ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
New London Development Corporation	)	ASBCA No. 54535
	)	
Under Contract No. N62472-00-RP-00117	)	

APPEARANCE FOR THE APPELLANT: Ian E. Bjorkman, Esq.
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE GOVERNMENT'S MOTION TO DISMISS

New London Development Corporation (NLDC) appeals the deemed denial of its claim for costs incurred in removing undisclosed asbestos contaminated material (ACM) and PCBs from real property leased from the government. The government moves to dismiss for (i) lack of subject matter jurisdiction under Section 3(a) of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 602(a), and (ii) for failure to state a claim upon which relief can be granted (gov't mot. at 1). We deny the motion on both grounds.

STATEMENT OF FACTS (SOF)
FOR PURPOSES OF THE MOTION

1. The lease was entered into on 29 September 2000 for 14 acres of government property in New London, Connecticut that had previously been occupied by the Naval Undersea Warfare Center (NUWC). The lease was authorized by 10 U.S.C. § 2667(f)(1) on a determination by the Secretary of the Navy that, after the closing of the NUWC, the lease would facilitate state and local economic adjustment pending final disposition of the property. (App. supp. R4, tab 1 at 3)

2. When the lease was entered into, the proposed final disposition was a no-cost conveyance to NLDC pursuant to Section 2905(b)(4) of the Defense Base Closure and Realignment Act of 1990 as amended, Pub. L. No. 101-510 (1990), 10 U.S.C.A. § 2687

(note at 582-83) (hereinafter "DBCRA") and Section 2821 of the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65 (1999), 113 Stat. 853 (app. supp. R4, tab 1 at 3-4 and ex. A at 1-2).

3. A "Term Sheet" signed by the parties and attached as an exhibit to the lease described the lease as a "Lease in Furtherance of Conveyance." The Term Sheet also stated that after the lease was executed, the parties would negotiate a Memorandum of Agreement (MOA) specifying the terms, conditions and closing schedule for conveying title to the property to NLDC. (App. supp. R4, tab 1 at 3-4, ex. A at 1-2)

4. Paragraph 2 of the lease stated: "The term of this Lease shall be for a period of twenty (20) years beginning on 1 October 2000 and ending on September 30, 2020 unless terminated earlier in accordance with the provisions of Paragraph 15" (app. supp. R4, tab 1 at 4). Paragraph 15.1 of the lease stated in relevant part:

> 15.1 Termination Upon Tender of Deed. Thirty (30) days after the Government tenders to Lessee, in accordance with applicable law, a good and sufficient Quitclaim Deed conveying fee title to any portion of the Leased Premises (each such portion hereinafter referred to as "Conveyed Portion"), (i) this Lease shall automatically terminate with respect to the applicable Conveyed Portion as if such date were the stated expiration date contained herein and neither party shall have any further obligations under this Lease with respect to the Conveyed Portion (other than any obligations which otherwise would survive termination of this Lease), (ii) all references to the Leased Premises shall be deemed to exclude such Conveyed Portion, and (iii) this Lease shall continue in full force and effect with respect to the remainder of the Leased Premises.

(App. supp. R4, tab 1 at 16)

5. In addition to termination 30 days after government tender of a deed conveying title, paragraph 15 also provided for termination of the lease by NLDC at any time upon 90 days written notice, and at the discretion of the government upon (i) any failure of NLDC to perform any obligation under the lease, (ii) use of the property incompatible with the government's Finding of No Significant Impact (FONSI), (iii) national emergency or (iv) discovery of environmental conditions constituting imminent and substantial endangerment to human health or the environment (app. supp. R4, tab 1 at 4, 16-18).

6. Paragraph 3 of the lease entitled "CONSIDERATION" stated in relevant part: "As consideration for this Lease, Lessee shall provide, or cause to be provided, annual protection and maintenance services as described in Paragraph 12 . . ." Paragraph 12 specifically required NLDC to maintain the structures, fencing, plumbing, electrical systems, heating and cooling systems, exterior utility systems, paving, grounds, security and fire protection precautions, and otherwise to keep the leased premises "at all times . . . in at least as good a condition as when received . . . subject, however, to ordinary wear and tear or Government approved work." (App. supp. R4, tab 1 at 4, 8-10)

