ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Empire Energy Management Systems, Inc.	)	ASBCA No. 46741
	)	
Under Contract No. F44650-88-C-0004	)	

APPEARANCES FOR THE APPELLANT: Timothy Sullivan, Esq.
Katherine S. Nucci, Esq.
Adducci, Mastriani
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Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL John M. Abbott, USAF
Chief Trial Attorney
Edwin R. Babbitt, Esq.
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Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE DICUS
ON THE PARTIES' MOTIONS FOR RECONSIDERATION

Both parties have moved for reconsideration of the Board's 27 October 1999 decision on their summary judgment motions ("*Empire I*"). Neither reconsideration motion is based upon any newly discovered evidence. For the most part, the parties have reargued the points they relied on in *Empire I* and with respect to those arguments, which we have fully considered, we see no reason to change or augment our earlier opinion. However, each party has also expanded one of its arguments on motion. Those arguments are deserving of additional consideration, as set out below.

Appellant's Motion

In *Empire I* we granted respondent's motion with respect to its argument that failure to compensate appellant for appellant's environmental claims did not bar respondent from exercising its right to terminate the contract for default. We reasoned that, even if respondent's actions had constituted a material breach, under *Cities Service Helix, Inc. v. United States*, 543 F.2d 1306 (Ct. Cl. 1976), respondent retained the right to terminate for default because appellant elected to continue contract performance prior to the default termination. Appellant argues in its reconsideration motion that *Cities Service* is inapposite because the contractor in that case received substantial payment and under the contract at issue here appellant could not be paid until it completed construction and

began delivery of utilities. Appellant argues that its situation more closely parallels *Northern Helix Co. v. United States*, 455 F.2d 546 (Ct. Cl. 1972). There, the court found "a special set of qualifying facts" and allowed the contractor to claim a material, contract ending breach in spite of that contractor's continuation of performance. No such qualifying facts have been established here. Moreover, although the contract did not provide for payment until utility services were delivered, it contained a cancellation ceiling of $19,900,000 pursuant to Modification No. 7 (R4, tab 1) and continued performance by appellant increased respondent's liability thereunder. Thus, we are not persuaded by appellant's argument that the facts here are closer to those in *Northern Helix*. To the contrary, we find the court's subsequent ruling in *Cities Service Helix* more persuasive. Accordingly, we affirm our holding in *Empire I* that the Government's actions did not invalidate its right to terminate the contract for default.

Respondent's Motion

In *Empire I* we found a material dispute of fact with regard to the effect of Condition 3.a of the lease, which imposed "as is, where is" acceptance terms on appellant (*Empire I*, finding 2). Specifically, we held that since the offending oil-water separator (OWS) was off-site and the storm drain system into which it discharged was under the leased premises, appellant was not responsible for including the OWS in its site inspection and it was reasonable to infer that an inspection by appellant would not have revealed the presence of an *underground* storm drain system. Respondent does not take issue with our holding regarding the OWS. It does, however, argue that under Condition 3.a the Government was not liable for any defects in the leased premises, "latent or patent," and appellant expressly acknowledged that the Government made no representations as to the condition of the site. Thus, according to respondent, since the Government could not be liable for *latent* defects, the fact that the storm drain system was underground did not matter. On reconsideration, we agree. The fact that the storm drain system was underground is not material because Condition 3.a shifted the risk for latent defects to appellant. Accordingly, we hold that pursuant to Condition 3.a appellant's "as is" acceptance of the leased premises included the underground storm drain system and any defects, actual or potential, arising from that system.

We must now come to grips with the proper interpretation of the risk assignment scheme incorporated into the contract by Modification No. 7 and how it is affected by the lease. That modification provides "[i]n the event of any inconsistency between this modification and the remainder of the contract, the provisions of this modification shall take precedence." (R4, tab 1) Under paragraph 26, respondent agreed to be responsible for the condition of the property at the time of lease execution and accepted liability for "damages, losses, costs or expenses" incurred by appellant because of environmental claims (*Empire I*, finding 6). The definition of environmental claims includes investigations. Respondent argues that, notwithstanding paragraph 26, the delays leading

to the default termination were not the result of any actual contamination, but of appellant's insistence on further investigation to determine if such contamination existed. According to respondent, Condition 3.a expressly imposed the duty to inspect on appellant, thereby making appellant accountable for any delay suffered as a result of its failure to adequately perform that duty. However, as appellant argues in rebuttal, inconsistencies between the provisions of the lease and Modification No. 7 are to be resolved in favor of the modification and paragraph 26 expressly includes investigations within the definition of environmental claims. We note, in addition, that paragraph 26 also extends beyond the leased premises to environmental claims related to respondent's activities both on-site and off-site. This would encompass environmental claims arising from operation of the OWS. It has not been established that appellant's investigatory responsibility under the lease extended to the OWS, which was not on the leased premises. The operation of the OWS gave rise to events which appellant alleges are environmental claims, and we found facts in dispute as to whether those events are environmental claims under paragraph 26 (*e.g.*, findings 8-11). Accordingly, summary judgment remains inappropriate notwithstanding the change in our holding in *Empire I* with respect to the underground storm drain system and Condition 3.a. Our decision in *Empire I* is modified to the extent indicated and otherwise affirmed.

Dated: 17 February 2000

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
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 No. 46741, Appeal of Empire Energy Management Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals