UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS OR IN THE ALTERNATIVE
FOR SUMMARY AFFIRMANCE DENIED: July 22, 2008

CBCA 1056

SECOND STREET HOLDINGS LLC,

Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Jerry L. Shulman, Gregory B. Craig, Ari S. Zymelman, and Thomas A. Craig of Williams & Connolly LLP, Washington, DC, counsel for Appellant.

George C. Brown, John P. Sholar, and Paul Brockmeyer, Office of the General Counsel, Securities and Exchange Commission, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **GOODMAN**, and **STEEL**.

GOODMAN, Board Judge.

On January 24, 2008, appellant, Second Street Holdings, LLC, filed an appeal from a final decision, dated October 26, 2007, of a contracting officer for respondent, the Securities and Exchange Commission (SEC). Respondent has filed a motion to dismiss or, in the alternative, for summary affirmance. Various responses and replies to these motions have been filed by the parties. We deny respondent's motion.

Background

The Lease, the Dispute, and the Contracting Officer's Final Decision

Appellant is a solely-owned subsidiary of Louis Dreyfus Property Group (LDPG) and the sole owner and lessor of the building known as Station Place Building One (the building), located at 100 F St., N.E., Washington, D.C. Appellant is the successor to LDPG's interest in the building and lease number SEC 003-DC (the lease), awarded to LDPG on May 29, 2001. Complaint ¶ 3. At the time of lease award, the building had not been constructed. *Id*. ¶ 9.

The lease stated that the building and the leased space were to be constructed to be accessible to the handicapped in accordance with the Americans with Disabilities Act Accessibility Guidelines and the Uniform Federal Accessibility Standards and where these standards conflict, the more stringent shall apply. The lease contained various provisions detailing these requirements. Appeal File, Exhibit 1 at 26. We refer in this decision to these provisions of the lease as the "accessibility requirements."

LDPG constructed the building to lease it to the SEC as its new headquarters. The building was constructed so that those entering the main atrium lobby must use stairs or a platform (wheelchair) lift in order to access the primary elevator bank. There is no elevator or ramp serving the primary elevator bank from the atrium lobby. Complaint ¶¶ 13-17.

With regard to the preparation, finalization, and approval of the design of the main atrium lobby, appellant and respondent submit detailed conflicting explanations as to the individuals involved, the chronology of events that occurred, and the contractual responsibilities that governed. Respondent's Statement of Uncontested Facts at 2-4; Appellant's Statement of Genuine Issues at 2-4.

The SEC accepted the building and the lease term commenced on April 25, 2005. Complaint ¶ 17. The SEC asserts that after the lease term commenced, employees and members of the public complained that handicapped individuals and others who are not able to use the stairs must then use the platform lift after entering the atrium lobby to access the main elevator bank. Appeal File, Exhibit 22. When the SEC informed LDPG as to these complaints, LDPG responded, asserting that the building complied with the accessibility requirements of the lease. Appeal File, Exhibit 23.

The SEC states that during summer 2006, the Department of Justice's (DOJ) Disability Rights Section was consulted as to whether the atrium lobby and main elevator bank complied with the accessibility requirements of the lease. The DOJ performed an

on-site examination of the platform lift and atrium lobby and then provided a letter dated September 12, 2006 (Appeal File, Exhibit 24), which the SEC shared with appellant (Appeal File, Exhibit 25), containing its opinion[1] that use of a platform lift instead of an elevator or ramp to provide disability access between the atrium lobby and main elevator bank did not comply with accessibility requirements.

The SEC obtained an additional assessment from Bill Hecker, AIA, an outside expert. Mr. Hecker also performed an on-site examination of the atrium lobby and provided an opinion dated November 22, 2006, which the SEC shared with appellant, that concluded that the platform lift was noncompliant with the accessibility requirements of the lease. Appeal File, Exhibit 33; Complaint ¶ 21. Mr. Hecker provided a supplemental report dated May 25, 2007, analyzing potential cures for the alleged noncompliance. This report, which the SEC shared with appellant, concluded that only an elevator or ramp between the atrium lobby and main elevator bank would provide compliant access between the two levels. Appeal File, Exhibits 32, 33; Complaint ¶ 21.

The SEC contracting officer issued a letter entitled "Final Decision and Notice to Cure" dated October 27, 2007, in which she stated:

> The SEC began discussion with [LDPG] about potential steps to correct the situation; however when the SEC raised the issue of [LDPG's] financial responsibility for any cure, [LDPG] stated that it was stopping work on corrective steps until the issue was resolved.
>
> Although [LDPG] has maintained that the platform lift is permitted under accessibility guidelines, it has never provided any authoritative support for this position. As a result, the SEC undertook a study to determine whether the use of a platform lift in this location was acceptable under the accessibility requirements that apply to Building One under the Lease and applicable law.

Appeal File, Exhibit 35.

The contracting officer's final decision then set forth the SEC's interpretation of the lease's accessibility requirements in conjunction with its study, including consultation with

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[1] The letter characterizes the opinion contained therein as "technical assistance" and stated: "As with all technical assistance, this letter does not bind the Department of Justice in any later legal dispute, investigation, matter, or litigation, including any interpretation of the applicability of statutory provisions." Appeal File, Exhibit 24 at 2.

the DOJ's Disability Rights Section and Mr. Hecker, and concluded that the platform lift did not comply with the accessibility requirements and that LDPG had a continuing obligation to bring the building into compliance. *Id*. Additionally, the contracting officer's decision stated:

> [LDPG's] use of a platform lift between the atrium lobby and the main elevator bank in [the building] is in violation of the Lease and applicable accessibility requirements. [LDPG] is obligated at its sole expense to correct this breach. Accordingly, pursuant to Clause 15[2] of the [lease], [LDPG] is directed to implement the steps indicated below to cure this default within sixty (60) days of the date of this Contracting Officer's Final decision.
>
> Potential cures of the current non-compliance may involve construction of an additional elevator to connect the atrium lobby with the main elevator bank on the ground level, or constructing a new building entrance on the lower level which will connect the Building One main elevator bank to the common connector corridor linking all three Station Place Buildings.

Id.

The contracting officer's decision concluded by stating appeal rights pursuant to the Contract Disputes Act and a direction to comply with the cure notice portions of the decision pursuant to the Disputes clause, clause 36 of the lease.[3] *Id*.

By letter dated November 16, 2007, Robert H. Braunholer, Regional Vice President of LDPG, responded to the contracting officer's final decision, stating in part:

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[2] Clause 15(b) of the lease reads in relevant part: "If, during the Lease term, any physical element or condition either within or affecting tenantability of the Premises deteriorates or fails such that a capital repair or replacement is necessary, and if Lessor fails to repair or replace such element(s) or cure or correct the condition after the Government has provided Lessor with reasonable notice, then such failure shall constitute default under the lease." Appeal File, Exhibit 1 at 85.

[3] Clause 36 reads in relevant part: "The Contractor shall proceed diligently with performance of this Contract, pending final resolution of any request, claim, appeal or action arising under the contract, and comply with any decision of the contracting officer." Appeal File, Exhibit 1 at 98.

> We hereby request that you withdraw for reconsideration the Final Decision you issued on October 26, 2007, regarding the lobby access requirements of Station Place Building One. We are not here arguing the merits of that Final Decision, although we reserve all rights of appeal on the matters dealt with therein. Rather, we request your withdrawal for reconsideration because of a material procedural infirmity.
>
> Your Final Decision is styled as a Notice to Cure under Clause 15 . . . of the Lease. However, Clause 15 simply does not apply to disagreements such as this one, and its misapplication here is both clearly erroneous and materially detrimental to Second Street Holdings LLC (the "Lessor").
>
> Clause 15 of the Lease is titled "Failure in Performance" and is . . . a "repair and deduct" provision which applies only to (a) a failure to provide contracted for services, utilities, or maintenance, and (b) a failure to repair or replace a physical element or condition of the property that has deteriorated or failed. The Clause is thus totally inapposite to the current dispute, which involves neither a failure to provide a service nor an issue of repair or replacement. . . .
>
> If you, as the Contracting Officer, conclude (incorrectly, in our view) that the Lessor has breached an obligation under the Lease because it has failed to comply with some legal standard regarding access, then the only applicable provision of the Lease would be Clause 18 (Compliance with Applicable Law). . . . And, while Clause 15 expressly provides self-help remedies to the Tenant and requires the Lessor to implement steps to cure the perceived default within sixty days, Clause 18 contains none of these remedies. . . .
>
> If, in the alternative, you were to order the Lessor to undertake specific work as a "Change" to the premises under Clause 33 of . . . the Lease, you would then be required to provide materially more detail as to the Change to be effected and would be required to follow the procedures set out in that Clause; the Lessor then could make a demand for payment that could eventually be resolved in the usual manner. . . .

Appeal File, Exhibit 36.

The contracting officer responded by letter dated December 12, 2007, which read in part:

> I disagree with your assertion that Clause 15 does not apply to the current dispute. . . . Under Clause 15(b), when a "physical element or condition either within or affecting the tenantability of the Premises deteriorates or fails such that a capital repair or replacement is necessary" and Dreyfus does not "cure or correct the condition" (after notice from the Government and opportunity for . . . cure) . . . failure becomes a default under the lease.

Appeal File, Exhibit 38.

Appellant's Appeal and Complaint

Appellant filed a notice of appeal with this Board on January 24, 2008, and a complaint on February 28, 2008. In its complaint, appellant asserts that clause 15 of the lease is not the correct contractual clause for the SEC to use if the SEC believes the lobby does not meet the accessibility requirements and must be corrected. Rather, the complaint asserts that clause 33 (Changes) of the lease would be the proper clause, and the contracting officer's final decision was not sufficient direction to proceed pursuant to this clause. Complaint ¶ 26. The complaint also stated:

> On January 18, 2008, while retaining its rights to appeal the Contracting Officer's decision to require a repair under Clause 15, appellant informed the SEC that it had retained an expert in the field and determined that, if a change were to be made in the configuration of the lobby, there were more efficient and cost effective solutions to the perceived . . . access problem then [sic] the lobby elevator proposed by the Contracting Officer. Specifically, appellant determined that simply installing an additional platform lift on the opposite side of the main stairwell would meet the requirements of the applicable regulations as an "equivalent facilitation," as that term is used in paragraph 2.2 of the ADA Standards for Accessible Designs (the "two-lift solution") and, further, that doing so would be much less expensive. . . . Appellant met with the acting Contracting Officer to discuss those plans on January 20, 2008. . . . Appellant requested that the SEC approve implementation of the two-lift solution, and agree that it resolves whatever access problems the SEC

> perceives. Id. At the time of the filing of this complaint, Appellant has not received a response. . . .[4]

Id. ¶¶ 29, 30.

In the complaint's prayer for relief, appellant asks the Board to:

> 1. Declare that Clause 15 [of the lease] is inapplicable to this dispute;
>
> 2. Order that Appellant is not required to respond to the notice of cure or to proceed under that Clause 15, and is entitled to recoup all costs incurred in responding to the Final Decision; and
>
> 3. Declare that if the Contracting Officer proceeds under the appropriate contract term to require Landlord to cure the alleged lack of compliance with the access regulation, that Appellant's obligations are limited to the minimum necessary to address the lack of compliance.

Complaint at 12.

Appellant's Response to the Final Decision and Notice of Cure

After filing this appeal, appellant sent a letter dated March 7, 2008, to the contracting officer which stated in part:

> We continue to believe that your direction to us to install an elevator under Clause 15 is improper, and that it will make the government liable for the costs incurred by Louis Dreyfus in acting at your direction. . . . [E]ven if Clause 15 were applicable, it would require the SEC to install the elevator and then to seek to recover its cost from us, rather than authorizing the SEC to demand that the Landlord do so. Those issues currently are on appeal. In the meantime, we do not believe it is in anyone's interest to have the SEC proceed further under Clause 15, to declare a default, and then to be forced to wait 60 days before it could begin installing an elevator as a form of self-help.

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[4] DOJ responded by letter dated April 24, 2008 stating that "the proposal to add a second lift in lieu of an elevator at the main entrance to the building, which was built after the ADA new standards took effect, would not satisfy those requirements." Appeal File, Exhibit 43.

> Accordingly, at your direction, but without conceding your authority to do so or waiving any of our rights to recover the costs of the elevator, we will follow your direction and install an elevator in the Station Place Lobby in a timely fashion. . . . [B]y complying with this direction Louis Dreyfus is not waiving, and specifically reserves, any and all rights in its appeal currently pending before the Civilian Board of Contract Appeals . . . and any rights to file future claims and/or appeals as they mature with regard to this direction and this undertaking.

Respondent's Motion, Attachment 1.

Thereafter, by letter dated March 14, 2008, to the contracting officer, appellant stated:

> On March 7, 2008, I wrote to inform you that, subject to the reservation of rights set out in my March 7th letter, we were complying with your March 1, 2008 e-mail directing us to install an elevator in the Building 1 lobby. In my letter, I informed you that we would provide a schedule for that work by today. I am now writing to provide that scheduling information insofar as information is currently available. . . . We have conferred with the project architect, . . . as well as our mechanical and structural engineers and our consulting contractor. We estimate that the entire project will take just under a year to complete. The detailed drawings and plans for the project will take about eight weeks to prepare, in large part because the project requires a structural change to the building, and considerable structural and mechanical engineering analysis is required before the plans can be completed. Once the plans are complete, our contractor will be able to obtain final bids on the work and begin fabrication and other preparation for construction. From that point, the project will take approximately nine months to complete, including about six months of on-site demolition and construction. Thus, assuming no unanticipated difficulties, and also that we are able to obtain approval of our plans in a timely fashion, the entire project should take between 11-12 months to complete.

Respondent's Motion, Attachment 2.

Discussion

Respondent's Motion to Dismiss

Respondent bases its motion to dismiss on the assertion that appellant's actions in response to the contracting officer's final decision have rendered moot the specific prayers for relief in appellant's complaint. The motion reads in part:

> Significantly, after filing its Complaint, Appellant advised the Contracting Officer by letter dated March 7, 2008, that Appellant intends to follow the Contracting Officer's Notice to Cure by installing an elevator as directed. . . . And, by letter dated March 14, 2008, Appellant stated that it would proceed to develop plans, put out bids, and construct the required elevator, and that the project would be completed in approximately one year. . . . These developments eliminate any controversy over the three prayers for relief in Appellant's Complaint. . . . Accordingly, since Appellant is proceeding with the specific actions that its Complaint seeks to avoid, these prayers should be dismissed for failure to state a claim in actual controversy. Further, as to the subordinate element of Appellant's second prayer for relief, that it is "entitled to recoup all costs incurred in responding to the Final Decision;" [footnote omitted] that too is appropriate for dismissal, as Appellant does not allege any written SEC amendment to the Lease removing Appellant's obligation to comply with accessibility requirements. Further, should the Board look beyond the failure of the Complaint to set forth matters in actual controversy or legally cognizable, the undisputed facts in the Complaint and Appeal File confirm the correctness of the Final Decision and Notice to Cure.

Respondent's Motion at 2-3.

Respondent's argument that the complaint is rendered moot by appellant's actions in response to the contracting officer's final decision lacks merit. The contracting officer's final decision stated a government claim for breach based upon a determination of noncompliance with the accessibility requirements of the lease, directed the appellant to correct the alleged noncompliance by performing certain work, and stated appeal rights. Appellant has appealed the final decision to this Board. While appellant has indicated that it will perform the work as directed by the contracting officer, appellant emphasizes that it does so as required by the Disputes clause of the contract, which requires that the contractor shall comply with any decision of the contracting officer. Appellant's Opposition to Respondent's Motion at 17-19. By complying with the decision of the contracting officer, the controversy is not rendered moot as respondent alleges, as appellant has specifically

reserved its right to challenge the legal basis and factual basis of the government's claim for breach of the lease as stated in the contracting officer's decision, has requested compensation for performing the work, and has proceeded to do so in this appeal.

The actions taken by appellant in response to the contracting officer's final decision and notice of cure do not eliminate the controversy over the three prayers for relief. The first prayer of the complaint challenges the applicability of clause 15 of the lease to the dispute. The actions of appellant in performing work do not resolve this issue, which itself is raised by the contracting officer's final decision. Appellant continues to contend that this clause is not the correct contractual provision to undertake the work it is performing.

The second prayer of the complaint is that the Board is requested to "[o]rder that Appellant is not required to respond to the notice of cure or to proceed under that Clause 15, and is entitled to recoup all costs incurred in responding to the Final Decision." While appellant is proceeding to perform work in response to the final decision, the question remains as to whether appellant is required to do so at its own cost as alleged by respondent or whether appellant is entitled to be paid its cost for compliance as a change order pursuant to clause 33 of the lease. Accordingly, the second prayer of the complaint is not moot.

The third prayer of the complaint is a request that the Board "[d]eclare that if the Contracting Officer proceeds under the appropriate contract term to require Landlord to cure the alleged lack of compliance with the access regulation, that Appellant's obligations are limited to the minimum necessary to address the lack of compliance." This prayer poses the issue of level of compliance, an issue raised in the contracting officer's final decision and also by appellant's proposed "two lift solution," which was rejected by DOJ as non-compliant. Again, appellant's performance of work does not resolve this issue, and the third prayer of the complaint is not moot.

The motion to dismiss the complaint is denied.

Respondent's Motion for Summary Affirmance

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, summary relief must to be denied. *Chanhassen Venture, Ltd. v. Department of Commerce*, CBCA 789, 08-1 BCA ¶ 33,826. That is the case here.

The initial issue which must be decided in this appeal is whether appellant has complied with the accessibility requirements of the lease. It is evident to the Board that there is a significant disagreement as to whether the lobby of the building as built and accepted by the SEC was compliant with the accessibility requirements and the manner of any corrective action, if any, that must be undertaken. Respondent has posited a letter of technical assistance from DOJ (with disclaimer language indicating that the opinions are not binding in litigation) as a basis of the contracting officer's determination of non-compliance and has directed the contractor to undertake specific corrective action. Appellant has countered with its own allegations of compliance and an expert's allegations as to the level of any corrective action. The determination of the existing lobby's compliance or non-compliance with the accessibility requirements of the lease therefore cannot be resolved on summary relief, as conflicting issues of material fact exist on this issue.

Additionally, the parties submit conflicting facts detailing the events involved in the design of the lobby. These facts purport to place legal responsibilities on the parties with regard to the design's compliance or non-compliance with the accessibility requirements. Because of the disagreement as to these material facts, the ultimate responsibility of the parties arising therefrom cannot be resolved on summary relief.

Decision

Respondent's motion to dismiss, or in the alternative, for summary affirmance, is **DENIED**.

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ALLAN H. GOODMAN
Board Judge

We concur:

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JAMES L. STERN
Board Judge

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CANDIDA S. STEEL
Board Judge