7. The leased premises were divided into two parcels. Parcel E was approximately 11 acres at the middle and south end of the site. Parcel F was approximately 3 acres at the north end of the site. (Gov't mot., ex. 2 at 8, ex. 3 at 8, ex. 4 at 9-10, 13) An Environmental Baseline Survey to Lease (EBSL) and a Finding of Suitability to Lease (FOSL) were prepared by the government and attached as exhibits F and G to the lease. The FOSL and EBSL made various representations as to the location and extent of ACM and other hazardous materials on the leased premises. (App. supp. R4, tab 1 at exs. F, G)

8. Paragraph 13.1 of the lease entitled "Government Indemnification and CERCLA Assurances" included an indemnification provision required by section 330 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2371, 10 U.S.C.A. § 2687 (note at 577), and other provisions required by section 120(h)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C.A. § 9620(h)(3). Paragraph 13.1 stated in relevant part:

> 13.1.1 Subject to the terms, conditions and limitations as set forth in Section 330 of P.L. 102-484, as amended, Government shall hold harmless, defend and indemnify, in full, Lessee . . . from and against any suit, claim, demand, administrative or judicial action, liability, judgment, cost or fee, arising out of any claim for personal injury or property damage (including death, illness, loss or damage to property or economic loss) that results from, or is in any manner predicated upon the release or threatened release of any hazardous substance, pollutant, contaminant, petroleum or petroleum derivative from or on the Leased Premises, as a result of Department of Defense activities on the Leased Premises.
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> 13.1.2(a) Pursuant to 42 U.S.C. Section 9620(h)(3) . . . Government, in consultation with U.S. EPA, has determined

that the Leased Premises are suitable for the proposed reuse as described in the Finding of Suitability to Lease ("FOSL"), that the proposed reuse of the Leased Premises as described in Paragraph 4 is consistent with protection of human health and the environment, and that there are adequate assurances that Government will take all response actions necessary to protect human health and the environment that have not been taken as of the date of this Lease. Accordingly, Government shall timely:

(1) assess, inspect, investigate, study and remove or remediate, as appropriate, the release or threatened release of a hazardous substance, pollutant or contaminant, from or on the Leased Premises in accordance with and to the extent required by applicable federal, state and local laws; and

(2) settle or defend any claim, demand, or order made by federal, state or local regulators or third parties in connection with any release or threatened release of a hazardous substance, pollutant or contaminant, from or on the Leased Premises in accordance with and to the extent required by applicable federal, state and local laws.

13.1.2(b) The Lessee and any sublessee shall:

(1) notify Government in writing within 90 days after confirming the existence of any previously unidentified condition at the Leased Premises which suggests a response action is necessary, or, within 90 days after receiving notice of a claim by Federal, State, or local regulators, or other third parties, of the existence of any condition at the Leased Premises that suggests a response action is necessary . . . . . The Lessee or any sublessee(s)' right to indemnification shall not expire due to late notice unless Government's ability to defend or settle is adversely affected.

. . . .

13.1.4 For purposes of this Paragraph 13.1, the following terms have the meanings indicated below:

. . . .

> (b) "Department of Defense activities" means the Department of Defense's: construction, installation, placement, operation, maintenance, use, misuse, abandonment of or failure to maintain the buildings and equipment and land at the Leased Premises . . . . "Department of Defense activities" does not mean the release or threatened release of a hazardous substance . . . to the extent that Government shows that the release or threatened release is caused or contributed to by the Indemnitee(s).
>
> (c) "Action . . . arising out of any claim for . . . property damage" includes, but is not limited to, any judicial, administrative or private cost recovery proceeding brought against an Indemnitee(s) (1) for response costs arising under CERCLA, (2) for costs incurred to enjoin or abate the presence or migration of contamination from or on the Leased Premises under RCRA, or (3) for costs incurred to comply with the requirements of similar federal or state laws and regulations (or the laws of any political subdivision of the state) which arise from environmental conditions at the Leased Premises.
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> . . . .
>
> (e) A release or threatened release which an Indemnitee "caused or contributed to" excludes actions by an Indemnitee which uncover environmental conditions arising from Department of Defense activities, including but not limited to testing of the Leased Premises, the excavation of soil, and the demolition of structures, and efforts to properly address an environmental condition arising from Department of Defense activities. . . .

