ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Kalaeloa Ventures, LLC	)	ASBCA Nos. 60527, 60528, 60529
	)	
Under Contract No. N62742-08-RP-0057	)	

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OPINION BY ADMINISTRATIVE JUDGE PROUTY

Before us are fully briefed motions for partial summary judgment by appellant, Kalaeloa Ventures, LLC (Kalaeloa), and full summary judgment by respondent, the Department of the Navy (Navy or government).[1] Because we find it evident that factual disputes preclude the entry of judgment on behalf of either party, we deny the motions as explained in relatively summary fashion below.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

I. The Background of the Dispute

Pursuant to the Base Re-Alignment and Closure process, the Navy conveyed significant amounts of property in Hawaii to private parties. One particular conveyance of approximately 495 acres was to Ford Island Ventures, LLC, through the above-captioned contract (the contract or the lease).[2] The lease was executed on

[1] Kalaeloa's motion for partial summary judgment is referred to herein as "app. mot." The government's combined opposition to this motion and cross motion for summary judgment is referred to as "gov't opp'n." Kalaeloa's responsive filing to the government's opposition and motion is referred to as "app. reply."

[2] We oversimplify somewhat: originally, Ford Island Ventures leased property from the Navy on Ford Island, HI, for which it had provided the Navy "In-Kind Consideration." That property was traded for the 495 acres at issue at Barbers

October 6, 2008, but became effective on February 1, 2009. (R4, tab 1 at GOV 20-21) Effective January 1, 2012, with the consent of the Navy, the lease was assigned by Ford Island Ventures to Kalaeloa (R4, tab 1 at GOV 124-26).[3]

The lease contemplated that Kalaeloa could request that the Navy convey to it, in fee simple, parcels of the property, and that the Navy would make such conveyances within whatever date Kalaeloa requested that was more than 180 days after the request (R4, tab 1 at GOV 32-34).[4] One of the main reasons we are here is because the Navy did not make the requested transfers within the requested time period and, time being money in the real estate development world, the considerable (on the order of four years) delay in the transfer allegedly significantly damaged Kalaeloa. Kalaeloa also lost the use of a substantial portion of the property to the historic preservation process and has complaints regarding the nonexistence of a utilities transition plan. We will discuss Kalaeloa's claims in more detail below.

II. Provisions of the Lease That are at Issue

Kalaeloa's partial motion for summary judgment rests entirely upon Section 2.1 of the General Terms and Conditions of the lease (*see* app. mot. at 2-3), which provides in relevant part:

> The Government hereby grants to Lessee the right and option ("Option"), exercisable in its sole discretion at any time during the Term of this Lease so long as Lessee is not then in material breach of its obligations hereunder, to acquire, subject to Existing and Unrecorded Encumbrances, fee simple title to all or any portion of the Premises from the Government. Lessee may exercise the Option to acquire fee simple title to all or any portion of the Premises at any time by giving the Government one or more notices (each a "Notice") to that effect upon not less than one hundred eighty (180) days prior written notice to

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Point. (R4, tab 1 at GOV 20) To make matters somewhat confusing, the government originally entered in a master development agreement over the property with Fluor Hawaii, LLC in 2003, but Fluor Hawaii's interest in the property was transferred by that company to Kalaeloa, as reflected by the lease at issue. (*Id.* at GOV 3, GOV 124-26)

[3] For simplicity, for the remainder of this opinion, we will refer to Kalaeloa's predecessors-in-interest as "Kalaeloa," except where otherwise specified.

[4] At the conclusion of the lease's 40 year term (R4, tab 1 at GOV 21), all remaining un-transferred parcels were to be conveyed, in fee simple, to Kalaeloa, if the government so chose (*id.* at GOV 32-33).

> that effect. Each Notice shall specify the description of all or that portion of the Premises to be acquired by Lessee and the date when the conveyance of such property shall occur, which date shall be not less than one hundred eighty (180) days following the date of the Government's receipt of such Notice.

(R4, tab 1 at GOV 32-33) (hereinafter Section 2.1)

The government, for its part, argues that the "governing law" provision of the lease is dispositive of Kalaeloa's motion (*see* gov't opp'n at 11-12). The provision is:

> 31.3 Governing Law. This Lease shall be governed by and construed in accordance with the federal laws of the United States of America. In the event that this Lease, or any portion of it, or the operations contemplated by it are found to be inconsistent with or contrary to laws or official orders, rules or regulations of the United States, then the laws of the United States shall control. This Lease then shall be modified accordingly and, as so modified, shall continue in full force and effect. Nothing in this Section shall be construed as a waiver of any right to question or contest any such law, order, rule or regulation before the Armed Services Board of Contract Appeals or the United States Court of Federal Claims pursuant to the Act.

