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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-188115 DATE: June 18, 1980

MATTER OF: Marquardt Company [Request for Reconsideration]

DIGEST:

1. Where Government furnishes contractor severable and nonseverable facilities, locating facilities on contractor-owned land does not give rise to a claim for rental value of land where free use of land was implied.

2. Government agreement to pay lessor reasonable value of utilities furnished if not otherwise reimbursed under other Government contracts is not guarantee to reimburse lessor for utility costs attributable to lessor's overall operation and claim for "unabsorbed" utility costs which were not allocated to instant contract is denied.

Marquardt Company (Marquardt) requests reconsideration of our Claims Division settlement disallowing Marquardt's claim for $4,968,743.00 believed due for the alleged taking of its property without compensation incident to various facilities contracts with the Government, and for reimbursement of $184,392.00 due for utilities services incident to Lease Agreement No. DA-04-353-ENG-9434.

The record shows that the Marquardt Company and the Government entered into a series of contracts beginning in 1950 with Contract No. AF 33 (038)-5911, wherein the Government provided Marquardt with non-severable facilities at a cost of $9,211,000.00 plus an equipment and installation expense of an additional $11,165,000.00, to be used by Marquardt in its design, testing, and

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fabrication of advanced propulsion engines for the Government. The facilities furnished by the Government included testing facilities and additional equipment and machinery in support of advanced aerospace propulsion programs of the Air Force and other Department of Defense programs. The use of the facilities for the advanced aerospace propulsion program was for a period ending March 1, 1971. Such use was extended until December 31, 1975, for the Multi-purpose Missile Free-Jet Test Program and augmented frequently by other programs. The title to these test facilities remained in the Government pursuant to the terms of the contracts.

Because nonseverable Government property was constructed and installed on Marquardt-owned real estate at considerable expense to the Government, the parties entered into Lease Agreement No. DA-04-353-ENG-9434 on January 1, 1965, whereby the Government leased 3.98 acres of Marquardt's land upon which the nonseverable facilities were located at a rental of $1.00 for the full term of the lease. The lease was executed in compliance with Defense Acquisition Regulation (DAR) 13-307(a) (1976 ed.), which requires that nonseverable Government property not be installed or constructed on land not owned by the Government unless the interests of the Government are adequately protected.

LAND USE CLAIM

The claimant contends that although the lease only covered 3.98 acres, the Government has in fact used approximately 14 acres of Marquardt land, and that the unauthorized use of approximately 10 acres of land gives rise to a right to compensation.

The claim essentially consists of (i) the rental value for the past 6 years of (a) land not included in the lease to the Government which is said to be essential to the operation of the Government facility, and (b) contractor-owned buildings and equipment needed

to support the Government facility; (ii) a pro-rata share of real estate taxes on the land excluded from the lease; (iii) use of sanitary services, and utilities; and (iv) interest on the total at an annual compounded rate of 10 percent per annum. Marquardt bases its claim on the theory of implied contract, breach of the lease agreement, and inverse condemnation.

The authorities relied on by the claimant do not support the existence of an implied contract under the facts of this case. In each of the cases cited by Marquardt, an implied-in-fact contract was found because an intent to pay could be inferred from the circumstances. However, no intent can be inferred and thus no implied contract exists, where, as in the instant case, the acts of the parties negate the existence of an intent. Hirsch v. United States, 170 F. Supp. 229 (E.D.N.Y. 1959). Nothing was said or done between the parties upon which to imply a promise on the part of the Government to compensate Marquardt for the use of its premises. Rather, by leasing only 3.98 acres of Marquardt's land, the implication is that the Government did not intend to lease any more than that. As stated previously, the lease agreement for 3.98 acres was only to assure that the Government's interests were protected. We understand that the usual practice where the Government provides a contractor the facilities to perform a Government contract on which profit is earned is that the land upon which the facilities are located is provided rent free. The Supreme Court has held that an "agreement will not be implied when the plaintiff did not expect payment, or under the circumstances, (and) when the defendant understood that the plaintiff would neither expect nor demand remuneration." Baltimore & Ohio RR v. United States, 261 U.S. 592, 599 (1923); Niagara Falls Bridge Commission v. United States, 76 F. Supp. 1018 (Ct. Cl. 1948).

