



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: February 12, 2016

CBCA 4717, 4741

JDL CASTLE CORPORATION,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

W. David Shannon, President of JDL Castle Corporation, Winston-Salem, NC, appearing for Appellant.

Helen Y. Kearns, Office of Regional Counsel, General Services Administration, Fort Worth, TX, counsel for Respondent.

Before Board Judges **VERGILIO**, **DRUMMOND**, and **SHERIDAN**.

DRUMMOND, Board Judge.

These appeals arise out of a lease between JDL Castle Corporation (JDL or appellant) and the General Services Administration (GSA or respondent). In both matters, JDL alleges that Government-caused delay entitles it to damages based on delayed rental payments. GSA filed motions for summary relief, arguing that JDL has not provided evidence to prove compensable relief. Although these appeals concern two different periods of alleged delay under the lease, our analysis of appellant's entitlement to damages is the same for each. As explained below, we find that appellant has failed to establish any compensable damages

resulting from Government-caused delays. We therefore grant GSA's motions and deny the appeals.

Findings of Fact

On November 26, 2012, GSA awarded lease GS-07B-17152 (lease) to JDL for building space for the United States Citizenship and Immigration Services (USCIS) in Fort Smith, Arkansas. The claims before the Board involve two periods of alleged delay during the course of the project – one occurring in the preconstruction phase (CBCA 4717), and one during construction (CBCA 4741). In CBCA 4717, appellant seeks compensation for Government-caused delay in the completion of project design activities, which delayed issuance of the notice to proceed. GSA accepts responsibility for the delay, but denies appellant established any damages. In CBCA 4741, appellant seeks delay costs related to the approval and installation of a security system. GSA denies responsibility for the delay, but again argues that appellant has failed to establish any damages.

CBCA 4717

The project schedule provided for 170 working days between contract award and the notice to proceed on construction, in order to allow JDL, GSA, and USCIS to complete design activities for the space. Those activities included developing the schematic design layout, reviewing and approving design intent drawings (DIDs) and construction documents (CDs), and negotiating the tenant improvements price proposal (TIPP). JDL and GSA agree that the project schedule was not followed and that the Government was responsible for the delay in completing the project design activities and issuing the notice to proceed. The parties agreed to a 135-day delay. GSA attributed the delay, in part, to USCIS' failure to provide a schematic design layout in a timely manner, changes to the DIDs and CDs, and submittal of incorrect DIDs. Exhibit 48.¹

While negotiating the delay period, JDL and GSA also negotiated the TIPP. JDL asserts that during these negotiations it agreed to accept a reduction in overhead and profit in the TIPP in exchange for the costs associated with the Government-caused delay.² GSA

¹ All exhibits for this section are found in the CBCA 4717 appeal file, unless otherwise noted; in addition, all cited pleadings are those filed under this docket number.

² In a February 24, 2014, email message, JDL states that it “will accept the [TIPP] after Reduction amount as long as we have [GSA's] word that the [delay claim] will be given a fair and reasonable evaluation for payment.” Exhibit 26.

counters that JDL agreed to this reduction to continue negotiations to the notice to proceed and construction phase. Exhibit 24.³ On March 4, 2014, GSA issued lease amendment 3, containing the notice to proceed. Exhibit 30.

On January 8, 2015, JDL submitted a certified claim in the amount of \$53,494.46 for delay damages.⁴ Exhibit 40. JDL characterized this claim as an “interest carry cost” claim for the delay period. JDL states that its “interest carry cost” claim represents interest paid on construction loans and the cost of carrying payments on the property. Exhibits 26, 39.

On January 28, 2015, the contracting officer (CO) issued a decision on the claim. Exhibit 48. In it, GSA reaffirmed that the delay was caused by the Government, but denied the claim because JDL failed to provide any evidence of actual loss or increased costs that resulted from the delay, despite requests by the CO for supporting documentation.⁵ *Id.*

On April 20, 2015, JDL appealed the CO’s decision, arguing that GSA agreed to pay the delay costs in exchange for JDL reducing its overhead and profit in the TIPP and that its claim represented its delay costs on the project. The calculation for the claim is based on “taking the amount of money [JDL] spent based on [its] actual draw requests and multiplying the interest rate by the number of days that amount was outstanding to arrive at the actual cost.” Notice of Appeal, Exhibit C.