(R4, tab 1 at GOV 75) (hereinafter Section 31.3) Three other lease provisions are important to the government's pending motion. The first, in paragraph 1 of the lease's General Terms and Conditions, addresses the environmental condition of the property (ECP) and provides, in relevant part:

> 1. LEASE OF LAND, ENCUMBRANCES AND QUIET ENJOYMENT
> Environmental Condition of Property. The Government's Environmental Condition of Property (the "ECP") for the Premises is attached hereto as Exhibit C, and incorporated herein by reference. The ECP sets forth the basis for the Government's determination that the Premises are environmentally suitable for leasing. The Lessee hereby acknowledges receipt of the notifications contained in the ECP and the required and recommended restrictions set forth in the ECP (the "ECP Restrictions"). Lessee agrees to comply with all such ECP Restrictions. If there is a

> discrepancy between the ECP Restrictions and any provision or restriction in this Lease, then the more restrictive or comprehensive restriction shall control. Lessee further acknowledges that a new ECP must be prepared for each conveyance which may take place one year or more after the date of the previously prepared ECP. In the event that Lessee has not taken title to all of the Premises within one year after preparation of the ECP attached hereto as Exhibit C, Lessee agrees to reimburse Government for the cost of preparing any such additional ECPs which may thereafter be required. Lessee further agrees to comply with any restrictions which may be set forth in such additional ECPs.

(R4, tab 1 at GOV 32) (hereinafter Paragraph 1)

The second important provision of the lease for the government's motion is the "as is" provision in paragraph B.5 of the Property Specific Terms and Conditions, which provides, in relevant part:

> Lessee agrees that its decision to lease the Premises was based solely on its own independent investigation. Lessee has assumed all risks regarding all aspects of the Premises including, without limitation, (a) the risk of any physical condition affecting the Premises including, without limitation, the existence of any soils conditions, or the existence of any archeological or historical conditions on the Premises;

(R4, tab 1 at GOV 23) (hereinafter as-is provision)

The third important provision of the lease, for purposes of the government's motion, deals with historic preservation. Paragraph C.11 of the lease's Special Terms and Conditions, in relevant part, states:

> (11) Historic Preservation. Lessee acknowledges that if any site features are listed in the Historic Resource Identification or are eligible for listing on the National Register of Historic Places and if other buildings and site features on the Premises may hereafter be listed or become eligible for listing on the National Register of Historic Places, such features or buildings may require consideration under the National Historic Preservation Act

> (16 [United States Code] U.S.C. § 470) and its implementing regulations (36 [Code of Federal Regulations] CFR Part 800).

(R4, tab 1 at GOV 30) (hereinafter historic preservation provision)

And finally, the lease addresses a utilities transition plan for the property. Paragraph 18.1.4 of the lease's General Terms and Conditions provides that:

> Within 36 months following the date of this Lease, the Government and Lessee shall develop a mutually satisfactory communications and utilities transition plan. The parties agree to commence development of such plan as soon after execution of this Lease as is practicable. Lessee will be responsible for utilities within the brokered parcels only but will assist in the utilities transmission for all of the area currently designated as "Barbers Point."

(R4, tab 1 at GOV 59) (hereinafter utilities plan provision)

III. What Happened When Kalaeloa Asked for the Transfer of Certain Parcels in 2013

By letter dated October 22, 2013, pursuant to Section 2.1 of the lease, Kalaeloa sought transfer of title in fee simple of parcels 1, 2, 3, 4, 5, 7, 8, 9A/B, 10, 11, 12, 13A/B, 14, 15, and 16 from the Navy (app. supp. R4, tab 7 at APP 1690-92). The Navy does not dispute its receipt of this letter in a timely fashion (app. mot. ex. 1, response to Request for Admission No. 8). For convenience, we will follow Kalaeloa's convention of referring to these as parcels 1-16, despite the fact that it did not request parcel 6, which was apparently transferred by the Navy in an earlier transaction (app. mot. at 10 n.6). The letter set April 22, 2014 as the date of conveyance (app. supp. R4, tab 7 at APP 1692).

None of the parcels were transferred anywhere close in time to April 22, 2014. Six of the parcels – numbers 1, 2, 5, 7, 11, and 14 – were transferred to Kalaeloa on October 13, 2017 (app. supp. R4, tab 21 at APP 1932-96). Most of the rest – numbers 3, 4, 8, 9A, 9B, 10, 15, and 16 – were transferred to Kalaeloa on December 19, 2017 (app. supp. R4, tab 22 at APP 1997-2144).[5]

The Navy had its reasons for the more than three-year delay. First, due to the timing of the requests for transfer, new ECPs were required to be effected for the

[5] Kalaeloa's motion does not explain what happened to parcels 12 and 13A/B and we need not address that subject here.

16 parcels.[6] Second, the historical preservation process prevented the Navy from transferring the parcels before its completion (R4, tab 7 at GOV 215; GOV 216-50).

The Navy has presented evidence that these issues were communicated with Kalaeloa at the time of the request for transfer of the 16 parcels and that the parties appeared to work together to prioritize which parcels would be completed first for Kalaeloa's best interests (*id.*). The evidence that is lacking (thus, as will be explained at more length below, largely precluding summary judgment) is whether the amount of time for these delays was reasonable and unavoidable.

IV. Kalaeloa's Additional Request for Parcels

On February 14, 2014, Kalaeloa sent a letter to the Navy contracting officer (CO) requesting transfer, in fee simple, of the remaining parcels which it had not yet requested: 17A, 17B, 18A/B and 19A/B. This letter sought their conveyance by August 14, 2014. (R4, tab 7 at GOV 212-13). None of these parcels were conveyed by the Navy to Kalaeloa by the requested date (*see* R4, tab 7 at GOV 217-18 (July 2015 meeting minutes reflecting lack of transfer)).

V. Portions of the Later Parcels are Designated as an Historic Landmark

Because the Marine Corps Air Station Ewa (Ewa Field) facility at Barbers Point (which was part of the property at issue in this appeal) had been subject to the Japanese attack on December 7, 1941, it was long recognized by the parties to the lease that portions of it might be subject to designation as a historic landmark, limiting their use. Kalaeloa has produced some evidence, notably in the deposition of its Senior Vice President, Mr. Steven Colón, that Navy representatives had assured Kalaeloa that only a small portion of Ewa Field – an approximately five-acre plot at the intersection of two runways – would be subject to such designation. (App. reply ex. 10, at 38, 46, 82) That estimate, it turned out, would be off by a factor of about 30.

A. Background on the Historic Landmark Process and the Posture at the Property at Issue Here

During our review of the pending motions, we determined that it would be helpful for the parties to provide additional briefing regarding the statutory and regulatory framework governing the designation of historic landmarks. Accordingly, we issued an order directing the parties to answer certain specified questions and the

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[6] Recall that under Paragraph 1 of the lease above, new ECPs must be prepared for every conveyance made more than one year after the date of the previously-prepared ECP.

parties did so.[7] From their responses, we may provide a greater explanation of how the National Historic Preservation Act (NHPA), 54 U.S.C. §§ 300101-307108,[8] its implementing regulations at 36 C.F.R Part 800, and the Navy's own regulations governing historic landmarks mesh with the Navy's actions in this matter.

Generally, prior to the approval of an expenditure of federal funds or the issuance of any license, the NHPA requires the responsible federal agency to "take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108. This is known as the "Section 106 process," which is driven by the implementing regulations at Part 800 of the C.F.R. *See* 36 C.F.R. § 800.1(a). The process involves consultation with "other parties with an interest in the effects of the undertaking on historic properties . . . to identify historic properties potentially affected by the undertaking. . . ." *Id.* Participants in the consultation process include the State Historic Preservation Officer (SHPO), 36 C.F.R. § 800.2(c)(1); applicants for the permit, license, or other approval, 36 C.F.R. § 800.2(c)(4); and the public. 36 C.F.R. § 800.2(d). The agency generally is expected to identify the "area of potential effects" when the process begins. 36 C.F.R. § 800.4(a)-(c).

Importantly, the regulations provide that the agency may enter into a "Programmatic Agreement" (PA) as a means of complying with the section 106 requirements. 36 C.F.R. § 800.14(b). On July 30, 2012, the parties entered into just such a PA related to Kalaeloa's desire to build a solar panel farm (known as the Kalaeloa Renewable Energy Park, or KREP) near Ewa Field (app. supp. R4, tab 43 at APP 2561-2632).[9] The KREP PA expressly contemplated that the Navy would submit a Determination of Eligibility (DOE)[10] to the Keeper of the National Register of Historic Places (the Keeper), but did not set forth the boundaries to be embraced in the DOE (*id.* at APP 2563).

The regulations governing the Keeper's consideration of the DOE may be found in 36 C.F.R. Part 63. The agency process is discussed in 36 C.F.R. § 63.2, which provides that the agency will consult with the SHPO and, if the two agree (as, to be explained below, happened here), will complete the process set forth in 36 C.F.R. § 63.3. The Keeper, who has the authority to place properties on the National Register

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[7] The government's supplemental brief in response to this order shall be referred to as "gov't supp."; Kalaeloa's, as "app. supp.".

[8] The NHPA was codified in Title 16 of the United States Code until December 19, 2014. We are aware of no material changes to the Act caused by its recodification.

[9] Kalaeloa's Senior Vice President, Mr. Colón, executed the document on August 3, 2012 (app. supp. R4, tab 43 at APP 2575).

[10] A DOE recommends an area for inclusion into the National Register of Historic Places. *See generally* 36 C.F.R. § 63.2.

of Historic Places (and thus limit their development), may, however, determine that properties *not* requested to be protected by the agency, nevertheless, should be protected, and the Keeper has the authority to reverse findings of eligibility made by the agency. 36 C.F.R. § 63.4(c).

B. Actions Taken Pursuant to the NHPA After Kalaeloa Requested Transfer of the Parcels

As a consequence of Kalaeloa's requests for parcel transfers, on March 21, 2014, the Navy submitted a memorandum to the State of Hawaii Department of Land and Natural Resources, SHPD (State Historic Preservation Division)[11] seeking its concurrence in the Navy's DOE recommendation that 81 acres of Ewa Field be subject to listing on the National register of Historical Places (app. supp. R4, tab 11 at APP 1720-21).[12] On August 14, 2014, the SHPD sent a letter to the Navy concurring with its 81-acre DOE recommendation (app. supp. R4, tab 12 at APP 1722). The local Navy historic preservation personnel forwarded its recommendation along with the SHPD concurrence to the Acting Navy Deputy Federal Preservation Officer on August 29, 2014 (app. supp. R4, tab 13 at APP 1723-24).

The Deputy Secretary of the Navy (in his role as the Navy's Federal Preservation Officer) forwarded the DOE request to the Keeper (who is an employee of the Department of the Interior, National Park Service) on September 26, 2014 (app. supp. R4, tab 15 at APP 1727). There is a rather confusing email string in the record that begins with the receipt of the Keeper's decision by the Navy in Hawaii on November 13, 2014, suggesting that the Keeper received "the wrong NR form," which was apparently "the same as the BPP form," although it was not clear where the error originated[13] (app. supp. R4, tab 46 at APP 2635-36). Kalaeloa alleges in its reply that "the BPP form" included a study by GAI Consultants (GAI) and Ms. Valerie Vander Veer (app. reply at 52 n.26). There is no direct evidence of this in Kalaeloa's filing, but it is consistent with the Keeper's final decision, which referenced that study (*see* app. supp. R4, tab 15 at APP 1728-29) and, for today's purposes, we will assume that assertion to be accurate.

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[11] We presume that this agency acts as the SHPO referenced in the regulations governed by the Section 106 process.

[12] Kalaeloa asserts that this was done over its objection, but the citations to the record provided by Kalaeloa do not support this finding (*see* app. reply at 51).

[13] Kalaeloa alleges that this apparent mix-up was the fault of the Navy (*see* app. reply at 51-52), but, again, Kalaeloa's characterization of the evidence is more than is supported by the cite provided. Participants in the email discussion thought it unlikely that the mistake had originated with the Navy, as opposed to admitting the same (*see* app. supp. R4, tab 45 at APP 2636 *cited* by app. reply at 52).

In any event, the Keeper ultimately considered the proper form from the Navy, seeking the 81-acre set-aside, (*see* app. supp. R4, tab 46 at APP 2635-36; app. supp. R4, tab 15 at APP 1728), but the Keeper had his own ideas. Although he referenced the Navy's "well-prepared DOE documentation" seeking the 81-acre amount, he found the report by GAI and Ms. Vender Veer to be more persuasive and, in a decision signed February 9, 2015, chose the more expansive historical area requested by that report (app. supp. R4, tab 15 at 1727-29). Thus, consistent with the Keeper's decision, the Navy submitted a formal nomination of a 180-acre "Ewa Plain Battlefield" (app. supp. R4, tab 17), which was apparently ultimately accepted by the Keeper on May 23, 2016.[14]

VI. One More Problem: The Lack of a Utility Transition Plan

So, as recited above, under the utilities plan provision of the lease, the parties were required to jointly create a utilities transition plan within 36 months of the "date of this Lease." Whether the date of the lease is defined as the date it was executed (October 6, 2008) or the date it became effective (February 1, 2009), no utilities transition plan was near completion at the 36 month mark.[15] The evidence before us regarding why this was the case is limited, to say the least. In April 2009, at the Navy's request, the General Services Administration (GSA) did produce a "Kalaeloa Utility Divestment Analysis," which included three "disposition" alternatives (R4, tab 7CC at GOV 579-605). The government alleges that this document was "promptly shared" with Kalaeloa (gov't opp'n at 35), but produces no evidence supporting that assertion. The document does not appear to seek Kalaeloa's input or directly propose the adoption of any particular plan (R4, tab 7CC at GOV 579-605). Moreover, the record is devoid of evidence regarding what else the government did or didn't do to create a joint utilities transition plan with Kalaeloa.

Kalaeloa, for its part has provided no evidence of efforts that it undertook to do its part in creating a mutually acceptable utility transition plan.

VII. Kalaeloa's Claims

Kalaeloa's frustration with the government's failure to timely convey the parcels, the extensive designation of historic landmark status, and the utilities issues led it to submit four certified claims to the Navy CO, pursuant to the Contract Disputes

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[14] This date is included in Kalaeloa's filing (*see* app. reply at 52-53), and we have no reason to doubt it, but, yet again, it is not supported by reference to the record and we decline to search for it, ourselves.

[15] At the time of the claim (approximately three years after the contractual deadline), there was still no jointly approved utilities transition plan (R4, tab 4 at GOV 140 (claim); R4, tab 6 at GOV 164-66 (CO appearing to agree that no utility transition plan was in effect)).

Act (CDA). These certified claims were all contained in one document submitted on February 4, 2015. (R4, tab 4)

The first claim was for the Navy's failure to convey the title of five of the sixteen parcels (numbers 4, 8, 10, 14 and 16) to Kalaeloa within the time period specified by the lease. Through this claim, Kalaeloa sought damages "in excess of $1,200,000.00."[16] (R4, tab 4 at GOV 129) This claim, we understand, is the basis for Kalaeloa's motion for partial summary judgment (*see* app. reply at 8 n.5).

Kalaeloa's second claim alleged that the Navy's recommendation to the Keeper seeking a larger designation of historic landmarks than previously represented deprived Kalaeloa of some 65 acres of land of a value greater than $28,000,000. These acres were found in parcels 17, 18, and 19 and were contrary to what the Navy represented would be appropriate at the time the parties entered the lease.[17] This, Kalaeloa argues, is a violation of the contractual duty of good faith and fair dealing. (R4, tab 4 at GOV 131-36)

Claim 3 involved the delay of the KREP solar energy project (R4, tab 4 at GOV 136-140), but we will not go into any detail about it here since the government's denial of this claim is not part of the appeals before us.

Claim 4 regards an alleged breach of the lease by the Navy's alleged failure to implement a utility transition plan as Kalaeloa asserts was required by the lease. This alleged failure has slowed the development of multiple parcels dramatically, supposedly damaging Kalaeloa $42,537,600 through October 2014, with additional damages accruing at the rate of up to $14,179,200 per year (R4, tab 4 at GOV 140-43).

The Navy denied Kalaeloa's claims in a Contracting Officer's Final Decision dated January 29, 2016 (R4, tab 6). Kalaeloa timely submitted appeals to the Board for claims 1, 2, and 4, which were docketed as appeals 60527, 60528, and 60529 respectively.

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[16] We might be concerned that this figure is not a sum certain except that the claim explained its basis and how the amount was increasing with the passage of time (*see* R4, tab 4 at GOV 130-31), and subsequent communications and certifications from Kalaeloa removed any uncertainty about the sum claimed (*see* R4, tab 5).

[17] This is a somewhat different theory, as will be discussed below, than the theory of recovery now advanced by Kalaeloa.

DECISION

The state of the evidence before us precludes summary judgment for either party, though some of the decisions regarding the different appeals before us are somewhat close calls.

I. Standards for Summary Judgment

The standards for summary judgment are well established and need little elaboration here. Summary judgment should be granted if it has been shown that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A non-movant seeking to defeat summary judgment by suggesting conflicting facts "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)). Nevertheless, "[t]he moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment." *Mingus Constructors v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

II. We Deny Kalaeloa's Motion for Partial Summary Judgment

Kalaeloa's motion for partial summary judgment is premised on the straightforward notion that the contract requires conveyance of parcels within the time requested (not less than 180 days from the time of the request) and the government did not meet that timetable[18] (*see* app. mot. at 2-3). The government opposes this motion based upon provisions of the lease requiring compliance with the law and its allegation that the necessary environmental impact statements could not be concluded within the time periods requested by Kalaeloa (*see* gov't opp'n at 11-13). The government has provided enough of a factual basis to preclude summary judgment, though whether the evidence at trial will support the entire three to four year delay will only be determined then.

A. The Scope of Kalaeloa's Appeal Covered by Its Motion

As a preliminary matter, we note that Kalaeloa's motion for partial summary judgment does not apply to all of the 16 parcels that it requested on October 23, 2013 – just parcels 4, 8, 10, 14, and 16. That is consistent with the parcels for which it filed the first claim (and which was appealed in number 60527). Though the government

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[18] We refer to this as "the 180 day requirement" for convenience, though we recognize that the time for conveyance requested by Kalaeloa could be longer than 180 days if it so chose.

expressed concern that Kalaeloa's motion for partial summary judgment embraced all of the 16 parcels (*see* gov't opp'n at 10), Kalaeloa has disclaimed that reading, stating clearly that it only seeks judgment for the five parcels named in claim 1 (app. reply at 3 n.4).

B. As a Matter of Contract Interpretation, the Lease Allowed That Statutory and Regulatory Compliance Trump the 180-Day Requirement for Transfer of Property to Kalaeloa

To decide whether the lease should be read as the government wishes (permitting delays if required by compliance with law) or as Kalaeloa argues (without room for such delays), we begin with the law of contract interpretation. Under basic principles of the law, a contract is interpreted "in terms of the parties' intent, as revealed by language and circumstance." *United States v. Winstar Corp.*, 518 U.S. 839, 911 (1996) (citations omitted). Generally, this process begins and ends with the language of the contract. *TEG-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006). And in reviewing this language, the Board should read the contract "as a whole and [interpret it] to harmonize and give reasonable meaning to all its parts," if possible, leaving no words "useless, inexplicable, inoperative, insignificant, void, meaningless or superfluous." *Precision Dynamics, Inc.*, ASBCA No. 50519, 05-2 BCA ¶ 33,071 at 163,922; *see also Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002) ("contract must be construed to effectuate its spirit and purpose giving reasonable meaning to all parts of the contract"); *Hunkin Conkey Constr. Co. v. United States*, 461 F.2d 1270, 1272 (Ct. Cl. 1972) (rejecting contract interpretation that would render a clause in the contract meaningless).

The two contract clauses competing for primacy in Kalaeloa's motion are Section 2.1 of the lease, which sets forth the 180-day requirement, and Section 31.3, Governing Law, which provides in relevant part that, if the lease, "or any portion of it, or the operations contemplated by it are found to be inconsistent with or contrary to laws or official orders, rules or regulations of the United States" the laws or regulations would take precedence. Since Section 31.3, Governing Law, clearly indicates the lease's intent that its dictates have primacy over other provisions of the lease, we give it priority over Section 2.1. Thus, we hold that, if compliance with environmental or other law requires a longer period of time than the 180 day minimum for conveyance provided for in section 2.1 of the lease, the 180 day requirement must yield to the requirements of complying with the law.

We note that this is not the same as an impossibility defense, though Kalaeloa characterizes it as such (*see* app. reply at 22-25). Impossibility is when a contract's terms cannot be complied with. *See, e.g., Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294 (Fed. Cir. 2002). Here, the lease's terms specify what happens when

there is a conflict of other terms of the lease and the law, and provide direction over what is to occur in that event. Thus, it is possible to comply with the terms of the contract here because those terms direct that the parties follow the law.

C. There Is Disputed Fact over Whether the Law and the 180-Day Requirement Conflict

The government has presented evidence that the reason it did not comply with the 180-day requirement was because the DOE and EFT processes, which it was compelled to follow (*see* paragraphs 1 and 11 of the lease, above), required more than the time given. This evidence, however, is not particularly specific in demonstrating that its compliance with the statutes and regulations required the entirety of the time that it took beyond the requested conveyance date. Kalaeloa, for its part, has not submitted evidence demonstrating that the Navy could have complied with both the statutory dictates and the 180-day requirement. Kalaeloa has, however, argued that the time was excessive, given the circumstances.

Though we caution the government that proof that 180 days was inadequate to comply with the statutes is not nearly the same as proof that three to four years of delay is warranted, and necessary,[19] we find that there is enough factual dispute here about when the government could have complied with the law to prevent us from granting summary judgment in favor of Kalaeloa. Accordingly, Kalaeloa's motion for partial summary judgment is denied.

C. We Deny the Government's Cross Motion for Summary Judgment

A. There Is a Factual Dispute Regarding the Ability of the Government to Make a Timely Transfer of the Requested Parcels

For the same reason that we deny summary judgment to Kalaeloa on its conveyance claim, we deny the government's mirror-image motion on the same claim: facts are in dispute over whether the government truly needed all of the time it took to convey the parcels in question to comply with the law.

[19] To be very clear: Section 31.3 does not excuse the Navy from its timely transfer obligations under Section 2.1 completely: it only does so for so long a period as compliance with statutes and regulations preclude it. After that period has passed without transfer, the lease is breached.

B. Factual Disputes Preclude Summary Judgement on Kalaeloa's Historic Designation Appeal

1. What, Exactly, Is the Theory of Kalaeloa's Historic Preservation Appeal?

Kalaeloa has made clear in general terms that its complaint regarding historic preservation is that the Keeper wound up designating a much larger site for the historic registry than it had reason to expect (*see generally* app. reply at 5). Why the Navy should (by Kalaeloa's lights) be held responsible for this action has changed somewhat. Generally, Kalaeloa posits that the Navy represented, at the time the lease was negotiated, that only a small fraction of the Ewa Field property would be subject to historic preservation claims (*see id.* at 44-47). The Navy then presented a much larger DOE to the Keeper, which he expanded even further than requested (*see id.* at 51-52; *see also* app. supp. br. at 8). Kalaeloa now also argues that the Navy presented additional information to the Keeper, which is should have kept to itself,[20] that the Keeper considered when designating an even larger area for the historic landmark than the Navy suggested (*see* app. reply 51-52). All of these actions, Kalaeloa asserts, in contravention to the Navy's early representations and with the knowledge that Kalaeloa was counting on a small footprint for the historic designation, deprived it of its reasonable contract-based expectations and were thus a breach of the implicit duty of good faith and fair dealing (*see* app. reply at 53-55; 60-63). Notably, Kalaeloa does not argue any form of misrepresentation by the government or that there was a mistake of fact based upon the information conveyed to it by Navy officials.

2. Factual Disputes (Barely) Preclude Summary Judgment for the Navy

The portion of the Navy's motion addressing historic preservation is largely dependent upon the notion that Kalaeloa should have known anything related to the Japanese surprise attack on December 7, 1941 was at high risk of being designated a historic landmark (*see* gov't opp'n at 14-15). This may be persuasive to some extent, especially in light of the "as-is" provision of the lease, but, to the extent that the Navy represented that only a small portion of the property at Ewa Field was likely to be so designated, we are inclined to find a factual dispute precluding us from accepting this portion of the Navy's argument.

Where we are more inclined to give the Navy credit is the notion that the Navy's DOE recommendations and the Keeper's decision should be considered to be independent of the Navy's contractual obligations to Kalaeloa (*see* gov't supp. at 9-10). It is self-evident that an agency's compliance with a statute cannot be considered to be a

[20] In a related note Kalaeloa also argues that the Navy should have objected to the funding of the research that led to the report that persuaded the Keeper to increase the protected acreage (*see* app. supp. br. at 12-14).

breach of the duty of good faith and fair dealing, since a contract contrary to public policy is unenforceable. *See, e.g., Fomby-Denson v. Dep't of Army*, 247 F.3d 1366, 1373-75 (Fed. Cir. 2001) (general discussion of contracts void due to public policy). We also find that compliance with the intent of a statute to be the sort of action that would not be considered to be the breach of an implicit contractual duty. Our review of the NHPA and its comprehensive implementing regulations makes clear to us that the expectation that agencies will take a proactive role in the implementation of the historic preservation statutory scheme is a manifestation of public policy that is "well defined and dominant," meaning that an enforceable contract cannot impose obligations to the contrary. *Id.* at 1375 (quoting *W.R. Grace and Co. v. Local Union* 759, 461 U.S. 757, 766 (1983)). We will not find breach of the duty of good faith and fair dealing in the Navy's failure to "look the other way" or in any alleged failure to minimize the information it provided when it forwarded its recommendations to the Keeper.[21]

We decline, however, to enter summary judgment on this issue now because the record begs just enough questions to preclude it. To the extent that Kalaeloa can adduce evidence to prove that the Navy used the Section 106 process as a pretext to target its contractual expectations, *cf. Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 829-30 (Fed. Cir. 2010),[22] we *might* be able to rule in Kalaeloa's favor. This will be difficult to prove, but, reading all of the evidentiary inferences in Kalaeloa's favor, as we must at this stage, we will not completely foreclose it.

C. We Do Not Have an Adequate Record to Decide the Utility Plan Portion of the Government's Motion

Though neither party has framed it as such, we perceive the utilities plan provision of the lease to be an "agreement to agree," since, by its terms, it requires *both* parties to develop the "mutually satisfactory communications and utilities transition plan" and required *both* parties "to commence development of such plan as soon after execution of [the lease] as is practicable." By law, such an agreement imposes upon the parties (*both* parties) an obligation to negotiate in good faith, though not necessarily come to agreement. *See North Star Steel Co. v. United States*, 477

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[21] To succeed, Kalaeloa will also need to prove that the Keeper would have come to a different conclusion even without the Navy's recommendation – a particular challenge here since the Keeper plainly departed from the Navy's recommendation to make it more rigorous.

[22] We recognize that *Precision Pine* may have been, *sub silentio*, limited by the Federal Circuit's later decision in *Metcalf Construction Company, Inc. v. United States*, 742 F.3d 984, 991-92 (Fed. Cir. 2014). *But see Dobyns v. United States*, 915 F.3d 733, 739-40 (Fed. Cir. 2019). *Metcalf*, however, arguably expanded the circumstances to which the duty of good faith and fair dealing applied; it did not curtail them. *See generally Metcalf*, 742 F.3d at 990-92.

F.3d 1324, 1332 (Fed. Cir. 2007); *Aegis Defense Servs., LLC, f/k/a Aegis Defence Servs. Ltd*, ASBCA No. 59082 *et al.*, 17-1 BCA ¶ 36,915 at 179,857. Needless to say, given the joint obligations present, one party may not sit idle and then complain that the other party did the same.

We cannot issue summary judgment because, on the record before us, we have no idea whether either or neither party ever entered into good faith negotiations to create a mutually agreeable utilities transition plan. The government's motion provides no evidence of the actions taken by either party except that the Navy obtained a GSA report providing the parties with some options (*see* gov't opp'n at 34-35). Perhaps, in the proper context, that report may have helped to begin discussions by the parties, but there is a dearth of evidence before us demonstrating just how it was presented to Kalaeloa and how the parties treated it. Likewise, Kalaeloa's response provides no enlightenment upon its actions, if any, to come to agreement on a utility plan (*see* app. reply at 66-73). Strongly tempted though we are to find that complete inaction by both parties here dooms an agreement-to-agree cause of action, we will defer making such a decision today. We do so only because the Navy has not provided any affirmative evidence stating that Kalaeloa did nothing on the negotiations front and we find it highly unlikely that the matter was not raised in some form[23] until Kalaeloa submitted its claim to the CO. Without knowing what, if anything, was communicated by the parties, we will not grant summary judgment in the government's favor on this subject.

CONCLUSION

For the reasons stated herein, we deny Kalaeloa's motion for partial summary judgment and the government's cross motion for summary judgment.

Dated: December 16, 2019

J. REID PROUTY
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

(Signatures continued)

[23] Merely raising the utilities issue, of course, is not the same as entering good faith negotiations. If the parties merely "kicked the can down the road" while dealing with other matters and Kalaeloa did little more, it will be very difficult for it to prevail on this cause of action on the merits.

I concur

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

I concur

REBA PAGE
Administrative Judge
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. 60527, 60528, 60529, Appeals of Kalaeloa Ventures, LLC, rendered in conformance with the Board's Charter.

Dated:

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