



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT DENIED:
November 20, 2018

CBCA 5997

SBC ARCHWAY HELENA, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Diana Parks Curran and Hadeel N. Masseoud of Curran Legal Services Group, Inc.,
Johns Creek, GA, counsel for Appellant.

Justin S. Hawkins, Office of General Counsel, General Services Administration,
Washington, DC, counsel for Respondent.

Before **VERGILIO, KULLBERG, and CHADWICK.**

VERGILIO, Board Judge.

SBC Archway Helena, LLC (lessor) seeks a sum certain denied by a contracting officer of the General Services Administration (agency) under a lease. The lessor asserts that the agency delayed issuing a notice to proceed with tenant improvements. It seeks to recover various cost increases that it attributes to the delay. The agency moves for summary judgment under Board Rule 8(f), 48 CFR 6101.8(f) (2018), asserting that, even if the agency delay is assumed to have occurred, the claimed amounts are not recoverable costs of performance under the contract and applicable law.

The Board denies the agency's motion. The agency reads too restrictively the terms of the lease and prior decisions based upon particular contract clauses, claims, and evidence. The lessor does not seek the payment of rent prior to occupancy. The lessor is not foreclosed from demonstrating that agency delays occurred that impacted the lessor's costs during an extended period of performance prior to or during occupancy.

Findings of Fact

With an award date of January 6, 2015, the agency and lessor entered into a lease that includes a Changes (MAR 2013) and a Disputes (JUL 2002) clause. The lease term is for fifteen years (ten firm) beginning upon acceptance by the agency of the premises. The annual rent consists of amounts for shell rent, real estate taxes, tenant improvements, operating costs, and building specific amortized capital costs. Payments would begin after occupancy. Among other obligations, the lease requires the agency to issue a notice to proceed within fifteen working days following the lessor's submission of the tenant improvements price proposal, provided the proposal conforms to contract requirements and the parties negotiate a fair and reasonable price for the improvements. For purposes of resolving its motion, the agency posits that it untimely issued that notice to proceed, which delayed the occupancy of the premises. Such a delay could extend the period from lease signing to occupancy and result in a later than anticipated start to rental payments under the lease. The lessor states in its claim that it is entitled to relief under the Disputes clause, seeking payment (with documentation in support) as a matter of right for the agency's delay in issuing the notice to proceed.

Discussion

The lessor contends that it has and will incur increased costs to perform the lease because of agency delay in issuing the notice to proceed. In particular, it states that the delay has resulted in base amounts (for which it is liable throughout the occupancy) for local property taxes and operating costs higher than would have occurred without the delay, and has required it to expend more on construction loan interest, return on capital, costs incurred as a result of inefficiencies and delays, and legal fees. Additionally, the lessor seeks to recover for operating cost increases, said to arise from increases in the tenant improvement budget that led to increased insurance costs over the life of the lease above those negotiated in the lease.

The standards for summary judgment are established and recognized. *JDL Castle Corp. v. General Services Administration*, CBCA 4717, et al., 16-1 BCA ¶ 36,249, at 176,857. The agency contends that the lessor's costs of performance have not increased because of the purported delay such that under the contract's Changes clause and case law,

including *Coley Properties Corp. v. United States*, 593 F.2d 380 (Ct. Cl. 1979), and *JDL*, relief is not available. The agency characterizes the claim as implicitly one for lost rent, stating that the lessor seeks compensation for obligations that it would have incurred regardless of the delay.

In the claim, the lessor seeks payment that is not necessarily prohibited under the lease or case law. The lessor does not seek payment of rent. Under the lease, rent obligations begin with occupancy and continue for at least ten years. In substance, the lessor seeks compensation for costs it has paid or will be obligated to pay that are not part of the rental payments. Regarding taxes and operating costs, the lessor maintains that the base rates (for which it is liable under the lease) have increased because of the delay, such that its cost of performance increases. Other costs, relating to construction loan interest, return on capital costs, costs incurred as a result of inefficiencies and delays, and legal fees, it maintains were incurred only because of agency delays. Further, the lessor seeks payment for what it describes as operating cost increases (higher insurances costs) arising from the larger than anticipated at award budget for tenant improvements.

The agency focuses upon language in *Coley* that states that the purpose of the Changes clause is to compensate for the unanticipated and extra out-of-pocket expenses incurred in performing the contract, and that the loss of expected income during a period of delay does not represent an out-of-pocket expense. 593 F.2d at 385-86. However, the Court recognized the contractor's ability to recover impact costs arising from a delay. *Id.* at 385 ("The delay that the changes the government ordered in the postal portion caused Coley in completing the tower portion, with its concomitant additional expenses to Coley in completing the tower, is an item of additional impact cost for which the government is liable . . ."). In *JDL*, the Board concluded that the contractor provided no evidence of additional incurred costs arising from an agency delay, and sought damages in the form of delayed rental payments. The Board recognized that delayed rental payments are not compensable under *Coley*, and the lack of evidence precluded further relief. 16-1 BCA at 176,858. This lessor's claim is structured differently. This lessor has provided sufficient support of costs it has incurred or will incur because of the alleged delay to move forward with the case. The lessor has the opportunity to demonstrate that these are impact costs and not mere loss of rental income.

Decision

The Board **DENIES** the agency's motion for summary judgment.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge