



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION FOR SUMMARY RELIEF DENIED: March 25, 2008

CBCA 789

CHANHASSEN VENTURE, LTD.,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Respondent.

Stephen A. Melcher of Fabyanske, Westra, Hart & Thomson, P.A., Minneapolis, MN, counsel for Appellant.

Lynn W. Flanagan, Contract Law Division, Office of General Counsel, Department of Commerce, Washington, DC, counsel for Respondent.

Before Board Judges **FENNESSY**, **POLLACK**, and **SOMERS**.

**POLLACK**, Board Judge.

This matter is before the Board on Respondent's Motion for Summary Relief filed by the Department of Commerce (Government or respondent) asking that the Board rule that Chanhassen Venture, Ltd. (appellant, Chanhassen, or lessor) is responsible under an office lease agreement for remedying flooding and water leakage problems in the leased premises. The leased premises house offices of the National Weather Service. The appeal is from a final decision of the Contracting Officer (CO) asserting that appellant is obligated to make certain repairs and that if not done, such repairs will be secured by the Government and charged back to appellant.

Initially this appeal was filed and docketed under the Board's standard procedures. Early in the proceedings, the parties discussed the possibility of using alternative dispute resolution procedures, but were unable to agree on a framework. Appellant requested that the appeal be handled under the Board's small claims procedure. Rule 52 (48 CFR 6101.52 (2007)). The Board initially granted that request on January 11, 2008, therefore making the matter subject to a single judge decision. However, questions arose as to the costs of the potential and already completed repairs and whether the dollar value of those claims might exceed the statutory thresholds for election of the small claims procedure. More specifically, the Government has asserted that it cannot place a specific dollar value on the result of a Board decision. Therefore, it has asked that the matter be returned to the standard procedure on the docket. Given that the question of dollars remains open, the Board has returned the matter to the standard procedure.

### Background

Respondent and Chanhassen (as successor to Bloomington Venture I) entered into a lease dated February 23, 1994. The lease called for appellant to construct a building and then lease it back to respondent. The parties agree that the lease provided certain criteria as to construction elements; however, the parties disagree over which party is responsible for various aspects of the design and particularly those involved with the seepage and wet conditions in issue. In essence, appellant argues that it had to conform to certain specified design elements, specifically those dealing with polyvinyl chloride (PVC) conduit for wiring, and that those design elements, separately and in conjunction with actions of respondent (in pulling conduit wire), resulted in the water conditions at issue. Respondent argues that appellant and not the Government was responsible for the final design and denies that any of its actions in setting or pulling wire contributed to or caused the problems. The parties appear to agree that the PVC conduit is the source of the leak.

The record before the Board appears to show that the building was generally constructed in accord with specification requirements prescribed by the Government, including the use of PVC conduit. Respondent took occupancy at some time in 1995 and has continued to occupy the leased space. The lease term expires on January 31, 2014.

The parties agree that at various times during the lease, respondent has had to deal with water seepage and wet conditions and that appellant at various times has taken steps to control and repair the water problem. Some of the steps taken by appellant have been of a temporary nature and others have been more permanent. The parties disagree as to the extent and frequency of the water issues, their overall severity, and who is responsible for them.

After a number of years of dealing with the presence of water, respondent apparently concluded that it needed to take steps beyond those that had been taken by appellant to deal with the water. Respondent sought a more permanent solution. Consequently, on March 12, 2007, the contracting officer (CO) issued a final decision. In that decision, the CO stated that the water problem continued, the owners would be given a chance to correct the problem, and if the problem was not corrected, the Government would hire a contractor to inspect and to make the necessary repairs or changes to bring the building into compliance with the lease. The CO stated that she would exercise the Government's right to correct the problem and deduct the cost from a future rent payment. She then stated, "Based on my decision, the owners will have the right to appeal that decision to the Board." On June 13, 2007, appellant filed a notice of appeal.

On December 20, 2007, respondent filed a motion for summary relief asking the Board to rule that appellant is responsible under the lease for the repairs needed to resolve the water problem and, if appellant fails to make such repairs or remedy the problem, the Government could undertake the necessary repairs and charge the costs back to appellant. In its motion, respondent refers the Board to paragraph 16 of the general clauses of the lease, GSAR 16.552.27-12- Maintenance of Premises (JUN 1985), which provides:

The Lessor shall maintain the demised premises, including the building and all equipment, fixtures and appurtenances furnished by the Lessor under this lease in good repair and tenantable condition except in case of damage arising from the act or the negligence of the Government's agents or employees. For the purpose of so maintaining said premises and property, the Lessor may at reasonable times, and with the approval of the authorized Government representative in charge, enter and inspect the same and make any necessary repairs thereto.

Appeal File, Exhibit 1 at 2. Respondent asserts that under paragraph 16, appellant is responsible as a matter of law for correcting the water problem.

Respondent points out that it is evident from the clause that the language of the lease requires the lessor to maintain the premises in "good repair and tenantable condition." Respondent asserts that the continuing or frequent presence of water is a per se violation of the clause. If the operative facts stopped there, then respondent would likely be correct; however, the facts make resolution much less clear.

