ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
General Atomics Aeronautical Systems, Inc.	)	ASBCA Nos. 61633, 61731
	)	
Under Contract No. FA8620-10-G-3038 *et al*.	)	

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OPINION BY ADMINISTRATIVE JUDGE MELNICK DENYING GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

These appeals are from a Defense Contract Management Agency (DCMA or government) determination and final decision that General Atomics Aeronautical Systems, Inc. (General Atomics) has not complied with the Cost Accounting Standards (CAS). The government seeks summary judgment upon entitlement. The motion is denied.

General Atomics is party to multiple contracts with the government subject to the Federal Acquisition Regulation (FAR) cost principles and the CAS (gov't mot., proposed findings of fact [GPFF] ¶ 1; app. opp'n, response to GPFF [APFF] ¶ 1). "[T]he FAR governs all matters of cost allowability, [while] the CAS has exclusive authority over the measurement, assignment, and allocation of costs." *Raytheon Co. v. United States*, 747 F.3d 1341, 1350 (2014) (citing 41 U.S.C. § 1502(a)(1)).

General Atomics, Sorrento West Properties, Inc. (Sorrento West), and San Miguel Valley Corporation (San Miguel) are related parties under common control through parent entities (GPFF at ¶ 6; APFF at ¶ 6). General Atomics has

leased properties from Sorrento West and San Miguel and transferred funds in accordance with the lease terms (GPFF at ¶¶ 7, 11; APFF at ¶¶ 7, 11, 16). FAR 31.205-36 is the cost principle applicable "to . . . renting or leasing real . . . property acquired under 'operating leases.'" FAR 31.205-36(a). Among the contractor costs that it recognizes as allowable costs are "[c]harges in the nature of rent for property between any divisions, subsidiaries, or organizations under common control, to the extent that they do not exceed the normal costs of ownership, such as depreciation, taxes, insurance, facilities capital cost of money, and maintenance." FAR 31.205-36(b)(3). This long-established restriction to "costs of ownership" upon recovery of lease related charges between parties under common control prevents contractors from receiving what would essentially be intraorganizational profits from the government. *See Mauch Lab'ys, Inc.*, ASBCA No. 8559, 1964 BCA ¶ 4023 at 19,803. In accordance with FAR 31.205-36(b)(3), General Atomics treats those portions of its lease charges reflecting the cost of ownership of the properties as allowable costs, but not the excess (compl. ¶ 15; GPFF ¶ 16; APFF ¶ 12). That is not controversial here.

This dispute arises from General Atomics' application of the same FAR 31.205-36(b)(3) limitation to the calculation of its General and Administrative (G&A) expense rate. General Atomics includes the cost of ownership portion of lease charges that it transfers to related parties in its G&A allocation base (compl. ¶¶ 15, 38; GPFF ¶ 12). However, it excludes the part of its lease charges exceeding the cost of ownership from that base (compl. ¶¶ 15, 30, 38; GPFF ¶¶ 13, 16). General Atomics does not consider the excess a cost but "simply a tax-and treasury-efficient inter-company transfer that eliminated upon consolidation" (APFF at ¶ 16; *see also* GPFF at ¶ 16;). The G&A base is the denominator to the G&A rate. Everything else being equal, the lower that figure is the higher General Atomics' G&A rate. *See Advanced Materials, Inc. v. United States*, 54 Fed. Cl. 207, 214 (2002). So, the government's financial interest is to increase the base as much as possible to reduce General Atomics' G&A rate, while General Atomics' interest is the opposite.

On March 28, 2018, the DCMA Divisional Administrative Contracting Officer (DACO) issued to General Atomics a determination that it had not complied with CAS provisions, starting January 1, 2007, and continuing to the present. The DACO concluded that General Atomics should have included the related party lease amounts exceeding costs of ownership in its G&A base calculated for indirect and forward pricing rate proposals. (R4, tab 7) On July 18, 2018, the DACO issued a final decision repeating its conclusions and determining that between January 1, 2007, and July 17, 2018, the government paid $41,658,000 in increased costs because of General Atomics' CAS noncompliance. Including interest, the DACO demanded the return of $46,716,711. (R4, tab 9) General Atomics has appealed both decisions.

The government's motion starts with the premise that because FAR 31.205-36(b)(3) treats the portion of General Atomics' lease charges reflecting the cost of

ownership of the related party properties as allowable costs, the excess of those amounts must be unallowable costs. From there, it turns to CAS 405-40(e), which provides that all unallowable costs covered by the standard "shall be subject to the same cost accounting principles governing cost allocability as allowable costs." 48 C.F.R. § 9904.405-40(e). The provision continues that "[i]n circumstances where these unallowable costs normally would be part of a regular indirect-cost allocation base or bases, they shall remain in such base or bases." *Id.* Thus, says the government, because General Atomics' unallowable lease charges exceeding the cost of ownership of the properties must be allocated in the same manner as the allowable portion, they must remain in its G&A base with the allowable charges.[1]

"Summary judgment should be denied when there are 'disputes over facts that might affect the outcome of the suit under the governing law.'" *Tkacz Eng., LLC*, ASBCA No. 60358, 18-1 BCA ¶ 36,940 at 179,962 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)); *see also Delfasco LLC*, ASBCA No. 59153, 15-1 BCA ¶ 35,853 (denying summary judgment when at least one disputed issue of fact has been identified for trial). Among General Atomics' numerous arguments in response to the government's motion is that its excess lease charges above cost of ownership of the related party properties are not costs at all. If they are not costs, there is no CAS requirement to include them in the G&A base.

The term "cost" in the CAS regulatory scheme is "clear and unambiguous." *Rumsfeld v. United Techs. Corp.*, 315 F.3d 1361, 1372 (Fed. Cir. 2003). One

[1] The government also contends that General Atomics exclusion of the related party lease charges exceeding cost of ownership from its G&A base fails to comply with CAS 410. Specifically, it cites CAS 410-40(b)(1)'s provision that the G&A expense pool "shall be allocated to final cost objectives . . . by means of a cost input base representing the total activity of the business unit," with an exception provided in (b)(2). 48 C.F.R. § 9904.410-40(b)(1). It also relies upon CAS 410-50(d)'s requirement that "[t]he cost input base used to allocate the G&A expense pool shall include all significant elements of that cost input which represent the total activity of the business unit." 48 C.F.R. 9904.410-50(d). The government suggests that General Atomics inclusion of the allowable portion of its related party lease charges in its G&A base proves that it considers all its lease charges to constitute a cost input representing the total activity of its business unit. Therefore, its exclusion of the portion exceeding the cost of ownership is improper. The government also observes that CAS 420-50(f)(2) generally requires some independent research and development as well as bid and proposal cost pools be allocated using the same base as G&A expenses under CAS 410-50. 48 C.F.R. § 9904.420-50(f)(2). Because General Atomics has failed to correctly calculate its base under CAS 410, the government says it has also not complied with CAS 420.

definition that the court of appeals has embraced characterizes cost as "an item of outlay incurred in the operation of a business enterprise (*as for the purchase of raw materials, labor, services, supplies*) including depreciation and amortization of capital assets." *Id.* at 1370 (emphasis in original) (quoting *Webster's Third New International Dictionary* 515 (1968)). Additionally, the court has recognized cost to equate "with the amount a contractor forgoes or gives up, i.e., its economic sacrifice, to obtain goods or services." *Id.* (quoting *Riverside Rsch. Inst. v. United States*, 860 F.2d 420, 422 (Fed. Cir. 1988)). The court acknowledges other definitions as well, such as that cost is "*the price paid to acquire*, produce, accomplish, or maintain anything . . . an outlay or expenditure of money, time, labor, trouble . . . to require the payment of (money or something else of value) in an exchange." *Id.* n.10 (emphasis in original) (quoting *Random House Webster's Unabridged Dictionary* 457 (1998)). Also, cost is "[t]hat which must be given or surrendered in order to acquire, produce, accomplish, or maintain something; the price paid for a thing." *Id.* (quoting 3 *Oxford English Dictionary* 988 (2d ed. 1989)). Bound up in the application of these definitions is an inquiry into whether General Atomics made an outlay for the operation of its business, gave an economic sacrifice, paid a price, or surrendered something to obtain the leaseholds. *See also Riverside Rsch.*, 860 F.2d at 422 ("[T]he relevant inquiry is whether there was an economic sacrifice").[2]

The government has provided 35 leases or subleases, the majority of which are between General Atomics and either Sorrento West or San Miguel.[3] Most contain similar terms. They lease real property to General Atomics and obligate it to pay specified sums in rent without deductions of any kind, with no mention of any distinction between costs of ownership and any excess. Failure to pay amounts due constitutes default, entitling the landlord to terminate the lease. Most of the leases are integrated, with neither party making any representations, warranties, or inducements, express or implied, except as set forth in the lease. Also, most of the leases expressly state that the parties intend only to establish a landlord tenant relationship. They do

[2] The government cites *Thomas Associates*, ASBCA No. 57795, 12-1 BCA ¶ 35,162, for the proposition that excess rental charges above cost of ownership of related party properties are unallowable costs as a matter of law. There, the contractor leased office space from its president, paying $52,924 in rent while the costs of ownership under FAR 31.205-36(b)(3) were $36,709. The contractor included the entire rent in its indirect cost submission to the government. The Board sustained a government penalty based upon the $16,215 difference because it was an expressly unallowable cost. Unlike this appeal, there is no indication that the parties in *Thomas Associates* disputed whether excess rent above costs of ownership was a cost to that contractor, so the Board was not required to decide that matter.

[3] One sublease is between General Atomics and another sublandlord that is the tenant of Sorrento West (gov't mot. at ex. C-22).

not create a partnership, joint venture, joint enterprise, or any business relationship other than that of landlord and tenant. All except two of the leases are governed by the law of California, with the others governed by the law of Utah. (Gov't mot. at ex. C)

The plain language of the leases establishes formal transactions between separate companies where General Atomics legally acquired valuable property interests that it otherwise did not possess, leaseholds, in return for which it was required to pay the full amount of rent. They reflect an economic sacrifice, or payment of a price, for the property rights they grant. *See Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1367 (Fed. Cir. 2017) (holding that leasehold interests are personal property in the absence of a statute commanding otherwise); *Riverside Rsch*, 860 F.2d at 423 (concluding that a lease's conveyance of the right to occupy premises constitutes valuable property); *see also Avalon Pac.-Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC*, 192 Cal. App. 4th 1183, 1190 (Cal. Ct. App. 2011) (explaining that in California a lease conveys an estate in real property granting the lessee exclusive possession against all the world, including the owner, for the term of the lease); *Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102, 107 (Utah 1998) (noting that in Utah a lease conveys an interest in land and transfers possession).

However, the leases are not all we have in the record. General Atomics has submitted declarations elaborating upon its relationship with Sorrento West and San Miguel. According to those statements, General Atomics' parent entities also control these landlord companies. General Atomics' Executive Chairman has voting control over all the entities. If General Atomics' leadership did not transfer the portion of the lease charges exceeding the costs of ownership of the properties it could still occupy them, suggesting an inference that it was not necessary to make those payments to retain the leaseholds. The transfers are vaguely characterized as tax and treasury efficient vehicles for the conveyance of funds between related entities. (Bd. Docket #137, exs 1-4)

We may not weigh the evidence on summary judgment. Instead, we must believe General Atomics' evidence and draw all justifiable inferences in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255; *see also Dairyland Power Co-op. v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (When ruling upon a summary judgment motion, the evidence must be viewed in the light most favorable to the non-movant and all reasonable inferences should be drawn in favor of the nonmoving party). General Atomics' declarations establish a triable question as to whether the excess amounts it paid above the cost of ownership were a price or economic sacrifice necessary to acquire and retain the leaseholds or unrelated fund transfers within a larger organization.

Separately, General Atomics' complaint alleges that the government was on notice more than six years prior to the final decisions that, for related party leases,

General Atomics had limited the lease charges in its G&A base to cost of ownership (compl. ¶¶ 37-41) Accordingly, Count II asserts that the government's claims are time barred under 41 U.S.C. § 7103(a)(4) (compl. ¶¶ 45-48). The government's motion is silent about this statute of limitations allegation.[4] While General Atomics ultimately bears the burden of proving what is essentially an affirmative defense to the government's claims, *see Alion Science and Technology Corp.,* ASBCA No. 58992, 15-1 BCA ¶ 36,168 at 176,488-489, that does not permit the government's motion to entirely ignore it. The Board may only grant summary judgment "if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Thus, it was incumbent upon the government to address why it is entitled to judgment upon General Atomics' statute of limitations allegation as a matter of law, and to point out the absence of evidence of a genuine issue of material fact, to then shift the burden to General Atomics to offer evidence establishing a genuine issue for trial. *See Goodloe Marine, Inc.*, ASBCA Nos. 62106, 62446, 22-1 BCA ¶ 38,053 at 184,774 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *DJ Mfg. Corp. v. United States*, 86 F.3d 1130, 1135 (Fed. Cir. 1996); *Dairyland Power Co-op v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994); *Homeland Housewares, LLC v. Sorensen Rsch. & Dev. Trust*, 581 F. App'x 869, 874 (Fed. Cir. 2014)). Having failed to even mention General Atomics' statute of limitations allegation in its motion, the government is not entitled to summary judgment upon it.

CONCLUSION

The government's motion for summary judgment is denied.

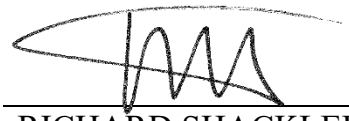
Dated: February 8, 2023

MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

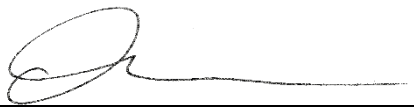
[4] The government mounts a continuing claims doctrine attack upon General Atomics' statute of limitations allegation for the first time in its reply brief. *See Fluor Corp.*, ASBCA No. 57852, 14-1 BCA ¶ 35,472. Though the government may seek to present evidence or argument in support of that contention at a hearing, it is too late in the summary judgment briefing to survive waiver. *Buck Town Contractors & Co.*, ASBCA No. 60939, 18-1 BCA ¶ 36,951 at 180,059.

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

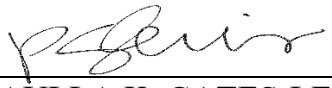
I concur



OWEN C. WILSON
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 61633, 61731, Appeals of General Atomics Aeronautical Systems, Inc., rendered in conformance with the Board's Charter.

Dated: February 8, 2023



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals