ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Daniel S. Sinclair, Callan E. Sinclair and Cayman C. Sinclair	)	ASBCA Nos. 56768, 56794, 56795 58152, 58153
	)	
Under Contract No. N62467-06-RP-00116	)	

APPEARANCES FOR THE APPELLANTS:

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APPEARANCES FOR THE GOVERNMENT:

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Navy Chief Trial Attorney
Mark R. Weiner, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PEACOCK

Appellants contend that the Navy breached the captioned lease's provisions regarding infrastructure improvements to be constructed on the leased property in the aftermath of Hurricane Katrina. Only entitlement is before us for decision. We dismiss ASBCA Nos. 56768 and 56794 for lack of jurisdiction. We dismiss the government claim docketed as ASBCA No. 56795 as duplicative. We sustain ASBCA No. 58152, deny ASBCA No. 58153 and remand quantum to the parties for negotiation and resolution.

FINDINGS OF FACT

1. On 29 August 2005, Hurricane Katrina struck the Gulf Coast causing severe destruction along the Gulf Coast from central Florida to Texas from flood and storm surge. Among the areas hit was the Gulfport, MS area where the storm left hundreds of Navy personnel from the Stennis Space Center (SSC) and their families without adequate shelter. Naval Facilities Engineering Command (NAVFAC), Southern Division, Real Estate Branch (herein the government or the Navy) was assigned the task of finding housing for the displaced families. (R4, tab 1; supp. R4, tabs G-17, -18, -28)

2. In early October 2005, the Navy exchanged a series of emails with realtor Betty Anne Burns about the lease of approximately 16 acres of property (hereinafter the Sinclair property) in St. Tammany Parish, Covington, LA for use as a mobile home park. The Sinclair property was owned by the Sinclair brothers, Callan, Cayman and Daniel

(the Sinclairs or appellants) who were represented by Ms. Burns. Callan Sinclair was the most active representative for the appellants. The Sinclair property was located north of Lake Pontchartrain and, aside from downed trees and debris, the property was unharmed by the hurricane. It also offered access to multiple interstate highways and schools and was not located in a flood zone. (R4, tabs 2-6; tr. 45)

3. The Navy was aware no later than 28 October 2005 from site maps provided by appellants and walking the property during site visits that approximately 2.6 of the 16 acres of the site was considered "wetlands" (exs. A-C, -D; tr. 106, 119, 142). At the end of October 2005, appellants provided the Navy with a copy of a previous plan to develop the site and a second attachment showing the potential wetlands (supp. R4, tab G-9). Use of the property as a mobile home site required zoning waivers and other approvals from the St. Tammany Parish Council and issuance of a temporary conditional use permit (supp. R4, tab G-6).

4. In late October and November 2005, the Navy and Ms. Burns discussed and worked out details of the lease, including access to the property and meeting St. Tammany Parish requirements (supp. R4, tabs G-5-7, -10, -14).

5. On 5 December 2005, Ms. Burns, appellants and Navy representatives met with St. Tammany Parish (supp. R4, tab G-13). An Executive Order was issued by the Parish on that day waiving and suspending all restrictions or impediments for use of the Sinclair property until 1 November 2006 (R4, tab 2; tr. 62-64; ex. A-J). The principal details of the permit were negotiated directly between the Navy and the Parish representatives and satisfied all Parish requirements for the work to proceed. No further permitting requirements or issues were mentioned by the Navy between execution of the permit and January 2006. (Tr. 67, 110, 117, 124; ex. A-J) The Executive Order stated in pertinent part (ex. A-J):

> WHEREAS St. Tammany Parish Government through Kevin C. Davis, as Parish President, is still empowered to take all necessary measures to ensure the continued safety, health and welfare of the citizens of St. Tammany, as per law; and,
>
> WHEREAS, the effect of Hurricanes Katrina and Rita upon all of St. Tammany's people and property requires continued action by St. Tammany Parish Government to offset the irreparable damages caused by wind and water, and
>
> WHEREAS, the Parish President has initiated action, with the assistance of Parish Council members, to combat the devastating effects of the storms, and

WHEREAS, without immediate and thorough governmental intervention, the natural habitat and intrinsic character of St. Tammany will be forever detrimentally impacted, and

WHEREAS continued action by the Parish of St. Tammany is mandatory to fulfill the needs of the people of this Parish until such time as the emergency state of this Parish has subsided.

WHEREAS the need for housing sites remains of paramount importance to the residents and workers of this Parish and that certain vacant tracts of land or subdivisions of record that are otherwise unoccupied are available for immediate use and occupancy but for possible zoning restrictions.

WHEREAS the United States Department of Defense, including but not limited to the Department of the Navy, is and remains in immediate need of housing for its government employees to serve the needs of the United States of America, and

WHEREAS there is a need to suspend, for a limited time, all restrictions and requirements as mandated by the Parish Code of Ordinances as to zoning on the property *more fully described in the attached Exhibit "A"*

....

IT IS ORDERED that *any and all zoning restrictions or impediments to the use of the property described in the incorporated Exhibit "A" are immediately waived and suspended* for a limited period of time until November 1, 2006.

IT IS ORDERED that the United States Department of Defense, including but not limited to the Department of the Navy, be permitted *to use the property set out in Exhibit "A"* as is needed to supply housing for government employees.

....

> IT IS ORDERED that any person or entity who interrupts or interferes with the control of the Parish and/or Parish President shall be prosecuted to the fullest extent of the law.

(Emphasis added)

6. Exhibit A attached to the Executive Order was a "Site Layout Plan" for development of the site. It depicted 62 mobile housing units and various infrastructure elements of the planned project. Submission of the "Site Layout Plan" was required to obtain the approval of St. Tammany Parish and a prerequisite to issuance of the Executive Order. The layout drawing was developed by the Navy working in conjunction with an engineering firm hired by appellant. (Ex. A-J; tr. 45-46, 60-61, 63, 66, 70, 78, 109-10, 156)

7. On 13 December 2005, the Navy awarded the referenced lease on a GSA Standard Form 2, U.S. Government Lease for Real Property, to the Sinclairs for lease of the Sinclair property "(As shown in Exhibit 'A')" for the 12-month period beginning 23 December 2005 to 22 December 2006. Annual rent was $153,600 at a rate of $12,800 per month. The lease was renewable annually for four years at the option of the government at slightly higher monthly rates if the government provided notice in writing to the Sinclairs at least 30 days before the end of the original lease or renewal term. (R4, tab 1) Exhibit "A," attached at page 4 of the lease, was the same "Site Layout Plan" submitted to St. Tammany Parish and incorporated into the Executive Order issued by the Parish as discussed above (R4, tab 1 at 4; tr. 156; ex. A-J at 3).

8. Standard Form 2 GSA Lease, paragraph 4 states: "The Government may terminate this lease at any time by giving at least 30 day's notice in writing to the Lessor and no rental shall accrue after the effective date of termination. Said notice shall be computed commencing with the day after the date of mailing." (R4, tab 1)

9. Paragraph 6 of the Lease provided the Sinclairs would furnish easements or similar legal documents allowing ingress and egress to the Sinclair property, provide the St. Tammany Parish Executive Order discussed above and, by 30 December 2005, remove trees and other debris (R4, tab 1). To provide ingress and egress, the Sinclairs granted the Navy rights of access to the site across an additional seven acres adjacent to the leased property to connect the site to highways (tr. 69-70, 111-12).

10. Paragraph 7 of the Lease, authored by the Navy (tr. 143, 145; ex. A-H), set forth the following "Additional Clauses:"

> 1) The Government is required to install a fence around the perimeter of the Leased Premises. The Government has

the right to determine not only the type of perimeter fence that will be installed, but also the materials that will be used in the construction of the fence. The only exception is shown in Additional Clause 2.

2) The Government specifically has to install a privacy fence for approximately 800 linear feet on the western boundary of the Leased Premises that borders Holly Crest Subdivision.
3) The Government is required to install gates at all entrances of the Mobile Home Community. The Government has the right to determine the type of gate that will be used at all entrances.
4) The Government is required to install a "Standard Road Bed" built to St. Tammany Parish's Specifications. The Government is not required to pave the Road.
5) The Government and local Utility Companies are granted the right to install utilities above ground.
6) The Lessor must provide all St. Tammany Parish Specifications for Additional Clauses 1 through 5 to the Government in a timely fashion before the Lease becomes effective.
7) Upon completion or termination of the lease, the Government will remove all Mobile Homes from the Leased Premises. All of the infrastructure improvements will be left in place and become the property of the Lessor.
8) The Government will perform an Environmental Condition of Property (ECP) Checklist of the Leased Premises prior to making any improvements to the property. It will represent the then present condition of the Leased Premises, and be attached to the Lease as Exhibit (B).

(R4, tab 1)

11. The main consideration inducing appellants to enter into the lease was the Navy's promise to make the infrastructure improvements identified in the "Additional Clauses" that appellants would retain after expiration of the lease. The Sinclair property was in high demand and had risen in value approximately 20-30% immediately following Katrina. The amount of rent was negligible in comparison to the value of the infrastructure and was far below the rent that would have been charged without those improvements. Once the Navy indicated its intent to lease and improve the property, appellants ceased marketing the property to others, including the Federal Emergency

Management Agency (FEMA). (Tr. 59-61, 67, 80, 84, 86, 106, 111-12, 115, 182-86; ex. A-A) The lease contained no timeline for construction of any of the government improvements addressed in the "Additional Clauses" (tr. 133).

12. The lease included in full text standard General Clauses for Acquisition of Leasehold Interests in Real Property, including 48 C.F.R. § 552.270-18, DEFAULT IN DELIVERY – TIME EXTENSIONS (SEP 1999) (VARIATION) and 48 C.F.R. § 552.270-22, DEFAULT BY LESSOR DURING THE TERM (SEP 1999) (R4, tab 1).

13. The lease also included in full text at paragraph 18, 48 C.F.R. § 552.270-8, COMPLIANCE WITH APPLICABLE LAW (SEP 1999) which states in applicable part:

> Lessor shall comply with all Federal, state and local laws applicable to the Lessor as owner or lessor, or both, of the building or premises, including, without limitation, laws applicable to the construction, ownership, alteration or operation of both or either thereof, and will obtain all necessary permits, licenses, and similar items at Lessor's expense.

(R4, tab 1)

14. Upon signing the lease, appellants hired a subcontractor to perform and timely complete the requisite debris removal by 30 December 2005 (tr. 113-15; exs. A-K, -L; R4, tabs 3-11).

15. On 30 December 2005, the Navy expressed concern to Callan Sinclair that the Executive Order from St. Tammany Parish was effective only until 1 November 2006 and that the Navy would require some assurance that the permissions granted would be extended. Mr. Sinclair was also reminded of the lease requirement that the Sinclairs were responsible for acquiring any necessary permits for clearing of the site and storm water runoff. (R4, tab 2)

16. By 4 January 2006, the Navy learned and discovered that appellants had not obtained permits from the State of Louisiana Department of Environmental Quality prior to clearing. The Navy was also concerned that a Department of the Army Corps of Engineers (COE) permit was required prior to disturbance or clearance of the portion of the property classified as wetlands. By Navy letter dated 5 January 2006, the Navy informed appellants of these permit issues and requested that appellants advise the Navy as to how they would be addressed within seven days of receipt and that time was of the essence because of the critical need for housing. (R4, tab 3)

17. Upon receiving the letter on 5 January 2006, appellants immediately hired an engineer/consultant and scheduled a meeting with the Army COE officials on 10 January 2006 to address any remaining permitting issues and timely reply to the Navy's letter. Any permitting issues relating to the minor "wetlands" portion of the site were easily resolvable and would not have delayed construction of improvements or use of the site by the Navy. Separately, the Navy was informed by the COE that a permit could be issued after the fact. Appellants scheduled a meeting with the Army COE on 10 January 2006 so that Mr. Sinclair could timely reply to the Navy's 5 January 2006 letter. (Tr. 71-75, 121-22, 168, 172; ex. A-Q; supp. R4, tab G-22)

18. As of 11 January 2006 and prior to the time for appellants' response to the 5 January letter, the Navy determined that it no longer had a requirement for a mobile home site in Covington and determined that the lease should be canceled. SSC would instead fill its housing shortage through single family home leases. (Supp. R4, tab G-24)

19. By letter dated 12 January 2006, the Navy notified appellants that "[r]egrettably we have determined that a need no longer exists for the future use of the site by the Navy" and that the Navy was terminating the lease in accordance with paragraph 4 with thirty days notice, becoming effective on 11 February 2006. The Navy determined that the Sinclairs were entitled to $21,461.82 for the 51 days of prorated rental. (R4, tab 4) None of the improvements specified in the "Additional Clauses" had been made by the Navy when it terminated the lease.

20. The post-Katrina demand for land in St. Tammany Parish had deteriorated significantly by the effective date of termination. The large population influx into the Parish and resultant demand for housing had been satisfied by existing housing or rapid construction. (Tr. 77-78)

21. By letter dated 27 July 2007, the Navy informed appellants that an audit had revealed that the government had inadvertently paid the entire annual amount of the lease in 12 monthly checks and that the Sinclairs had been overpaid for the terminated lease in the amount of $132,138.18 ($153,600.00 – $21,461.82). The Navy made a demand for repayment by 31 August 2007. (R4, tab 5)

22. By letter dated 9 October 2007, the Navy reaffirmed that its termination was proper in accordance with paragraph 4 of the lease and again demanded repayment. Appellants were advised to submit documentation of claimed termination costs for possible reimbursement. (R4, tab 8)

23. By letter dated 19 December 2007, appellants' attorney submitted a termination settlement proposal seeking $63,678.08 from the government to settle all claims. The proposal included $17,500 for the cost of clearing the property and $178,316.26 for contractual consideration less the government's claimed overpayment.

In the 19 December 2007 proposal, appellants' counsel stated that under the "Additional Clauses" of the lease the government was required to make improvements to the infrastructure of the leased property and that those improvements represented a substantial portion of the consideration for appellants to enter the lease. He stated that the actual rent in the lease was below market either before or after Hurricane Katrina. (R4, tab 11)

24. Attached as an exhibit to the proposal was a Cooper Engineering, Inc., estimate dated 8 November 2007 in the amount of $1,276,185 of costs to construct the infrastructure improvements that appellants allege the government promised under the lease that would have become appellants' under the "Additional Clauses." In the 19 December 2007 proposal, appellants calculated the amount due from the government for infrastructure by taking the Cooper estimate of infrastructure improvements ($1,276,185), dividing that amount by 365 days, and then multiplying that amount by the 51 days the lease was in effect. This calculation resulted in the $178,316.26 figure claimed in the settlement proposal as the contractual consideration for infrastructure improvements that the Navy should have made but did not. (R4, tab 11)

25. By letter dated 8 February 2008, the Navy agreed to pay for the costs of clearing the land ($17,500) and deducted that amount from the $132,138.18 it sought as overpayment to leave a balance of $114,638.18. The Navy disagreed that it was contractually obligated to pay for infrastructure improvements to the leased property after it exercised its lease termination rights under paragraph 4 of the lease and again demanded payment in the amount of $114,638.18. (R4, tab 12)

26. By letter dated 27 March 2008, appellants' attorney stated that "the Navy is obligated to pay for all of the infrastructure improvements, not merely the improvements up to the time of termination." He considered that the termination provision of the lease in paragraph 4 allowed the Navy to terminate its obligation to pay rent but made no reference to infrastructure improvements. He further stated that the rent provision in paragraph 3 of the lease made no reference to the infrastructure improvements addressed in the "Additional Clauses" of the lease. He concluded that while the Navy may have terminated its right to have to pay rent, "the Navy's obligation to deliver to my client the full infrastructure improvements found in the Additional Clause section of the contract survived the termination of the contract...." (R4, tab 13)

27. On 29 December 2008, appellants submitted a request for relief seeking "a minimum" of $1,957,236.48 for alleged breach of the lease based on a revised estimate of infrastructure costs (R4, tab 18).

28. As of 12 March 2009, the Navy had not issued a contracting officer final decision nor advised appellants when such a decision would be issued. As a result,

appellants appealed the constructive denial of its request on that date. That appeal was docketed as ASBCA No. 56768.

29. By final decision dated 23 March 2009, the Navy's contracting officer denied the Sinclairs' claim in its entirety and asserted a government claim alleging that the Sinclairs owed the United States $114,638.18 for rent received after termination of the lease. That amount credits the Sinclairs with the $21,461.82 paid for 51 days of rent and the $17,500 paid for preparing the site. In the final decision, the contracting officer noted that appellants failed to have the proper permits for site clearing and wetland work, that this failure constituted a breach of the lease under paragraph 18, and that the Sinclairs had to apply for and obtain the required permits before the Navy could initiate any actions on the property, including constructing drainage, roadways, fence, etc. He reiterated that paragraph 4 of the lease allowed the government to terminate the lease at any time upon giving 30 days notice in writing and no rent was to accrue after the effective date of termination. With regard to the damages claimed, he observed that the Sinclairs were claiming damages for infrastructure improvements, including drainage, utility service, sewers and treatment plant, which the government had no obligation to provide under the lease and that the provision of such improvements to the property was only speculation on the Sinclairs part. He stated that the lease required the government to install a gate and fence, both of a type largely determined at government discretion, and to install a standard road bed but that even these portions of the project could not proceed because of appellants' breach in not providing applicable permits. (R4, tab 19)

30. Appellants appealed the contracting officer's final decision by letter dated 20 April 2009. The Board docketed the appeal of the final decision's denial of appellants' affirmative request as ASBCA No. 56794 and separately docketed the appeal of the government's claim as ASBCA No. 56795.

31. During the preparation of this Opinion, the Board *sua sponte* discovered a jurisdictional issue. Specifically, the Board noted that appellant's request for relief underlying ASBCA Nos. 56768 and 56794 was quantified in the amount of "a minimum of $1,957,236.48." Because the amount sought was qualified ("a minimum"), the Board convened a teleconference with the parties on 15 September 2011 to discuss whether the CDA jurisdictional prerequisite for a "claim" seeking recovery of a "sum certain" was met. As a result of the teleconference, appellant elected to submit a certified claim to the contracting officer in a sum certain without qualification on 7 October 2011. (R4, tab 32) On 16 April 2012, the contracting officer issued a final decision denying the latter claim and reasserting the government claim for substantially the same reasons as discussed in finding 29 above. On 14 May 2012, appellant timely appealed that final decision. On 24 May 2012, the Board docketed the Sinclairs' claim as ASBCA No. 58152 and the government's claim as ASBCA No. 58153. The docketing notice indicated that the record previously made in the three prior appeals (ASBCA Nos. 56768, 56794, and 56795) was incorporated in the two new appeals and further requested that the

government supplement the Rule 4 file as appropriate and, at a minimum, to include the 7 October 2011 claim and the 16 April 2012 final decision. On 8 June 2012, the Board convened a teleconference with the parties during which neither party expressed a desire to further supplement the consolidated record or submit additional briefs. Therefore, the Board indicated that it would consider the record complete, as consolidated, and the appeals ready for the Board's resolution upon receipt of the claim and final decision. The government supplemented the record on 13 June 2012 as Rule 4, tabs 32 and 33, respectively.

32. The Sinclairs have not repaid the $114,638.18 demanded by the government as overpayment on the lease (tr. 137). The Sinclairs retained the rent payments in part because they regarded them as recognition by the Navy of its continuing obligations to provide the promised infrastructure improvements (tr. 82, 98, 133-34). Appellants do not dispute that the government is entitled to return of the excess rent paid but that the amount should be offset against amounts awarded appellants on its claim for the Navy's breach of the infrastructure provisions (*see* R4, tab 13).

DECISION

As discussed in our findings, the original request for relief underlying ASBCA Nos. 56768, 56794 was quantified by appellants in the amount of "a minimum of $1,957,236.84." As a result, the Board, *sua sponte,* raised the issue of whether a properly quantified "claim" in a "sum certain" amount had been submitted to the contracting officer. To remedy this perceived jurisdictional defect, appellant submitted a certified claim quantified in the unqualified "sum certain" amount of $1,957,236.84 to the contracting officer. Following issuance of a final decision denying that claim and reasserting a government claim, the Board docketed the appellants' timely appeal as ASBCA Nos. 58152 (appellants' claim) and 58153 (government's claim). Although afforded the opportunity, neither party has elected to brief the jurisdictional issue described above and in our findings. We conclude that we are without jurisdiction to decide ASBCA Nos. 56768 and 56794 because the underlying request for relief by appellant was qualified and, therefore, did not satisfy the CDA requirement for a "claim" seeking recovery of a "sum certain." *See, e.g., J.P. Donovan Construction, Inc.,* ASBCA No. 55335, 10-2 BCA ¶ 34,509, *aff'd,* No. 2011-1162, 2012 U.S. App. LEXIS 6190 (Fed. Cir. 2012) ("approximately"); *Van Elk, Ltd.,* ASBCA No. 45311, 93-3 BCA ¶ 25,995; *Precision Standard, Inc.,* ASBCA No. 55865, 11-1 BCA ¶ 34,669 ("at least"); *Sandoval Plumbing Repair, Inc.,* ASBCA No. 54640, 05-2 BCA ¶ 33,072 ("no less than"); *Eaton Contract Services, Inc.,* ASBCA No. 52888 *et al.,* 02-2 BCA ¶ 32,023 ("well over" and "in excess of"). We now turn to the merits of the claims and appeals within our jurisdiction.

The government maintains that its obligations with respect to the improvements impliedly ended with the termination as did its obligation to pay rent following the notice

period. The government asserts that there was no timetable for making the improvements and by virtue of the Navy's unilateral option rights under the lease it could have postponed them for several years over the option periods. (Gov't br. at 19-20) The essence of the government's argument is that the termination and option provisions and the "Additional Clauses" are mutually dependent and when read reasonably as a whole must be interpreted to absolve the government of further liability with respect to the enumerated infrastructure improvements.

We disagree. Termination of the lease did not end the government's contractual obligations regarding the "Additional Clauses." Most significantly, the clear language of the lease places no conditions, restrictions or limitations on the Navy's obligations. It is well settled that unambiguous contract provisions are to be given their plain and ordinary meaning. *E.g., George Hyman Construction Co. v. United States,* 832 F.2d 574, 579 (Fed. Cir. 1987); *cf. San Carlos Irrigation & Drainage District v. United States,* 877 F.2d 957, 959-60 (Fed. Cir. 1989). Here the Navy expressly and unambiguously assumed the duty to make the improvements listed in the "Additional Clauses," in accordance with the "Site Layout Plan" also incorporated into the lease.

Although the Navy in terminating the lease reserved the right to stop rental payments, it reserved no comparable right eliminating its duties with respect to the improvements. The "Additional Clauses" are not cross-referenced in the termination clause or otherwise expressly dependent on continuance of the lease. The Navy authored that clause and if it intended that the government's obligations with respect to the improvements ended with termination of the rental payments, it would have been a simple matter to so state and link the termination and "Additional Clauses."

In fact, the obvious essence of the bargain and primary consideration for appellants' execution of the lease were the improvements promised by the Navy. Appellants would not have entered into the lease and removed the sought-after property from the market without that promise. The rent paid was relatively unimportant and secondary to the Navy's promise to make the improvements. The Navy deprived appellants of the time-sensitive opportunity to make alternative arrangements with other prospective lessors when the land was in critical demand.

As emphasized above, the "Additional Clauses" in question were specially-drafted by the Navy. Moreover, in interpreting contracts and discerning the intent of the parties, the Navy concedes that specially-drafted clauses are given greater weight and generally prevail over general "pre-printed" terms in standard form contracts. *E.g., Abraham v. Rockwell Int'l Corp.,* 326 F.3d 1242, 1254 (Fed. Cir. 2003); *see also C Construction Co.,* ASBCA No. 47928, 96-2 BCA ¶ 28,499 at 142,313 ("when a contract contains general and specific provisions that are in conflict, the provision directed to a particular matter controls over the more general provision"); *cf. Interstate General Government Contractors, Inc. v. Stone,* 980 F.2d 1433, 1434 (Fed. Cir. 1992) (any ambiguities in

disputed language in specially-drafted provisions will be construed strictly against the drafter).

The government contends that there was no express time specified for construction of the improvements. This argument runs counter to the principal purpose and obvious intent of the lease which was to house employees displaced by the Katrina disaster as soon as possible. Time was of the essence. Appellants' contentions regarding the timetable for the Navy's commencement of the improvements are grounded in a reasonable, common sense belief that the Navy intended to start construction as quickly as feasible. The option periods were not designed for the government to leisurely assess when to start work but how long to use the improved property in the face of recovery uncertainties. The improvements were required before and/or contemporaneously with installation of the mobile homes and the housing of displaced personnel. Neither party at the time of lease execution considered that the property might remain unimproved for the first year and not be used for its urgent intended purpose. Before its needs were revised in early January 2006, the Navy indicated its intent to move promptly forward with the improvements on 30 December 2005. The entire focus of the emergency meetings with the Parish was to expedite construction. The government contention is a post hoc mischaracterization and recasting of the contemporaneous intent of the parties. That intent is reflected in the government's disingenuous contention that termination was warranted because appellant was not proceeding expeditiously with the permitting process. In any event and regardless of any right to delay construction but illogically continue to pay rent over the option periods, the government remained liable upon expiration of the lease. At best for the government, the obligation could be postponed but not eliminated without compensating appellants.