As noted above, appellant argues that while water is present from time to time, the impact and degree of the water problem is overstated by respondent. Appellant argues that respondent cannot meet the legal test for the property being in an untenable condition and

points out that throughout the “problem,” respondent has continued to use the premises. If we accept appellant’s contentions as true, and the evidence before us at this point allows for that conclusion, respondent has not established that the property is untenable. As to the second proviso of the clause, “in good repair,” the Board recognizes that “good repair” sets out a broader standard than untenable. A property does not have to be untenable to qualify as not being in “good repair.” However, while wet conditions certainly suggest an absence of “good repair,” the record in this case contains genuine issues of material fact to the extent of the water and its frequency and does not allow resolution of that matter on a motion for summary relief.

Moreover, even if the Board finds that conditions are not “in good repair” and thus not in accord with paragraph 16, the appeal still cannot be resolved. That is because appellant contends that the water problem was caused by the Government, asserting that the presence of water is due to a defective design and further compounded by the methods the Government used in pulling wires through the specified PVC conduit.

Appellant also points out that paragraph 16 places responsibility for good repair and tenantability on the lessor, “except in case of damages arising from the act or the negligence of the Government’s agents or employees.” Appellant asserts that the damages here arise from the Government requirement that it use PVC conduit in an application where such conduit proved to be inappropriate. Appellant refers the Board to the *Spearin* doctrine (*United States v. Spearin*, 248 U.S. 132 (1918)), a well established legal principle which applies not only to buildings constructed by a contractor for ownership by the Government, but also to buildings which are built for the Government and then leased to the Government. *Spearin* essentially holds that when government plans or specifications specify in design detail the precise manner or method of performance, the Government implicitly warrants a satisfactory performance result if those plans or specifications are followed.

Appellant charges that the water problems in issue in this case are due to respondent’s actions in requiring appellant to use PVC conduit and in choosing a particular method of pulling and placing wires in the conduit. Appellant refers the Board to *Poorvu v. United States*, which provides:

These cases [*Spearin* and others], therefore, clearly stand for the proposition that when a contractor agrees to construct a facility, for the government as owner, and is required to follow plans and specifications supplied by the government, and those plans are faulty (thereby requiring the contractor to incur additional costs) the government must reimburse the contractor for damage incurred because of the breach of the implied warranty that the plans will be sufficient. The case now before the court is noticeably

different in two major aspects: (1) The government did not contract to have the facility built for it as the owner, but as the tenant of the builder-lessor, (2) The damage was not incurred during the construction, but a number of years after the completion of the building. These differences, however, rather than removing the case from the ambit of the *Spearin* rule, if anything, make an even stronger case for the application of the underlying principle and reasoning of *Spearin*.

The reasoning of *Spearin* is both simple and straight-forward. If the government chooses to have a building built, it may do so in at least two ways: (1) To explain to potential builders what type of facility it wants and allow the low bidder to design, construct and warrant that the building is fit for its intended purpose, or (2) choose to design the building itself and require the low bidder to construct it in accordance with the plans, and warrant that it will have been constructed in a workmanlike manner. If the plans prove insufficient, it is the government, as the owner, upon whom the defects will take their toll.

420 F.2d 993, 999 (Ct. Cl. 1970).

Respondent answers appellant's charges as to the design by asserting that the lease only required appellant to construct and design the premises in accordance with the Solicitation for Offers, the Special Requirements, and drawings provided by the Government. Respondent asserts that the drawings set out the basic requirements for the facility, were not to serve as construction drawings, and simply provided the size, quantity, orientation, and general location of the PVC conduits. Respondent says the drawings provided to appellant were preliminary, not final, and were to be site adapted. Finally, respondent points out that since appellant's architect engineer (A/E), not the Government, prepared the final drawings, any defect is appellant's and not respondent's responsibility.

### Discussion

It is evident to the Board that there are significant disagreements over who was responsible for various aspects of the design, as well as disagreements as to whether or how the claimed design issues contributed to the presence of wet conditions. Further, there are multiple issues as to whether the pulling of wire caused damage to the PVC conduit and whether the Government and not appellant had the responsibility to seal joints. The fact is that the parties provide different fact patterns for why the conduit performed as it did. Those fact patterns cannot be sorted out on summary relief. It is also of note that appellant has presented through affidavit various statements which, if found true, could establish that the

presence of the water was the result of poor design or, alternatively, poor design aggravated by pulling of cable and other actions taken by the Government. Given that, there is no basis for summary relief at this time.

In addition, there are disagreements as to the extent and frequency of water seepage and whether the presence of water made the building untenable and/or not in good repair. Neither party has provided a standard against which the assertions as to these matters might be measured.

The purpose of summary relief is to resolve a matter on the law where there are no specific factual issues which could vary the result. The Board does not weigh evidence when considering whether to grant summary relief. Once the non-moving party offers enough evidence to establish that its position could prevail, then summary relief must to be denied. That is the case here.

#### Decision

Based on the reasons set out above, respondent's motion for summary relief is **DENIED**.

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HOWARD A. POLLACK  
Board Judge

We Concur:

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EILEEN P. FENNESSY  
Board Judge

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JERI K. SOMERS  
Board Judge