenty-six exhibits), a reply from GSA, and a surreply from LFH.

Pursuant to an order issued by the GSBCA on August 17, 2006, which incorporates a schedule jointly requested by the parties, written discovery requests may be sent for receipt no later than June 13, 2007, and answers to timely-submitted written discovery requests shall be sent for receipt no later than July 13, 2007.

Discussion

The principal issue here is whether LFH should be compelled to respond to GSA's interrogatories and requests for production of documents regarding information related to maintenance or repair performed on certain building systems from September 11, 1972, to February 16, 1990. As to this matter, we wrestle with two competing considerations.

First, under Federal Rule of Civil Procedure 26, parties may generally "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). As GSA notes, the phrase "relevant information" "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)).

Second, a tribunal has an obligation to the parties to move cases toward resolution as promptly as is practicable. Toward that end, as LFH points out, courts have denied motions to compel discovery when they are filed in a tardy fashion. *See*, *e.g.*, *Johnson v. Hensley*, 62 F. App'x. 85, 86 (6th Cir. 2003) (district court did not abuse its discretion in denying motion to compel "because [plaintiff] filed his motion . . . two years after the response to discovery had been submitted by the defendants."); *In re Sulfuric Acid Antitrust Litigation*, 230 F.R.D. 527, 533 (N.D. Ill. 2005) ("if a party has unduly delayed in filing a motion for an order compelling discovery, a court may conclude that the motion is untimely"); *Suntrust Bank v. Blue Water Fiber, L.P.*, 210 F.R.D. 196, 199, 200 (E.D. Mich. 2002) (motion to compel denied where filed approximately eighteen months after close of discovery). Indeed, some courts have gone so far as to conclude that "[f]ailure to promptly enforce discovery rights may be construed by the court as a waiver of the right to enforce such rights." *Choate v. National Railroad Passenger Corp.*, 132 F. Supp. 2d 569, 574 (E.D. Mich. 2001); *see also Price v. Maryland Casualty Co.*, 561 F.2d 609, 611 (5th Cir. 1977).

Both considerations -- the importance of discovering information which may be relevant to the merits of the cases and the need to move the cases promptly toward resolution -- are important. We are disappointed that GSA did not file its motion much earlier -- preferably, soon after the agency received LFH's objections. We accept LFH's contentions

that if it is made to answer the discovery requests now, it will have to incur some additional costs and its plans for completing discovery may be disrupted. Nevertheless, balancing the two considerations, and keeping in mind that four months remain in the established schedule for completion of written discovery, we believe that the interests of justice weigh more heavily on the side of granting the motion. We agree with GSA that the way in which building systems were maintained and repaired before the Government assumed responsibility for this work may well have some bearing on the need for repairs after that assumption occurred. We do not see that LFH would have to incur materially more costs in time and other resources to provide the requested information now than it would have faced if the motion had been presented and granted earlier.

We also agree with GSA that the agency has not made a counterclaim involving maintenance and repair costs incurred before the Government assumed responsibility, as happened in *American Manufacturing Co. of Texas*, ASBCA 25816, 83-2 BCA ¶ 16,608 (counterclaim for a specific amount of money). Consequently, GSA would not be in breach of the 1989 settlement agreement if it were to use pre-February 16, 1990, maintenance and repair records to demonstrate that the agency's obligation to pay post-February 16, 1990, costs is reduced (or negated) by actions that occurred during the earlier period.

The motion to compel also asks the Board to direct LFH to produce its tax returns for a period which GSA has recently restricted to 1999 through 2001. GSA says it needs the tax returns to counter LFH's argument as to economic duress. In advancing this proposition, the agency relies on the GSBCA's decision in *P. J. Dick v. General Services Administration*, GSBCA 11772, et al., 94-3 BCA ¶ 27,266. GSA reads the decision incorrectly. The key paragraph there reads in pertinent part as follows:

> Our circuit court has indicated that "[e]conomic pressure and 'even the threat of considerable financial loss' are not duress." *Systems Technology Associates, Inc. v. United States*, 699 F.2d 1383, 1387 (Fed. Cir. 1983). "Economic duress may not be implied merely from the making of a hard bargain." *Id.* "Some wrongful conduct must be shown, to shift the responsibility for bargains made by plaintiff under stress of financial necessity." *Id.* The coercive nature of the act and the defeating of the will of the party coerced is dispositive as to the wrongfulness to the conduct. *Id.*

P. J. Dick, 94-3 BCA at 135,862.

As *P. J. Dick* makes clear, the coercive nature of the act and the defeating of the will of the party coerced are the key factors in determining whether economic duress is present. GSA has not explained how LFH's tax returns would show either of these factors.

Consequently, whether the motion to compel had been filed promptly after receipt of LFH's objections or when it actually was filed, it merits denial.

Decision

GSA's **MOTION TO COMPEL** is **GRANTED IN PART**. The motion is granted insofar as it seeks responses to the agency's fall 2006 written discovery requests regarding maintenance and repair of building systems from 1972 to February 16, 1990. The parties are directed to agree on a date by which the requests shall be answered. The motion is denied insofar as it seeks copies of LFH's tax returns.

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STEPHEN M. DANIELS
Board Judge