The government places substantial reliance on *Grand Acadian, Inc. v. United States,* 87 Fed. Cl. 193 (2009), involving a similar lease of land in post-Katrina Louisiana by FEMA. The case, however, is distinguishable for several reasons. In *Grand Acadian,* a specially-drafted lease rider specified that neither party would have "further rights or liabilities" following termination which the Court considered included any government obligation to construct infrastructure improvements. 87 Fed. Cl. at 202. In contrast, the lease here included solely the standard form provision that addressed only the government's post-termination obligations with respect to rent. Nothing in the instant lease addresses the parties' other rights and obligations upon termination.

The infrastructure provisions in the lease in dispute in *Grand Acadian* granted the government considerable discretion, stating that the leased property was "to be used for such purposes as determined by [FEMA]" and improvements were to be constructed "as the Government determines necessary and/or expedient." 87 Fed. Cl. at 199-200. Here in contrast, the infrastructure improvements were expressly spelled out. The improvements were to comply with the Parish requirements for the project. Although the Navy had a degree of discretion as to the precise particulars and quality of the

improvements to be constructed, there was no comparable broad discretionary grant present as there was in *Grand Acadian*.

The primary bases for the Navy's position revolve around its contentions regarding the absence of any time limitations on construction in the instant lease. The Navy notes that factor was significant to the *Grand Acadian* court in reaching its decision in favor of the government. However, it was only one factor in the "entirety" of all relevant circumstances that the Court considered. 87 Fed. Cl. at 201. The other countervailing factors here, as detailed previously, warrant a contrary conclusion.

Finally we note that the Court's decision in *Grand Acadian* was by summary judgment on a record that contained significant conflicts and discrepancies in the evidence presented by the plaintiff. Here our decision is based on a post-trial record. That record contains unrebutted evidence that the main consideration for appellants' execution of the lease was the Navy's promise of infrastructure improvements. Given the primacy of that consideration, it was incumbent on the Navy to expressly draft provisions that would protect it from breach damage claims if it failed to construct the improvements prior to termination. The government did so in *Grand Acadian*. The Navy failed to do so in this case. It is important to stress that the government offered no witnesses or other persuasive evidence to rebut appellants' testimony regarding the intent of the parties, the consideration exchanged and the time-critical state of the market during negotiation of the lease terms in dispute.

Despite its failure to terminate under the lease's Default provisions, the government continues to allege that the appellants failed to comply with lease provisions requiring the Sinclairs to obtain permits. The Navy asserts that "the project could not proceed because of appellants' breach in providing applicable permits." (Gov't br. at 14, 23) This contention is inaccurate and a "red herring." The government did not terminate the lease for cause and the termination occurred even prior to expiration of the time granted the Sinclairs to respond to the Navy's 5 January 2006 letter. As we have found and as stated by the government at the time, reassessment of the Navy's needs and its determination to house its employees in single family residences drove the termination decision, not the alleged failure of appellants to obtain environmental permits. Moreover, appellants had either actually obtained all necessary authority to proceed or any remaining permits would have been easily obtained. The Navy knew about possible "wetlands" issues on a small portion of the land as early as October 2005, prior to execution of the lease and discussions with St. Tammany Parish. There is nothing in the record to indicate that the construction of the improvements was delayed by lack of permits.

CONCLUSION

We conclude that the Navy breached its obligations under the "Additional Clauses" provision of the lease. Accordingly, the appeal of the contracting officer's final decision denying appellants' claim, docketed as ASBCA No. 58152 is sustained as to entitlement. The appeal of the government's affirmative claim, docketed as ASBCA No. 58153, is denied. Because the same relief is sought by the government in ASBCA No. 56795, that appeal is dismissed as duplicative. Quantum is remanded to the parties for negotiation. We express no opinion concerning the standards to be applied by the parties in computing quantum.

ASBCA Nos. 56768 and 56794 are dismissed for lack of jurisdiction.

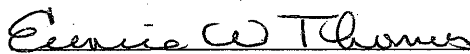
Dated: 16 July 2012

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



EUNICE W. THOMAS
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. 56768, 56794, 56795, 58152, 58153, Appeals of Daniel S. Sinclair, Callan E. Sinclair and Cayman C. Sinclair, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals