

JAMS ARBITRATION CASE REFERENCE NO. 1200042851

ANGELES FIELD PARTNERS, LLC, and SOLIE GRACIE, LLC,
Claimants,

and

LYNWOOD REDEVELOPMENT AGENCY,
Respondent.

INTERIM AWARD

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Place of Arbitration: Los Angeles, CA

Date of Interim Award: September 21, 2011

THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration provision contained in paragraph 27 of the Second Amendment to Amended and Restated Exclusive Negotiation Agreement ("ENA"), and having examined the submissions, proof and allegations of the parties, finds, concludes and issues this Interim Award as follows:

I. Introduction and Procedural Statement

Claimant Angeles Field Partners, LLC and Solie Gracie, LLC jointly referred to as "AFP" or "Claimants") filed a Demand for Arbitration (Notice of Claims and Remedies Sought) dated January 24, 2011, seeking (1) a determination that AFP is not in breach of the ENA for not tendering the sum of \$500,000 to the Agency and therefore the ENA is not terminated; (2) specific performance requiring the Lynwood Redevelopment Agency ("Agency") to negotiate in good faith the language in the disbursement agreement and acceptance of the \$500,000 deposit. The Agency filed its Response on February 7, 2011, seeking a determination that (1) AFP had breached the ENA by failing to timely deliver or tender a deposit; (2) the disbursement agreement was not a condition precedent or concurrent to the delivery or tender of the deposit; (3) the Agency did not waive its claim of breach by tendering a draft disbursement agreement; and (4) AFP is not entitled to specific performance requiring the Agency to negotiate the disbursement agreement or accept the deposit.

The arbitration took place on August 15, 2011. John McDonald, the principal of AFP, and Ronald E. Winkler, an expert witness for the Agency, testified. Counsel presented closing argument. Counsel were well prepared and professional and presented their cases in an efficient manner.

II. Facts

AFP is a developer who entered into an Exclusive Negotiation Agreement on October 17, 2006 with the Agency to build a 300 acre commercial, residential and retail development project in the city of Lynwood, California (the "Project"). The Project also included a NFL football stadium.

On October 17, 2006, the parties entered into the first ENA. This agreement was revised and amended and on July 17, 2007, then the parties entered into a First Amendment to the ENA ("First Amendment ENA"). AFP had concerns with the First Amendment ENA, including issues involving the deposit that AFP was to provide to the Agency and how that deposit would be held and accounted for. AFP did not execute the First Amendment ENA and the parties continued to negotiate.

On October 2, 2007, following a recall election recalling four of the five City Council members and electing four successor City Council members, but prior to the new City Council members being sworn in, the parties executed the Second Amendment to ENA (referred to henceforth as the ENA). The Agenda Staff Report (Ex CIS) noted that AFP had neither executed the First Amendment ENA nor delivered the \$500,000 deposit. The Staff Agenda listed thirteen new "material terms and conditions" embodied in the revised ENA, including extending the time from 120 days to 180 days within which AFP had to submit documents and perform due diligence work, and "a stipulation that a bank account be established and a disbursement agreement be mutually agreed upon among the Agency, Developer and the Bank. ENA provides:

"The Developer shall deposit with the Agency, in accordance with this Section 16, an amount of up to Two Million Dollars (\$2,000,000)(the which shall be used exclusively to fund certain Project-related costs incurred the Agency ... all as generally set forth in an Agency prepared cost budget approved by the Developer. Pursuant to this Section 16, the Deposit (and all installments thereof) shall be placed into a bank account of a nationally

recognized banking institution operating and located within the City of (the "Bank") for disbursement to the Agency in accordance with a mutually acceptable fund disbursement agreement by and among the Agency, and the Bank. In this regard and within forty-five (45) calendar days the execution of this Agreement by the Agency, the Developer shall deliver to Agency for deposit with the Bank the sum of \$500,000 which shall constitute maximum amount of the Deposit proceeds maintained by the Bank on behalf the Agency at any given time...."

Section 20 of the ENA provides:

"This Agreement, when executed by the Developer and delivered to the Agency, accompanied by the Deposit described in Section 16 hereinabove, shall be deemed to be an offer by the Developer to enter into negotiations pursuant to the terms of this Agreement and will then be scheduled for approval by the Agency's Board of Directors. This Agreement must be authorized, executed and delivered by Agency within sixty (60) days after the date of signature by the Developer or the Developer shall have the right to withdraw its offer to enter into this Agreement upon written notice to Agency...."

It is undisputed that AFP and the Agency signed the ENA on October 2, 2007. It is also undisputed that AFP did not deliver the \$500,000 deposit to the Agency or to a bank prior to the Agency signing the ENA, as required by Section 20, or within the forty-five day time limit prescribed by Section 16, or at all. John McDonald testified that the parties were focused on other things that they needed to accomplish under the ENA and that they agreed that they would get around to the disbursement agreement at a later date. Mr. McDonald testified that AFP did not want to deliver the \$500,000 deposit to the Agency until it had the protection of a disbursement agreement in place because AFP was concerned with the political situation in Lynwood and wanted to insure that the \$500,000 deposit would be placed into a special bank account, subject to the terms of a disbursement agreement, and not be deposited by the Agency into a general account. Mr. McDonald further testified that he was concerned with corruption in Lynwood.

On October 9, 2007, Aide Castro, a new City Council member, filed a lawsuit in Los Angeles Superior Court against the City of Lynwood, the Lynwood Redevelopment Agency and various City Council members seeking to restrain and enjoin the defendants from spending city funds or committing city funds and from implementing or enforcing any actions taken by the Agency on October 2, 2007, namely the ENA. The Court issued the temporary restraining order on October 9, 2007, and it remained in effect until replaced by a preliminary injunction on November 7, 2007.

On October 16, 2007, the new City Council was sworn in and on October 26, 2007 the Lynwood Redevelopment Agency filed a declaratory relief action in Los Angeles Superior Court seeking a declaration regarding whether the ENA was legally adopted by the Agency inasmuch as the prior Agency Board had been recalled prior to the October 2, 2007 approval of the ENA. On January 23, 2008, the Court issued a preliminary injunction in that action, enjoining the Agency and AFP from implementing, enforcing or giving any legal effect to the ENA. On June 20, 2008, the Court issued a final judgment that the ENA was invalid. AFP took an appeal and, on December 10, 2009, the Court of Appeal reversed, concluding, inter alia, that the first City Council members were still in office when they voted on the ENA.

On July 7, 2008, following the ruling by the Superior Court that the prior Agency's action approving the ENA were invalid, the (new) Agency sent two letters to AFP (the letters were actually addressed to Lynwood Promenade, LLC, the predecessor in interest to AFP and the entity named as developer in the First Amendment ENA) notifying it that it was in breach of the First Amendment ENA, demanding that AFP cure a large number of default items, and requiring documentation of a number of items. AFP did not respond to these letters. It is AFP's position that the First Amendment ENA was not in effect because it had never been adopted by the Agency. Meanwhile, the Agency entered into an exclusive negotiating agreement with another entity, Lynwood Gateway Center, LLC, which encompassed a portion of the property covered by the AFP ENA. Lynwood Gateway Center cancelled its exclusive negotiating agreement after the Court of Appeal's decision. AFP was unaware of this other exclusive negotiating agreement. AFP sought review of the Court of Appeal decision at the California Supreme Court, which denied review on March 24, 2010.

On April 20, 2010, the Agency sent a letter to AFP acknowledging the Court of decision and stating that it would comply. The Agency gave AFP forty-five days to deposit

\$500,000 deposit and to provide other information regarding its plans for the Project in intervening events.

AFP did not respond within the forty-five day period. On June 15, 2010, the Agency voted to terminate the ENA and sent AFP written notice of default and termination, and gave AFP a thirty-day period in which to cure the defaults. The Agency stated that the reason for the termination was AFP's failure to respond to the requests in the Agency's July 7, 2008 and April 20, 2010 letters.

On July 12, 2010, within the thirty-day cure period, AFP responded to the April 20 and June 16, 2010 letters. AFP stated its intention to provide the \$500,000 deposit subject to the signing of a mutually acceptable fund disbursement agreement signed by the Agency, AFP and the bank. AFP reiterated its concern that it could not provide the Agency with a large cash deposit without the restrictions of a fund disbursement agreement, as provided in Section 16 of the ENA.

The Agency drafted and provided a funds disbursement agreement to AFP on July 14, 2010. AFP's counsel provided two comments on July 19, 2010, one of which would delete the Agency's right to veto contracts and consultants. AFP also requested that the Agency toll the Termination Notice until the parties had mutually agreed upon a disbursement agreement. The Agency did not respond to the comments, but rather continued to demand the \$500,000 deposit. On August 3, 2010, in an effort to compromise and avoid arbitration, AFP proposed delivering the deposit to the Agency's counsel to be held in his trust account, until the parties could resolve the disbursement agreement. The Agency did not accept this offer.

III. Analysis

It is the Agency's position that the ENA requires the deposit to be delivered to the Agency before the disbursement agreement was to be signed, citing Section 20 the ENA. position is that the execution of a mutually acceptable disbursement agreement among Agency and the bank, and opening of a bank account were conditions precedent to the of the \$500,000 deposit, citing Section 16. Alternatively AFP argues that the disbursement agreement and the opening of a bank account were conditions concurrent with the delivery \$500,000 deposit. AFP further argues that the Agency waived its April 20, 2010 notice of

termination by its July 14, 2010 letter which included a proposed disbursement agreement comment or signature by AFP.

We begin our analysis by reviewing the changes between the unsigned First Amendment ENA and the operative, signed ENA.

The First Amendment ENA would have required AFP to deliver the \$500,000 deposit to the Agency prior to the execution of the agreement. (Sections 16 and 19) AFP objected to these provisions, among others, refused to sign the First Amendment ENA, and sought modifications. One such modification was the addition of language in Section 16 requiring the establishment of a bank account and a mutually agreed upon disbursement agreement; another was providing that AFP would have forty-five days following execution of the ENA to deliver the deposit. (Section 16)

The Agency's staff recognized these modifications explicitly in the Agenda Staff Report dated October 2, 2007, after noting that the Developer had neither signed the First Amendment ENA nor delivered the initial deposit: "The Developer has expressed its interest in continuing with the development proposal now entitled "Angeles Fields" by proposing the approval and execution of a proposed Second Amendment by the Agency which provides for certain modifications to be First Amendment, including the time by which the initial deposit is to be made by the Developer." Exhibit R15.

These modifications were made to the ENA but the parties neglected to make conforming changes to old Section 19 which was carried over unchanged into the ENA as Section 20, and which still contained the language requiring delivery of the initial deposit prior to the Agency executing the ENA. The Panel is of the opinion that the retention of that language in Section 20 was an oversight. Accordingly the inconsistent language in Section 20 ~~Reading Section 19 of the~~ Panel concludes that it was the intention of the parties that they were to select a bank for the deposit, then develop a mutually acceptable fund disbursement agreement among AFP, the Agency and the bank, and then "[i]n this regard and within forty-five (45) calendar days following the execution of this Agreement by the Agency, the Developer shall deliver to the Agency for deposit with the Bank the sum of \$500,000...." The failure of the parties to execute a mutually agreed upon disbursement agreement excuses AFP's failure to make the initial \$500,000 deposit.

Our analysis is informed by several additional considerations. First, the Agency executed the ENA on October 2, 2007, without requiring the deposit. Second, immediately upon executing the ENA, AFP found itself caught up in Lynwood's political imbroglio (to use the language of the Court of Appeal) and restricted by the TRO and preliminary injunction entered in the first litigation and the preliminary injunction and judgment in the second litigation. Mr. McDonald also testified to his concern regarding political corruption in Lynwood, providing the example of Enrique Martinez, then-Executive Director of Lynwood Redevelopment Agency, coming to Mr. McDonald's office with another man and asking him to "buy-out" the other man's agreement with the City. It is understandable that AFP would be reluctant to hand over a cashier's check for \$50,000 before having in place a depository bank and the disbursement agreement for which it had negotiated as a ~~modified~~ ~~Wood~~ ~~to~~ ~~the~~ ~~ENA~~. The Agency's requests for the deposit contained in the July 7, 2008 letters. Those demands were based upon the First Amendment ENA which was not executed and under which AFP had no obligations.

The Agency's April 20, 2010 letter, requesting the deposit, is also defective as it fails to make any mention of the depository institution or the funds disbursement agreement provisions of Section 16. Mr. McDonald testified that at some point he tried to contact the Agency to discuss the situation as there were matters that he did not want to put into writing. For whatever reason, nothing appears to have happened between the April 20, 2010 letter and the June 15, 2010 vote by the Agency to terminate the ENA. AFP argues that the termination was defective as AFP should have first received a "notice of intent to terminate" setting forth the basis for the proposed termination. We find that the June 16, 2010 Notice of Termination does specify reasons for the termination, namely failure to deliver the deposit and failure to respond to the information requests in the Agency's prior letters. In any event, the Agency gave AFP the thirty-day cure period.

Within that thirty-day cure period AFP re-opened communications with the raised the issue of the disbursement agreement and responded to the Agency's questions Proposition 99 and the NFL Stadium. The Agency provided AFP with a draft agreement on Wednesday, July 14, and AFP provided its comments on Monday, July 19, (AFP's letter providing comments and information is dated July 19, 2010, technically thirty-day cure period, but the parties appear to have discussed a few day extension due to

City Hall being closed on Friday July 16 and Mr. McDonald's representation that a check would be delivered on July 19,2010, before his counsel had reviewed the draft disbursement agreement.)

Further, the Agency appears to have recognized its obligation to draft a disbursement agreement and sent its draft to AFP, albeit immediately before the end of the cure period. However, it then failed to follow up on the comments submitted by AFP - and there were only two changes-with no explanation. Nor did it respond to AFP's offer to deliver the \$500,000 deposit to the Agency's counsel to be held in the trust account until the disbursement agreement could be mutually agreed upon by the parties and the bank. We find that AFP responded timely to provide comments to the disbursement agreement and acted in good faith in offering to deliver the deposit to be held in trust by counsel.

IV. Conclusion and Further Proceedings

- I. Claimants Angeles Field **Partners** and Solie Gracie are not in breach of the Second Amendment to Amended and Restated Exclusive Negotiation Agreement, and the Second Amendment to Amended and Restated Exclusive Negotiation Agreement is not terminated and remains in effect.
2. Within forty-five days (on or before November 4,2011), Angeles Field **Partners** shall deliver its initial deposit of \$500,000 in accordance with the terms of a mutually agreeable funds disbursement agreement. Angeles Field Partners and Lynwood Redevelopment Agency shall negotiate in good faith to agree upon a funds disbursement agreement.
3. Claimants are the prevailing party. Claimants shall file and serve an application for expenses, costs and legal fees, pursuant to Section 27 of the Second Amendment to Amended and Restated Exclusive Negotiation Agreement, on or before October 10, 2011. Respondent Lynwood Redevelopment Agency may file opposition evidence and argument by October 20,2011, and Claimant may reply by October 25,2011. The matter shall be submitted for final decision at that time unless any party requests an oral hearing, in writing, by October 25, 2011.

The further determinations to be made at any further hearing or based on written submissions shall be embodied in a Final Award which shall also incorporate the contents of the Interim Award. It is not intended that this Interim Award be subject to review either pursuant to 9 U.S.C. §§ 9, 10 or Cal. Code Civ. Proc. §§ 1284, 1285.

DATED: September 21, 2011



Barbara Reeves Neal, Esq.
Chair Arbitrator



Sherman W. Smith (Ret.)
Arbitrator



Hon. Robert E. Thomas (Ret.)
Arbitrator