(App. supp. R4, tab 1 at 10-13)[1]

9. NLDC alleges that between 16 June 2001 and 15 June 2002 its contractors while performing demolition and excavation work on the site discovered ACM and PCBs in locations that had not been disclosed in the FOSL, EBSL and other environmental documentation provided by the government. NLDC further alleges that as a result of the

[1] RCRA is the Resource Conservation and Recovery Act, 42 U.S.C § 6901 *et seq*.

discovery of these materials (i) there was a release or threatened release of hazardous materials into the environment, (ii) that its contractors were required to monitor, remove and dispose of the hazardous materials in accordance with federal, state and local laws and regulations, (iii) that its contractors did in fact remove and dispose of the materials, and (iv) that it paid them $1,212,932 for this work. (Compl. ¶¶ 15-21)

10. On 7 May 2002, NLDC and the government signed the MOA for conveyance of title to the leased property to NLDC. The MOA provided for conveyance of Parcel F no later than 30 May 2002, and for conveyance of Parcel E within 365 days after the conveyance of Parcel F. The recitals in the MOA cite the DBCRA as the authority for the conveyance, and 10 U.S.C. § 2667 as the authority for the existing lease. (Gov't mot., ex. 1 at 5-6)

11. On 28 May 2002, the government conveyed Parcel F to NLDC by quitclaim deed (gov't mot., ex. 2) . On 27 November 2002, it conveyed Parcel E to NLDC by quitclaim deed (gov't mot., ex. 4). In accordance with section 330 of Pub. L. No. 102-484, 106 Stat. 2371-73, 10 U.S.C. § 2687 (note at 577-79), both deeds included substantially the same indemnification provision as paragraph 13.1.1 of the lease (gov't mot., ex. 3 at 4, ex. 4 at 4). Each deed also included a clause stating that it "supercedes all prior agreements and understandings relating to the Conveyed Property" (gov't mot., ex. 3 at 6, ex. 4 at 6).

12. By letter dated 13 June 2003, NLDC submitted a claim for reimbursement "[p]ursuant to Section 330 of the Fiscal Year 1993 Defense Authorization Act, as amended . . ." for its costs incurred in monitoring, removal and disposal of the previously undisclosed ACM and PCBs (R4, tab 9 at 1). An attachment to the claim letter broke the claim down into eight items. Six of the eight comprising 96 percent of the claimed costs were expressly identified as work in Parcel E, or as work in buildings that are shown on the site map as located in Parcel E (R4, tab 9 at 3-6; app. supp. R4, tab 1 at ex. B; app. supp. R4, Vol. III at Site Map). The remaining two items (Items 4 and 5 with a total claimed amount of $38,929) are not identifiable on their face as to their location on the site (R4, tab 9 at 4-5). The back-up documentation submitted by NLDC for the claim shows that most of the claimed work was performed from late 2001 through the summer of 2002. The last item of claimed work is shown as being performed on 18 December 2002. (App. supp. R4, Vol. II) In its complaint on appeal and in its reply to the motion to dismiss, NLDC describes the claimed costs as contractor claims for "cost overruns" (compl. ¶¶ 16, 17; app. reply at 14).

13. By letter dated 17 July 2003, the contracting officer told NLDC that the undisclosed ACM "was fully contained within the subject building and underground steam piping system," that there was no "release" or "threatened release" of the materials

into the environment, and that the proper disposal of the material was NLDC's responsibility under paragraph 13.5 of the lease.[2] (R4, tab 10)

14. On 22 September 2003, NLDC resubmitted its claim for reimbursement as a certified claim for decision under the CDA (R4, tab 11). Paragraph 26 of the lease stated that the lease was subject to the CDA (app. supp. R4, tab 1 at 24-25). When no decision, or notice of when a decision would be issued, was received by 17 March 2004, NLDC appealed the deemed denial of the claim to the Board (R4, tab 12).

DECISION

A. Subject Matter Jurisdiction

Our subject matter jurisdiction under the CDA consists of any express or implied contract entered into by an executive agency for "(1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or, (4) the disposal of personal property." 41 U.S.C. § 602(a). The government moves to dismiss this appeal for lack of subject matter jurisdiction under the foregoing provisions.

First, the government argues that there is no contract in dispute because the lease under which the claim is brought became "null and void" when NLDC accepted title to the property (gov't mot. at 6). This argument appears to be based on the provision in each of the quitclaim deeds that the deed "supercedes all prior agreements and understandings relating to the Conveyed Property." The record on the motion shows that at least 96 percent of the total claimed costs were incurred on Parcel E before the lease terminated as to that parcel. Since the indemnity provision at paragraph 13.1.1 of the lease was required by statute and included in the deeds as well as in the lease, we do not read the superceding provision in the deeds as nullifying any right to indemnification that accrued under paragraph 13.1.1 while the lease was in effect. *See* SOF ¶¶ 4, 8, 11, 12.

The government argues that the lease was "part and parcel" of and "an unseverable condition-precedent" to a contract for the sale of real property, and that a contract for the sale of real property is not within our disposal of personal property jurisdiction under the CDA (gov't mot. at 5-6). We agree with the second part of this argument. We disagree with the first. A lease of real property by the government as

[2] Paragraph 13.5 of the Lease stated in relevant part: "Subject to paragraph 13.1 hereof, the Lessee shall indemnify and hold harmless the Government from any costs . . . resulting from discharges, emissions, spills, storage and disposal occurring during the term of the Lease solely as a result of Lessee's . . . control, occupancy, use or operations . . . of the Leased Premises" (app. supp. R4, tab 1 at 14).

lessor is a disposal of personal property within section 3(a)(4) of the CDA, 41 U.S.C. § 602(a)(4). *Arnold V. Hedberg*, ASBCA No. 31747, 90-1 BCA ¶ 22,577 at 113,307-08. While the 29 September 2000 lease agreement was characterized in the Term Sheet as a "Lease in Furtherance of Conveyance," neither the lease itself nor the attached Term Sheet contained the final agreed terms for the conveyance, nor did they obligate the parties to complete the conveyance. According to the Term Sheet, the final and complete terms for the conveyance were to be negotiated in a separate MOA. *See* SOF ¶ 3.

Moreover, we find nothing in the DBCRA, the implementing regulations (29 CFR Part 135), or the statutory authority for the lease that required the lease as a condition precedent for a conveyance. The statutory authority for the lease states only that the Secretary of the military department involved "may" lease property closed under a base closure law pending final disposition. 10 U.S.C. § 2667(f).[3] The fact that the parties provided a 20-year term for the lease if there was no conveyance, and expressly provided that the lease was subject to the CDA, is further evidence that they did not regard the lease as either "part and parcel" of, or an unseverable condition-precedent for a conveyance contract.[4] *See* SOF ¶¶ 4, 14.

The government argues that a dispute under the lease is outside our CDA subject-matter jurisdiction because "the donative nature of the transfer of real property, prevents the [lease] from being characterized as a contract for the procurement of property or services" (gov't mot at 6-9). This argument is without merit. The lease with the government as lessor was a contract for government disposal of personal property, *see Hedburg*, *supra*, and it was not a donative transfer. NLDC was obligated under the lease to maintain the property at all times during the term of the lease in as good a condition as when received, subject only to ordinary wear and tear and government

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[3] Section 2667(f) states in relevant part: "(1) Notwithstanding subsection (a)(3), pending the final disposition of real property and personal property located at a military installation to be closed or realigned under a base closure law, the Secretary of the military department concerned may lease the property to any individual or entity under this subsection if the Secretary determines that such a lease would facilitate State or local economic adjustment efforts."

[4] The government's reply brief cites a government manual defining a lease in furtherance of conveyance as a contract entered into after the Secretary has issued "a final disposal decision for the Property" (gov't reply br. at 3). The Secretary's final disposal decision (a unilateral decision by one party) was neither a conveyance nor a contract for conveyance of the property. Nor has the government shown that pursuant to this final disposal decision the conveyance could not take place unless preceded by the lease.

approved work. Given that the government retained the right to terminate the lease in the event of a national emergency, NLDC's maintenance obligation was a tangible benefit to the government and not a sham consideration.[5] *See* SOF ¶¶ 5, 6.

The government's final argument on subject matter jurisdiction is that the Board cannot grant the money damages that NLDC seeks because the remedies specified in the lease for undisclosed hazardous materials do not include that relief (gov't mot. at 10). We find this argument indistinguishable from the government's arguments on its second ground for dismissal. We consider that ground below.

There is no genuine issue on the facts material to our subject matter jurisdiction, and for the reasons stated above, the appeal is within that jurisdiction. *See Ortiz Enterprises, Inc.*, ASBCA No. 51409, 01-1 BCA ¶ 31,155 at 153,894.

B. Failure to State a Claim Upon Which Relief Can Be Granted

For its second ground, the government initially argued that NLDC's claim failed to "make a prima facie case under CERCLA" (gov't mot. at 14). NLDC countered that its claim "rests not on the Government's liability under CERCLA but on the Government's liability under the environmental indemnification provisions at paragraph 13.1.1 of the Lease" (app. reply br. at 11). NLDC is correct. The claim submitted to the contracting officer was for reimbursement "[p]ursuant to Section 330 of the Fiscal Year 1993 Defense Authorization Act, as amended . . . ." *See* SOF ¶ 12. Paragraph 13.1.1 incorporates the statutory section 330 indemnification provision into the lease. The government in its reply brief has addressed its motion in part to the paragraph 13.1.1 claim (app. reply br. at 6-10). We decide the motion on that basis.

[5] None of the cases cited by the government in support of its "donative transfer" argument involved a lease of property for consideration by the government as lessor. In *G.E. Boggs & Associates, Inc. v. Roskens*, 969 F.2d 1023 (Fed. Cir. 1992) and *DRC, Inc.*, ASBCA No. 54206, 04-2 BCA ¶ 32652 the contracts at issue had been "adopted" by or "assigned" to the government solely for the purpose of settling terminations. *Kurtis R. Mayer*, HUD BCA No. 83-823-C20, 84-2 BCA ¶ 17,494 involved a contract for government rental assistance payments to a landlord in exchange for the landlord renting to low income tenants. In *West Chester Savings Bank*, AGBCA No. 83-278, 84-1 BCA ¶ 17,077, the contract subrogated government loans to bank loans to facilitate bank loans to a farmer. In *Pasteur v. United States*, 814 F.2d 624, 627 (Fed. Cir. 1987), the pleaded contracts were agreements on the handling of virus samples provided free of charge in the context of a collaborative research effort.

For indemnification under paragraph 13.1.1, three conditions must be met. First, the indemnification claim must be for costs "arising out of any claim for personal injury or property damage (including death, illness, loss or damage to property or economic loss)." Second, the claim for personal injury or property damage must result from or be predicated upon the release or threatened release of a hazardous substance from or on the leased premises. Third, the release or threatened release must be "as a result of Department of Defense activities on the Leased Premises." *See* SOF ¶ 8.

The government's motion to dismiss for failure to state a claim may be granted only if, on the allegations in the complaint, NLDC can prove no set of facts entitling it to indemnification under paragraph 13.1.1 of the lease. *See Gould, Inc. v. United States*, 67 F.3d 925, 929 (Fed. Cir. 1995). With respect to the first condition for indemnification, the term "property damage" is parenthetically defined in paragraph 13.1.1 as including "economic loss." The term "economic loss" is defined in tort law as including among other things "costs of repair and replacement" of the defective product or defective property. *See Trans States Airlines v. Pratt & Whitney Canada*, 130 F.3d 290, 291 (7th Cir. 1997); *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 829 n.11 (8th Cir. 1983).[6] Property damage in paragraph 13.1.1 is further defined in paragraph 13.1.4(c) of the lease as including costs incurred "similar" to response costs arising under CERCLA or costs to enjoin or abate the presence of contamination under RCRA. *See* SOF ¶ 8. Considering both the parenthetical and paragraph 13.1.4(c) definitions, we cannot conclude that under no set of facts could NLDC's contract cost overrun claims be property damage claims indemnifiable under paragraph 13.1.1.

With respect to the second and third conditions for indemnification, we note the exception for "excavation of soil" and "demolition of structures" in paragraph 13.1.4(e) from the exclusion of indemnitee activity in the definition of "Department of Defense activities" in paragraph 13.1.4(b). *See* SOF ¶ 8. Considering that exception, we cannot conclude that under no set of facts could the allegations in the complaint meet the second and third conditions for indemnification, namely that the claimed property damage result from a release or threatened release of hazardous substance as a result of Department of Defense activities on the leased premises. *See* SOF ¶ 9. The government's argument that NLDC is responsible under paragraph 13.5 of the lease for the clean-up work at issue is without merit for purposes of its motion. Paragraph 13.5 expressly states that it is subject to paragraph 13.1. *See* SOF 13 n.2.

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[6] While economic loss without a claim of personal injury or damage to other property is generally not compensable in tort, it is compensable in contract. *See America Online, Inc. v. St. Paul Mercury Insurance Co.*, 207 F. Supp. 2d 459, 470-71 (E. D. Va. 2002) *aff'd*, 347 F.3d 89 (4th Cir 2003). The inclusion of "economic loss" in the paragraph 13.1.1. parenthetical definition of property damage indicates an intention that indemnification would not be limited to tort liability claims.

The motion to dismiss is denied.

Dated: 5 July 2005

MONROE E. FREEMAN, JR.
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 No. 54535, Appeal of New London Development Corporation, rendered in conformance with the Board's Charter.

Dated:

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