ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Alameda Reuse and Redevelopment	)	
Authority	)	ASBCA No. 54684
	)	
Under Contract No. N62474-97-RP-00P68	)	

APPEARANCE FOR THE APPELLANT: Carol A. Korade, Esq.
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OPINION BY ADMINISTRATIVE JUDGE THOMAS
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Alameda Reuse and Redevelopment Authority (ARRA or the Authority), lessee of surplus parcels at Naval Air Station, Alameda (NAS Alameda), appeals a final decision asserting a government claim for $987,242 for payments allegedly due for common services under the Lease. The government moves for summary judgment as to entitlement, stating that it is undisputed that ARRA has not made all of the payments required by the Lease. Appellant opposes the motion upon the ground that the government breached the contract by failing to provide the common services, relieving it of the obligation to make any further payments. Appellant cross-moves for summary judgment upon the grounds of accord and satisfaction and *laches*. We deny the motions.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. On 24 March 1997, ARRA and the Navy entered into Large Parcel Lease N62474-97-RP-00P68 (the Lease) leasing surplus parcels at NAS Alameda. Article 3 of the Lease required ARRA to pay 2.4 cents per month per square foot of building space and .027 cents per month per square foot of land area for "the cost of common services." These payments are sometimes referred to by the parties as "CAM" charges or fees.

Common services included services such as fire protection, police services and general perimeter security, and maintenance and repair of roads. (R4, tab 1 at 1-3)

2. Lease Article 24, Disputes stated that the Lease was subject to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, and that "[e]xcept as provided in the Act, all disputes arising under or relating to this lease shall be resolved under this clause." It defined "Claim," in pertinent part, as "a written demand or written assertion by the Lessee or the Government seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of lease terms, or other relief arising under or relating to this lease." It included the following provision:

> 24.9 The Lessee shall proceed diligently with the performance of the lease, pending final resolution of any request for relief, claim, appeal, or action arising under the lease, and comply with any decision of the CO EFA WEST [the Commanding Officer, Engineering Field Activity West, Naval Facilities Engineering Command].

(R4, tab 1 at 20, 22)

3. In April 1997, the City of Alameda and the Navy acting through Naval Facilities Engineering Command (NAVFAC) entered into a Base Caretaker Cooperative Agreement (Cooperative Agreement). This agreement was the vehicle for the Navy to perform its common services responsibilities under the Lease. (R4, tab 6; app. resp., ex. 1, ¶ 3)

4. According to the declaration of Ms. Dina Tasini, a former employee of the City of Alameda responsible for day to day management of the Cooperative Agreement, "the Navy never adequately funded the Cooperative Agreement with the City in order to ensure that the Common Services were provided" as required by the Lease, the City and ARRA bore "a significant additional cost to cover the Navy's shortfall in funding of Common Services," and Mr. Dave Ryan, the Navy Base Conversion Manager, led her to believe that to the extent the Navy decided to reduce the common services during the term of the Lease, it would reduce the CAM fees charged under the Lease (app. resp., ex. 1, ¶ 5). The government accepts *arguendo* for purposes of the motions that Mr. Ryan, who was not a contracting officer, "'agreed in principle' that Respondent would decrease charges specified in the Lease for common services to reflect Respondent's actual costs incurred" (gov't resp. at 9-10, 10 n.5).

5. On 1 November 1999, Mr. William R. Carsillo, the Navy's Real Estate Contracting Officer, sent ARRA a schedule showing CAM charges due through 30 September 1999. The cover letter indicated that prior payments had totaled

$416,546.79 and that the total amount currently due was $629,960.19. Mr. Carsillo requested that ARRA pay the amount due. (Gov't reply, ex. 9)

6. According to Mr. Carsillo's declaration, ARRA did not formally respond to the letter and made no further payments "in spite of follow up telephone and face-to-face inquiries . . . to ARRA representatives" (gov't reply, ex. 14, ¶ 14).

7. On 6 June 2000, ARRA and the Navy entered into a Memorandum of Agreement (MOA) for conveyance of portions of NAS Alameda to ARRA and Lease in Furtherance of Conveyance (LIFOC). The MOA terminated the lease, referred to as the "Master Lease," as follows:

> **ARTICLE 20. Master Lease Termination and Residual Obligations.**
>
> (a) It is acknowledged that the Authority currently leases the Property from the Government under [the Master Lease]. Simultaneous with the execution of this Agreement, (i) the Authority's leasehold interest in the Property shall extinguish in accordance with the terms of said Master Lease, and all obligations and responsibilities of the parties to the Master Lease shall cease and (ii) the parties agree to execute a Lease in Furtherance of Conveyance for the Property ("LIFOC"). Attached as Exhibit "J" is the form of LIFOC for the Property to be leased by the Government to the Authority.
>
> (b) The Authority agrees to indemnify and hold harmless the Government, its employees and agents for activities conducted by the Authority, its tenants, agents, employees or contractors under the Master Lease or any rights-of-entry's [sic] authorized and granted pursuant to this Agreement or any other pre-existing lease between the Authority and any third party or any rights-of entry authorized by the Government prior to this Agreement. The Authority assumes no liability for damages for personal injury, illness, disability, death or property damage arising from (i) any actions or activities prior to the time the Authority took possession of the Property under the Master Lease, or any other pre-existing lease or right of way between the Authority and the Government, (ii) any exposure or failure to comply with any legal requirements applicable to lead based paint or asbestos on any portion of the Property

> arising prior to the Government's conveyance of such portion of the Property to the Authority pursuant to this Agreement, or (iii) any lead based paint, asbestos or asbestos containing materials that were located on the Property at any time prior to the date of the Government's transfer of the applicable portion of the Property but are no longer located thereon at the time of such transfer, or (iv) any disposal, prior to the Government's transfer of the applicable portion of the Property, of any lead based paint, asbestos or asbestos containing materials. Nothing contained herein shall affect any liability of the Authority for claims arising under the Master Lease or any sublease of any portion of the Property by the Authority prior to Closing.

(R4, tab 3 at 12)

8. On 20 March 2001, NAVFAC demanded payment of alleged arrears on payments for common services under the Lease. ARRA responded *inter alia* that MOA Article 20(a) satisfied and extinguished ARRA's obligation to make CAM payments. ARRA and NAVFAC continued to correspond in this vein over the next several years. (R4, tab 2, ARRA letter dated 19 April 2001, and *passim*)

9. On 21 April 2004, the contracting officer issued a final decision determining that ARRA's continuing failure to pay for common services was a breach of its obligations under the Lease and that ARRA owed the Navy $987,242. According to the final decision, the total due under the Lease was $1,403,788 and ARRA had only paid $416,546. (R4, tab 8) ARRA timely appealed from this decision and the appeal was docketed as ASBCA No. 54684.

10. With particular reference to MOA Article 20 (SOF ¶ 7), Mr. Carsillo, who negotiated and executed the MOA on behalf of the Navy, states in his declaration that "there was absolutely no discussion in negotiating the [MOA] on the subject of waiving the ARRA's obligation for payment of past due CAM charges" and "no one, to my knowledge, considered that any language in the [MOA] would release—or could even be argued to release—the Navy's right to payment of the full amount for the CAM services specified in the [Lease] and its Addendums" (gov't reply, ex. 14, ¶ 13).

11. In response, appellant has submitted the declaration of Ms. Nanette Banks, an employee of the City of Alameda and ARRA, who participated in negotiations with the Navy, stating that it was her:

> understanding and I believe the understanding of ARRA that the outstanding CAM Fees would be extinguished, as promised by the Navy in prior years, through the language of Article 20(a)ii [sic]: "the Authority's leasehold interest in the Property shall extinguish in accordance with the terms of the said Master Lease, and all obligations and responsibilities of the parties to the Master Lease shall cease." To my knowledge, the Navy never mentioned that ARRA would receive a bill for CAM Fees following the execution of the [MOA].

(App. resp., ex. 2, ¶ 8)

DECISION

Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Where there are cross-motions, the Board "must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987).

I. The Government's Motion for Summary Judgment

The government states that it is undisputed that ARRA has not made all of the payments for common services and the only issue before the Board is whether ARRA can prove some defense. According to the government, ARRA has asserted two defenses to its claim, neither of which is meritorious. The first is that "the Navy allegedly did not meet certain of its obligations to ARRA under the Lease." The second is that the MOA extinguished the Navy's right to payment under the Lease. The government states that it is not addressing for purposes of the motion whether the Navy actually provided the level of common services required under the Lease, although it contends it did. (Gov't mot., memo. at 2, 7 n.6)

The government characterizes the first defense as the "retaliation argument": "ARRA presents a retaliation argument, asserting that if the Navy allegedly disregards a lease obligation, then this allows ARRA the right to disregard any of its obligations." The government states that the "retaliation argument" fails because ARRA's only remedy was to submit a claim under the Disputes clause, while paying the Navy the full amount due for common services under the Lease. "ARRA has not done this, and its failure to assert its rights in accordance with the plain requirements of the Lease cannot now accord ARRA an *ex post facto* remedy that is prohibited under the Lease." (Gov't mot., memo. at 7-9)

In opposition, appellant argues that "[i]mplicit in Appellant's obligation to pay the cost of common services was Respondent's obligation to perform, or cause to be performed, such services. . . . Appellant is not obligated to pay for something it did not receive." It elaborates that where there has been a material government breach, the contractor has a right of legal avoidance. "One can hardly imagine a more material breach than the Government failing to perform the Common Services for which it claims payment." (App. cross-mot. and opp'n, memo. at 2; app. resp. at 8)

In reply, the government says:

> [T]he Lease plainly, on its face, specified a fixed per square footage basis for calculating the amount Appellant owed to the Respondent regardless as to the extent of common services performed or not performed by Respondent. . . . Since the Lease did not link the amount that Appellant was required to pay for common services to any level of performance by Respondent, Respondent did not breach the Lease.

(Gov't resp. at 4-5)

The Disputes clause provides: "The Lessee shall proceed diligently with the performance of the lease, pending final resolution of any request for relief, claim, appeal, or action arising under the lease, and comply with any decision of the CO EFA WEST" (SOF ¶ 2). The clause means that when ARRA submits a claim arising under the Lease, it shall continue to perform pending resolution of the claim and comply with any decision of the contracting officer on that claim. Here, the Navy, not ARRA, has asserted a claim, and appellant is alleging various defenses at the Board, including that the Navy breached the Lease by not providing the required level of common services. The government seems to think that appellant must have submitted a separate claim of its own to make those arguments. Appellant is entitled, however, to assert its defenses in connection with its appeal of the contracting officer's decision. *Alliant Techsystems, Inc.*, ASBCA Nos. 48200, 48201, 96-2 BCA ¶ 28,482.

Moreover, the Disputes clause obligation on ARRA to proceed and comply with the contracting officer's decision pending resolution of the dispute applies only to claims "arising under the lease." The government's claim for ARRA's failure to pay the CAM fees is a claim for breach damages. It is not a claim under a specific remedy granting provision of the Lease. Therefore, it is not a claim "arising under the lease," *see Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1341 (Fed. Cir. 2000), and the Disputes clause proceed and comply obligation is not applicable.

It is clear that there are genuine issues of material fact as to whether the Navy breached the Lease relieving appellant of its obligation to make further payments. *See Malone v. United States*, 849 F.2d 1441, 1446, *clarified*, 857 F.2d 787 (Fed. Cir. 1988). Accordingly, the government motion for summary judgment with respect to the "retaliation argument" is denied.

We address the second defense, as listed by the government, under the next heading.

II. Appellant's Motion for Summary Judgment Upon the Ground of Accord and Satisfaction

Appellant moves for summary judgment upon the ground that the MOA and LIFOC constituted an accord and satisfaction of the Navy's claim for common services payments under the Lease. The government also moves for summary judgment as to this defense (*supra*).

The parties agree that the critical language to be construed is that in MOA Article 20. Article 20(a) provides that "[s]imultaneous with the execution of this Agreement, (i) the Authority's leasehold interest in the Property shall extinguish in accordance with the terms of said Master Lease, and all obligations and responsibilities of the parties to the Master Lease shall cease. . . ." Article 20(b) provides "[n]othing contained herein shall affect any liability of the Authority for claims arising under the Master Lease or any sublease of any portion of the Property by the Authority prior to Closing" (SOF ¶ 7).

Appellant states:

> Accord and satisfaction may occur by the substitution of a new agreement constituting the accord and satisfaction, which extinguishes the claim, or by an executory accord, which discharges the claim only if the agreement is later performed. [Citation omitted] In this case the execution of the MOA and the LIFOC substituted the Lease and constituted the accord and satisfaction.
>
> Article 20(a) of the MOA makes clear that upon execution of the MOA, simultaneous with the execution of the LIFOC, "all obligations and responsibilities" of Appellant to the Lease cease. . . . Specifically, the phrase "all obligations and responsibilities of the parties to the Master Lease shall cease" can only be read to include a release of

> Appellant's alleged obligation to pay for past common services.

(App. cross-mot. and opp'n, memo. at 7-8) The government's interpretation of Article 20(a) is that "ARRA's obligation to pay for past common services is not extinguished, and it is only its obligation to pay for additional common services that ceases" (gov't mot., memo. at 9).

With respect to Article 20(b), appellant argues that the government must have submitted any claim prior to execution of the MOA and the LIFOC (app. cross-mot. and opp'n, memo. at 9). The government, on the other hand, equates "arising under" with accrual, and argues its claim need only have accrued prior to execution of the MOA and the LIFOC. It asserts that the language in Article 20(b) "trumps any extinguishment argument relating to the Government's claim." (Gov't mot., memo. at 10-11).

We conclude that neither party has established that it is entitled to summary judgment with respect to this defense. We take the two parts of Article 20 up in reverse order, because, if the government's interpretation of Article 20(b) is correct, there is no need to address Article 20(a). We are not persuaded on this record, however, that either party's interpretation of Article 20(b) is correct. The language "[n]othing contained herein shall affect any liability of the Authority for claims arising under the Master Lease or any sublease of any portion of the Property by the Authority prior to Closing" appears at the end of a lengthy paragraph primarily concerned with tort liability to third persons. In our view, the word "herein" refers to that lengthy paragraph, not to Article 20(a). The language at the end of Article 20(b) does not trump the language in Article 20(a). For it to do so, it would need to be placed in Article 20(a) or in a separate paragraph applicable to both Article 20(a) and (b).

That brings us to Article 20(a). We conclude that neither party has established that its interpretation is correct for purposes of summary judgment. As appellant points out, the word "all" is inclusive. The purpose of the word "all" "is to underscore that intended breadth is not to be narrowed. 'All' means the whole of that which it defines—not less than the entirety." *National Steel and Shipbuilding Co. v. United States*, 419 F.2d 863, 875 (Ct. Cl. 1969). Here, "all obligations and responsibilities" may include all existing obligations such as the obligation to pay the government for common services pursuant to the Lease up through the effective date of the MOA. On the other hand, as the government suggests, the reference to "shall cease" as opposed to "shall extinguish" may indicate that existing obligations continue but no additional obligations are to be incurred. To the extent that it may be proper to look at parol evidence to interpret the agreement, the parties' declarations conflict (SOF ¶¶ 10, 11). Accordingly, neither party is entitled to summary judgment on this issue.

III. Appellant's Motion for Summary Judgment Upon the Ground of Laches

Appellant also moves for summary judgment upon the ground that the government's claim is barred by the doctrine of *laches*. Appellant contends that the Navy "did not submit its demand for payment of common services or convert its demand into an appealable decision prior to the parties terminating the Lease and executing the MOA and LIFOC . . . ." It continues that "[a]ppellant has been prejudiced by Respondent's delay because Appellant lost the opportunity to consider Respondent's claim during the negotiations on the termination of the Lease and execution of the MOA and LIFOC" (app. cross-mot. and opp'n, memo. at 12-13).

Laches is generally defined as "neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party and operates as an equitable bar." *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1028-29 (Fed. Cir. 1992) (*en banc*). At a minimum, there are disputed issues of material fact with respect to this issue. Mr. Carsillo's declaration indicates, for example, that he had requested payment of the charges due through 30 September 1999 prior to execution of the MOA on 6 June 2000 and that there had been follow up telephone and face-to-face inquiries to ARRA (SOF ¶¶ 5-7). Appellant's motion for summary judgment on the ground of *laches* is denied.

CONCLUSION

The motions for summary judgment are denied.

Dated: 8 November 2006

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
Of Contract Appeals

(Signatures continued)

I concur

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

I concur

MONROE E. FREEMAN
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 No. 54684, Appeal of Alameda Reuse and Redevelopment Authority, rendered in conformance with the Board's Charter.

Dated:

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