On September 21, 2015, GSA filed a motion for summary relief, arguing that the communications between GSA and JDL show that GSA never agreed to pay the delay claim in exchange for JDL reducing its profit and overhead in the TIPP. Rather, GSA asserts, JDL only requested that its claim be given a fair and reasonable evaluation for payment, which GSA agreed to. Exhibit 26. GSA further argues that JDL failed to provide any evidence of actual losses on its borrowing due to the delay period. During discovery, JDL provided the Government with documentation of two mortgage loans on the property, both dated January 22, 2013, but with different maturity dates. Respondent’s Motion for Summary

³ GSA cites a February 12, 2014, email message in which JDL “agreed in the spirit of cooperation to forgo some of the profit/overhead and fee.” Exhibit 24.

⁴ JDL has since removed eleven working days in its appeal because the certified claim included days from a mandatory government furlough, from October 1 to 16, 2013, which occurred during the delay period, resulting in a claim for 135 days of delay. Exhibit 39.

⁵ During discussions regarding JDL’s claim, GSA, on numerous occasions, requested documentation evidencing JDL’s damages from the delay, which JDL refused to provide, believing it was not obligated to do so. *See generally* Exhibits 36-46.

Relief, Exhibit 7. GSA argues that there is no evidence that either of these loans was impacted by the delay, i.e., by an increase in the interest rate or by an extension of the maturity date. GSA reasons that because the repayment of the principal and interest on the loans would have occurred regardless of the delay, JDL has failed to prove any additional costs, and therefore is not entitled to its claimed amount.

In response, JDL argues that “[h]ad the lease schedule been maintained, but for the agency delays, rent would have been received, [and] interest payments would have been made from rent.” Appellant’s Response to Respondent’s Motion for Summary Relief at 3. With regard to GSA’s argument that the loan documents show an absence of damages, JDL states that it paid interest on the loans during the time of delay. *Id.* at 4. However, JDL does not provide any evidence that those loans were procured as a consequence of the delay or were in any way affected by the delay.

CBCA 4741

This claim concerns an alleged delay relating to the installation of a security system during the construction phase of the project. The lease included general security requirements, which, in part, prescribed the following:

ENTRY SECURITY: INTRUSION DETECTION SYSTEM WITH CENTRAL MONITORING CAPABILITY BY LESSOR (BUILDING SPECIFIC SECURITY) (DEC 2011)

A perimeter Intrusion Detection System (IDS), compliant with government standards, with tie-in to a central monitoring facility shall be provided, installed and maintained by the Lessor. Standards can be obtained from the Contracting Officer upon request. This system shall also be compatible with the Department of Homeland Security, Federal Protection Service (DHS/FPS) mega center central monitoring facility. Information regarding system compatibility requirements is available from the Contracting Officer. Internal IDS for Government space may be required based on the government’s building security assessment.

Exhibit 2 at 2.⁶

⁶ All exhibits for this section are found in the CBCA 4741 appeal file, unless otherwise noted; in addition, all cited pleadings are those filed under this docket number.

USCIS subsequently provided the detailed security system scope of work (SOW) to JDL on August 19, 2013. The SOW required the following:

The access control system shall be a Viscount Freedom by VSI or equal system with the following capabilities;

.....

The access control system shall not use controllers or intermediate panels to communicate between door hardware and the access control server. The door devices shall connect to a single IP [internet protocol] bridge that will convert to CAT [category] 6 and connect directly to the server using a USCIS approved Cisco POE [power over ethernet] enable Switch.

.....

e. Contractor must only use equipment on the GSA Approved Products List (APL) where required for HSPD-12 [Homeland Security Presidential Directive 12] access control compliance. The APL is located online at <http://fips201ep.cio.gov/apl.php>.

Exhibit 10 at 1-2.

As part of the TIPP, originally proposed on December 29, 2013, JDL submitted the Kantech ACS (Kantech) security system. After some negotiations concerning the TIPP, on March 3, 2014, the Government accepted the proposal and issued lease amendment 3 with a notice to proceed for tenant improvements and building security. Exhibit 17.