While Marquardt claims to have made demand for rent in a letter to the Air Force's contracting officer on June 21, 1973, in the Niagara case and in each of the cases cited by Marquardt, an implied contract was found

because the Government had in fact deprived the plaintiff of the use and occupancy of its property. While Marquardt's claim is premised on its belief that a similar situation exists in this case, we do not agree. Any Government equipment and facilities on Marquardt's property was the direct result of the facilities and procurement contracts. Under the circumstances, as long as the equipment and facilities were located on Marquardt's realty pursuant to the contracts, no implied contract could arise with a concomitant obligation to pay rent.

Marquardt also claims that the use and occupancy of its land by the Government has resulted in a "taking" compensable under the Fifth Amendment. Marquardt claims that the natural and probable consequence of locating Government-owned facilities on Marquardt's property is to take the property and that the facilities contracts do not create rights in land. Marquardt further alleges that the Government felt it necessary to lease a portion of the land because of this deficiency in the facilities contracts.

However, the facilities contracts did not expressly create Government rights in Marquardt's land. These contracts did authorize Marquardt to use the facilities without charge in the performance of any Government contract or subcontracts to the extent that such use did not interfere with the performance of the principal contract. While it is reported that use of the facilities diminished in recent years to the point where Marquardt was unable to realize a profit and meet its expenses, we do not think that the Government can be said to have taken Marquardt's property as a consequence.

Marquardt also claims that the Government's breach of lease agreement entitles Marquardt to recover the fair rental value of the unleased property used by the Government. The record, however, contains no evidence that the Government breached the lease. As Marquardt stated in its request for reconsideration, "this claim relates primarily to what the lease did not cover and not to what was encompassed under the terms of the lease."

Accordingly, Marquardt's claim for the rental value of 10 acres of land not leased by the Government is denied.

UTILITY CLAIM

Concerning Marquardt's claim for utility expenses, Paragraph 3 of the Lease Agreement states:

> "3. The lessor agrees * * * to provide to the Government or the occupants of the leased premises utility services, including, without being limited to, water, gas, steam, compressed air and electrical services. Lessor shall be reimbursed the reasonable cost of such services as negotiated between the parties hereto when such costs are not otherwise reimbursed to the Lessor under other Government contracts."

The claim consists of unabsorbed overhead expenses on Government contracts and costs for utilities provided by Marquardt to its commercial customers.

Marquardt argues it has not been fully reimbursed for utility services. Although forecasted utility expenses, including those applicable to the leased premises, were included in the overhead bid rates used in negotiating other Government contracts, Marquardt alleges that a certain portion was "unabsorbed." In denying the claim, our Claims Division concluded that additional reimbursement could not be permitted under the lease agreement in that the amount of payment received was the result of an inadequate allocation formula rather than nonpayment by the Government.

The Air Force believes that this claim should be denied. It states that the provision in the lease for reimbursement should not be construed as a blanket guarantee for reimbursement of utility costs because that would be contrary to specific provisions and the intention of the facilities contract under which the

lease was issued. The Air Force argues that the facilities contract merely provided that the Government should pay Marquardt the reasonable cost of utilities as negotiated between the parties, and it was the intention to define and limit such reasonable cost rather than to provide a blanket guaranty of costs applicable to Marquardt's overall operation. The Air Force points out that Marquardt has received under the facilities contract reimbursement for utilities costs properly allocable to the facilities contract.

We agree with the Air Force. To give this lease provision the effect argued by Marquardt requires an interpretation that the Government intended to guarantee reimbursement of Marquardt's utility costs attributable to its overall operation. We do not believe this is a reasonable interpretation of paragraph 3. Rather we read the last sentence of the paragraph upon which Marquardt relies as merely indicating that the lessor shall not be reimbursed for utility services under this contract for which reimbursement has been received under another Government contract. In effect, the purpose of the provision is to prevent double reimbursement.

Therefore, this portion of the claim also is denied.

Milton J. Socolar

Acting Comptroller General
of the United States