On May 15, 2014, the Government notified JDL that the Kantech security system did not comply with the security SOW, specifically because the Kantech access control system uses controllers to communicate between door hardware and the access control server. Exhibits 18, 26. Therefore, the Government directed JDL to install the Viscount security system. Following further negotiations, GSA issued lease amendment 6, dated August 28, 2014, which provided a notice to proceed on installing the Viscount security system and paying JDL for the difference in cost between the two systems plus an additional amount for increased general and administrative overhead expenses. Exhibit 27.

On October 31, 2014, GSA issued lease amendment 7, accepting the tenant improvements as substantially complete and establishing that date as the commencement date of the lease rental payments. Exhibit 29.

On November 14, 2014, JDL submitted a claim to the CO for “interest carry costs” associated with the security system delay. Exhibit 40. JDL sought \$53,705.96 as compensation for seventy-seven days, which represented the time between the anticipated completion date, August 15, 2014, and the actual completion date, October 31, 2014. On February 5, 2015, the CO issued a decision denying JDL’s delay claim. *Id.* In it, the CO concluded that JDL was responsible for the delay because, among other issues, it misunderstood the security SOW and proposed the Kantech system, which did not meet contract requirements. *Id.* at 2. The CO also determined that the delay was caused by JDL incorrectly proposing certain door positioning switches, which again did not meet the security SOW requirements. *Id.* at 5. The CO stated that the Government was not at fault because JDL’s nonconforming security proposal caused the delay. *Id.* Finally, the CO stated that JDL had not submitted any evidence that it incurred additional costs due to the security system that had not already been reimbursed through lease amendment 6.⁷ *Id.* at 6.

On May 4, 2015, JDL appealed the CO’s decision, arguing that the delay was caused by the Government issuing incorrect DIDs concerning door positioning switches and contradictory security system requirements. Notice of Appeal. On the latter issue, JDL stated that under subsection (e) of the SOW, GSA provided an approved product list, which allowed for the Kantech system. *Id.* JDL argued that this approved product list contradicted GSA’s later instructions that only the Viscount system would be allowed. JDL argues that because the Government caused the delay, it is entitled to \$53,705.96.

On September 21, 2015, GSA submitted a motion for summary relief, reaffirming the CO’s decision that JDL caused the delay, that JDL did not provide any evidence that it incurred any additional cost because of the delay, and that GSA paid all amounts JDL was entitled to under the lease.⁸ During discovery, JDL provided the Government with the same documents it had provided in CBCA 4717 concerning the two mortgage loans. GSA again

⁷ As it had during discussions involving CBCA 4717, GSA, on numerous occasions, requested documentation from JDL evidencing its damages from the delay. Again, JDL refused to provide any. *See generally* Exhibits 30-41.

⁸ GSA argued that the actual amount of delay was only sixty-five days, the time from the issuance of the temporary certificate of occupancy until the completion of construction and acceptance of the space, occurring between August 27 and October 31, 2014. JDL calculated seventy-seven days of delay, the time from the change to the security system until completion of construction, occurring between August 15 and October 31, 2014. The amount of time of the delay is not material to our decision.

argues that there is no evidence that either loan was impacted by the delay, and reasons that repayment of the principal and interest on the loans would have occurred regardless.

In response, JDL reasserts that the Government caused the delay by its contradictory specifications. Pertaining to its additional costs, JDL argues that “[b]ut for the Respondent’s directing Appellant to select a security system using a flawed methodology, the facility would have been complete and accepted and GSA tenant agency would have paid rent. The rent would have been used in part to pay interest expense, an appropriate cost of lessor’s bargain.” Appellant’s Response to Respondent’s Motion for Summary Relief at 1. As a result, JDL argues, “[it] was required to make interest payments on its loan that it otherwise would have received rental income to offset such interest payments.” *Id.* at 2.

Discussion

Summary relief is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial burden of proving its motion on the basis of the pleadings, depositions, answers to interrogatories, admissions on file, or affidavits. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In considering summary relief, the tribunal will not make any credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249. All reasonable inferences are drawn in favor of the nonmoving party. *Id.* at 255. “In response to a motion for summary relief, it is incumbent upon a party to come forth with sufficient evidence to ‘show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient.’” *Fortis Networks, Inc. v. Department of the Interior*, CBCA 4176, 15-1 BCA ¶ 36,066, at 176,127 (quoting *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987)). Nevertheless, “the moving party’s burden of demonstrating the absence of genuine issues of material fact may be discharged by showing the absence of evidence in support of the nonmoving party’s case.” *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3522, 15-1 BCA ¶ 36,164, at 176,476 (citing Fed. R. Civ. P. 56(c)(1)(B); *Celotex Corp.*, 477 U.S. at 323).

In these cases GSA argues, and we agree, that JDL has not provided any evidence of damages caused by the delays. Although JDL provided documents concerning two mortgage loans in connection with the property, it failed to provide any evidence that these loans were procured because of or were affected by the delay. Because JDL has failed to provide a sufficient showing on its damages, we grant GSA’s motions for summary relief. *See EHR Doctors*, 15-1 BCA at 176,476-78 (finding for the moving party because the nonmoving party failed to provide evidence to support elements of its duress claim).

Furthermore, JDL has presented no evidence or arguments that it is seeking anything other than the time value of money on the delayed payment of rental income. While JDL does not calculate its claims strictly as the loss of the monthly rental payments, the claims are based on outstanding costs that were incurred regardless of the Government's delays, i.e., monthly payments made on already existing mortgages. In its responses to GSA's motions, JDL argues that had the lease schedule been maintained, rent would have been received sooner, and the principal and interest payments on the loans would have been made from rent. *See S.S. Silberblatt, Inc. v. United States*, 3 Cl. Ct. 644, 647 (1983) (finding that the plaintiff implicitly made a claim for loss of rental income when it argued that the rental income would be used to pay interest on an outstanding loan).

In *6000 Metro LLC v. General Services Administration*, GSBCA 15725, et al., 04-1 BCA ¶ 32,510, the appellant sought damages in the form of delayed rental payments due to the Government's delay in connection with DIDs. Our predecessor board found that "[c]ase law establishes that when Government delay occasions later-than-anticipated commencement of rental payments, compensation may be made only for increases in costs of performance; loss of rental income, although an economic detriment, is not a cost of performance and therefore is not compensable for the delay." *Id.* at 160,821 (citations omitted) (quoting *Jay P. Altmayer v. General Services Administration*, GSBCA 12639, 95-1 BCA ¶ 27,515, *aff'd in part, rev'd in part, sub nom. Altmayer v. Johnson*, 79 F.3d 1129 (Fed. Cir. 1996)). Compensable costs of performance are any unanticipated, extra out-of-pocket expenses that a contractor would not have incurred but for the Government's delay. *See Coley Properties Corp. v. United States*, 593 F.2d 380, 385-86 (Ct. Cl. 1979). Such expenses may include increases in interest on existing loans, or loans procured to cover the expenses caused by the delay. *See S.S. Silberblatt*, 3 Cl. Ct. at 646-47. "However, a claim for loss of rental income is far different than a claim for additional interest costs It has been held that loss of rental income . . . is not an additional cost of performance of the contract." *Id.* at 647 (citing *Coley Properties*, 593 F.2d at 385-86).

To support its proposition that we may grant its "interest carry cost" claim, JDL directs the Board's attention to *Hedlund Construction, Inc. v. Department of Agriculture*, CBCA 105, 08-1 BCA ¶ 33,798. However, JDL's reliance on this case is misplaced. In *Hedlund*, appellant paid interest on the difference in the cost of the performance bond between the amount set forth in the timber sale prospectus and the amount later required by the contract. The cost difference was an unanticipated, out-of-pocket expense, and the appellant was further awarded interest on that compensable cost of performance. *Id.* at 167,311-12. That decision does not affect the aforementioned principle that a loss in rental income due to the Government's delay is not an additional cost of performance of the contract.

Because JDL has not provided any evidence of additional incurred cost and sought damages in the form of delayed rental payments, GSA is entitled to judgment as a matter of law. While JDL also argues that GSA agreed to pay its delay claim in CBCA 4717 in exchange for a reduction in its overhead and profit in the TIPP, JDL has not provided any evidence that GSA agreed to such an arrangement. The record reveals an agreement to provide fair consideration; without more from JDL, the Board denies this basis of appeal.

Decision

For the foregoing reasons, respondent's motions for summary relief are granted and the appeals are **DENIED**.

JEROME M. DRUMMOND
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

PATRICIA J. SHERIDAN
Board Judge