UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT DENIED;
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT GRANTED IN PART:
January 17, 2024

CBCA 7502, 7503

HAMIDULLAH, SON OF MOHAMMAD RAJAB,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Enayat Qasimi and Shamsi Maqsoudi of Whiteford, Taylor & Preston LLP, Washington, DC, counsel for Appellant.

Erin M. Kriynovich, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **GOODMAN**, and **SULLIVAN**.

SULLIVAN, Board Judge.

Hamidullah, Son of Mohammad Rajab (Hamidullah or appellant), appealed the decisions of the contracting officer for the Department of State (DOS) on appellant's claims arising from the termination of lease contracts in Afghanistan following the withdrawal of United States forces. In cross-motions for summary judgment, the parties address whether the terminations were proper and Hamidullah's contention that DOS was required, but failed, to return physical control of the properties upon termination of the lease. Consistent with *Abdul Mutakaber v. Department of State*, CBCA 7576 (Jan. 17, 2024), we hold that DOS terminated the leases for convenience and that DOS was not obligated to return physical control of the property to Hamidullah.

Statement of Undisputed Facts

I. Lease Contracts and Their Relevant Provisions

A. Qasemi Lot

In September 2013, DOS entered into a lease with Hamidullah for a 10,060-square-meter lot in Kabul, Afghanistan, referred to as the Qasemi lot. Respondent's Statement of Undisputed Facts ¶¶ 16-17. The initial lease term was for approximately ten years and rent was $1,327,920 annually. *Id.* ¶¶ 18, 20. The Qasemi lease was renewable for four additional periods until 2063, provided that DOS gave written notice to the landlord (Hamidullah) "at least 30 days prior to the date the Lease term or any renewal period would otherwise expire." *Id.* ¶ 19.

The Qasemi lease contained two termination provisions that control the resolution of the parties' dispute. First, article 12, Destruction of Premises, gave DOS the right to immediately terminate the lease should the property be rendered unfit for tenancy:

> Whenever the Premises or any essential part thereof shall be destroyed or rendered unfit for further tenancy through fire, vandalism, earthquake, flood, storm, war, civil disturbance, Act of God, or other similar casualty, this Lease shall, at the option of the TENANT, immediately terminate. In case of partial destruction or damage, this Lease may be terminated in whole or in part at the TENANT's option. Should the TENANT exercise its option, it shall provide at least twenty days' written notice to the LANDLORD, and no rent shall accrue to the LANDLORD after such termination.

Respondent's Statement of Undisputed Facts ¶ 23. Article 12 required the landlord to "refund any advance rental payments in excess of rental liabilities accrued to the date of termination." *Id.*

The second termination provision, article 14, Termination, allowed DOS to terminate the lease for its convenience by giving ninety days' notice of its intent:

> The TENANT may, for its convenience, terminate this Lease in whole or in part at any time, if it determines that such termination is in the best interests of the TENANT, by giving written notice to the LANDLORD 90 days in advance. If the TENANT terminates this Lease in accordance with this clause, the TENANT shall not be liable for any charges additional to those normally incurred up to the date the Lease is terminated.

Respondent's Statement of Undisputed Facts ¶ 24. Article 14 required the landlord to issue a "pro rata refund of any rent payments made for periods beyond the date" DOS "surrender[ed]" the premises. *Id.*

Article 14 stated that DOS was to return the property in the condition received, less normal wear and tear: "The TENANT will return the property in which [sic] it was received minus normal wear and tear. No unnecessary make-ready will be accomplished unless the damages is [sic] the result of negligence by the TENANT." Respondent's Statement of Undisputed Facts ¶ 24. But, article 8, Tenant Rights and Responsibilities, permitted DOS to alter the premises and permitted, but did not require, DOS to remove the alterations:

> The TENANT shall have the right, during the existence of this Lease, to erect structures, additions and signs, to make alterations, and/or attach fixtures in or upon the premises including internal and external security upgrades, access doors in the East wall of the property to an adjacent property to be leased by the TENANT, installation of generators, fuel tanks, air conditioners, and any other items deemed necessary by the TENANT. Such fixtures, additions, or structures placed in our [sic] upon or attached to the said Premises shall be and remain the property of the Tenant and may be removed before, at the time of, or within a reasonable time after the Lease or any extension thereof expires or is terminated.

Id. ¶ 22. Article 8 also relieved DOS of responsibility for damage to the property caused by forces outside of its control:

> The TENANT shall, unless specified to the contrary, maintain the said Premises in good repair and Tenantable condition, including minor maintenance such as trash removal and light bulb replacement, during the continuance of this Lease, except for reasonable and ordinary wear and tear, damage by the elements, or other circumstances not under the TENANT's control. Any damage arising from the intentional acts or negligence of the LANDLORD, its agents or employees, or any other third parties not under LANDLORD's or TENANT's control, is similarly excepted.

Id.

B. Polaski Lot

In November 2014, DOS entered into a second lease with Hamidullah for a 2612-square-meter lot in Kabul, Afghanistan, referred to as the Polaski Lot. Respondent's Statement of Undisputed Material Facts ¶¶ 28-29. The initial lease term was for five years,

beginning July 2014, and the rent was $344,784 annually. *Id.* ¶¶ 30, 32. The Polaski Lease was renewable for three additional five-year periods provided that DOS gave written notice to the landlord "at least sixty days" prior to the expiration of the current lease term. *Id.* ¶ 31. DOS renewed the Polaksi lease in 2019, extending the lease term through July 2024. *Id.* ¶ 8.

The Polaski lease also contained a clause, article 12, Destruction of the Premises, giving DOS the right to terminate if the premises were rendered unfit for further tenancy:

> Whenever the Premises or any essential part thereof shall be destroyed or rendered unfit for further tenancy through fire, explosion, vandalism, earthquake, flood, storm, war, act of terrorism, civil disturbance, Act of God, or other similar casualty, this Lease shall, at the option of the TENANT, immediately terminate upon provision of written notice to the LANDLORD. In the event of such termination, no rent shall accrue to the LANDLORD after he/she/it receives the TENANT's written notice.

Respondent's Statement of Undisputed Facts ¶ 36. Article 12 also stated that the landlord would be required to refund advanced rental payments in excess of rental liabilities accrued to the date of termination. *Id.*

Article 14, Termination, gave DOS the right to terminate the lease for its convenience:

> The TENANT may, for its convenience, terminate this Lease in whole or in part at any time, if it determines that such termination is in the best interests of the TENANT, by giving written notice to the LANDLORD sixty (60) days in advance. If the TENANT terminates this Lease in accordance with this clause, the TENANT shall not be liable for any charges additional to those normally incurred up to the date the Lease is terminated.

Respondent's Statement of Undisputed Facts ¶ 37. Unlike the Qasemi lease, the Polaski lease did not specify the condition in which the property was required to be returned. The lease also provided for the return of rent payments "made for periods beyond the date the TENANT surrender[ed]" the premises. *Id.*

Both leases contained provisions specifying that the leases are subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), and that the terms of the lease were to be construed in accordance with the laws of Afghanistan. Respondent's Statement of Undisputed Facts ¶¶ 25-26, 38-39.

II. Facts Leading to the Dispute

In February 2020, the United States signed the "Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America," referred to as the "Doha Agreement." Respondent's Statement of Undisputed Material Facts ¶ 41. On August 15, 2020, the Taliban entered Kabul. *Id.* ¶ 48. Subsequently, the Ghani administration, which led the Government of the Islamic Republic of Afghanistan, collapsed. *Id.*

In the period leading up to the Taliban's advance, DOS evacuated properties peripheral to the embassy, including the Qasemi and Polaski lots. *Id.* ¶ 43. When it left the properties, DOS did not dismantle fixtures that it had installed and left behind certain equipment. Appellant's Statement of Undisputed Material Facts ¶ 55. On August 31, 2021, the U.S. embassy suspended its operations in Kabul. *Id*. ¶ 33; Respondent's Statement of Undisputed Material Facts ¶ 52. The Taliban took control of the properties after DOS departed. Respondent's Statement of Undisputed Material Facts ¶ 66.

Following suspension of the embassy mission, DOS discussed whether to maintain or terminate its leases for properties in Kabul. Respondent's Statement of Undisputed Material Facts ¶ 56. For some properties, DOS entered an arrangement for Qatar to serve as a protecting power for U.S. diplomatic and consular interests in Afghanistan. Appellant's Statement of Undisputed Material Facts ¶¶ 35-37. The Qasemi and Polaski lots were not included in this arrangement. *Id*. ¶ 38.

On November 9, 2021, DOS issued a termination notice for the Qasemi lease, referencing article 12 of the lease. Appellant's Statement of Undisputed Material Facts ¶ 44. The notification email informed Hamidullah that the final rent payment, covering the period between September 30, 2021, and November 29, 2021, in the amount of $221,926 would be paid to Hamidullah. *Id.* The email did not explain why DOS was invoking article 12. *Id.*; Respondent's Statement of Undisputed Material Facts ¶¶ 58-59.

On March 3, 2022, DOS issued a termination notice for the Polaski lease, also referencing article 12. Appellant's Statement of Undisputed Material Facts ¶ 45. The notification email stated that Hamidullah owed DOS a refund of $118,076, for the period March 3, the termination date, through July 6, 2022, the date through which DOS had paid rent in advance. *Id.* The email did not explain why DOS was invoking article 12. *Id.*; Respondent's Statement of Undisputed Material Facts ¶¶ 61-62.

On February 4 and April 15, 2022, Hamidullah submitted claims contesting the terminations of the Qasemi lease and the Polaski lease, respectively. Respondent's Statement

of Undisputed Material Facts ¶¶ 78, 84. The contracting officer denied the claims on June 27 and July 19, 2022, respectively. Notice of Appeal (CBCA 7502), Attachment A; Notice of Appeal (CBCA 7503), Attachment B. In addition to denying Hamidullah's claim for the Polaski lot, the contracting officer demanded Hamidullah refund the $118,076 requested in the termination notice. Notice of Appeal (CBCA 7503), Attachment B. Hamidullah timely appealed both decisions to the Civilian Board of Contract Appeals, and the appeals were consolidated pursuant to Board Rule 2 (48 CFR 6101.2 (2022)).

Discussion

I. The Lease Terminations Are Converted to Terminations for Convenience

A. DOS Fails to Establish That Termination Was Proper Under Article 12

DOS asserts that its terminations were proper because the Taliban takeover "was an act of a third party, akin to war, civil disturbance, or similar casualty, that rendered the premises unfit for further tenancy" per article 12 of the leases. To decide this claim, the Board must interpret the meaning of the article 12 language "unfit for further tenancy" and determine whether the facts here fall within the circumstances contemplated in article 12 that would justify the terminations.

We look first to the plain language of the lease contract. *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993). "[P]rovisions of a contract must be so construed as to effectuate its spirit and purpose . . . an interpretation which gives a reasonable meaning to all of its parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (quoting *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978)). Given that the clause provides for the immediate cancellation of DOS's obligation to pay rent, the termination is akin to a termination for default, wherein the agency bears the burden to prove the termination was justified. *See generally Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987).

The clause in both leases gave DOS the right to terminate should some physical event render the property itself destroyed or unfit for occupation. The first indicator of this construction is found in the title of the clause, "Destruction of the Premises." This title suggests that the type of event that would merit a termination under article 12 would need to alter the habitability or physical use of the property. The text of the clause supports this construction: "Whenever the Premises or any essential part thereof shall be destroyed or rendered unfit for further tenancy through fire, explosion, vandalism, earthquake, flood, storm, war, act of terrorism, civil disturbance, Act of God, or other similar casualty, this

Lease shall, at the option of" the tenant, "immediately terminate." DOS's right to terminate arises when some kind of event occurs that affects the "[p]remises or any essential part thereof," clarifying that the impact of the events listed in the clause must be to the physical premises or the environs. The type of events contemplated that would destroy or render the premises unfit for further tenancy, such as fires, explosions, earthquakes, and floods, would all have an immediate and obvious destructive impact to the properties. Reading the other listed events in this context, including the circumstances of war or civil disturbance relied upon by DOS, makes clear that these events must cause some kind of similar destructive impact to justify termination under the clause. Finally, article 12 gives DOS the option to terminate or partially terminate immediately the lease of the property or portion of the property damaged by an event, which reinforces the idea that the damage to the premises that would give DOS the right to terminate must be of a nature that requires DOS to determine whether it can continue to use or inhabit the damaged properties.

DOS puts forth no material facts showing that the Taliban occupation destroyed the premises or damaged them to such an extent that they were rendered unfit for further tenancy. Instead, DOS asserts that the Taliban takeover "created a dangerous security situation that . . . [made] it impracticable for the U.S. Embassy to maintain operations in Afghanistan." Respondent's Motion for Summary Judgment at 8. This assertion does not demonstrate that the properties themselves were destroyed or rendered unfit for tenancy, as required by the clause. Instead, it appears that the Taliban takeover created a situation which affected DOS's ability to carry out its mission in Afghanistan and eliminated its need for the properties, rather than any determination about the condition of the properties.

After it suspended embassy operations, DOS waited two months to terminate the Qasemi lease and six months to terminate the Polaski lease. DOS did not claim that it discovered some destruction or damage to the premises during those periods that influenced its decisions to terminate. Rather, DOS admits that it undertook discussions internally as to whether to terminate its Afghanistan leases and that, for some leases, it entered into an agreement with Qatar to protect its interests. DOS's decision to terminate did not arise from any destruction or damage to the Qasemi or Polaski lots themselves. DOS has not met its burden of justifying its termination pursuant to the requirements of article 12.

B. Terminations Were Proper Terminations Under Article 14

DOS argues in the alternative that its termination was proper pursuant to article 14 of both leases. In considering this alternative argument, the Board looks to the judicial doctrine of constructive termination. "Constructive termination is applied when the basis upon which a contract was actually terminated is legally inadequate to justify the action taken." *Maxima Corp. v. United States*, 847 F.2d 1549, 1553 (Fed. Cir. 1988). In such cases, so long as the contract was *actually* terminated and contains a termination for convenience clause, an

improper termination "will not be considered a breach but rather a convenience termination." *Id.* (quoting *G.C. Casebolt Co. v. United States*, 421 F.2d 710, 712 (Ct. Cl. 1970)). When a tribunal finds constructive termination to be the proper remedy, the contractor will be entitled to the amount owed under a termination for convenience. *See John Reiner & Co. v. United States*, 325 F.2d 438, 444 (Ct. Cl. 1963).

DOS terminated the Qasemi lease on November 9, 2021, and the Polaski lease on March 3, 2022. Because DOS had the right to terminate the leases for convenience under article 14 on those dates, we construe the article 12 terminations to be terminations for convenience pursuant to article 14 of both leases, with notice given on the dates that DOS issued the terminations. *Maxima*, 847 F.2d at 1553-54.

In light of this conversion to terminations for convenience, we must determine the amount of rent either owed to Hamidullah or to be refunded by Hamidullah to DOS pursuant to article 14. *Reiner*, 325 F.2d at 444. We return the matter to the parties to calculate the amounts owed with the following guidance. For the Qasemi lease, article 14 provides that DOS will pay rent for ninety days after the notice of the termination for convenience (November 9, 2021). Because DOS paid rent through November 29, 2021, Hamidullah is entitled to an additional seventy days of rent, plus CDA interest starting February 2, 2022, the date Hamidullah submitted its claim to DOS. The parties shall calculate the amount owed for the additional seventy days.

For the Polaski lease, article 14 provides that DOS will pay rent for sixty days from the notice of the termination for convenience (March 3, 2022). In the contracting officer's decision, DOS demanded a refund of $118,076 for 125 days of prepaid rent. Hamidullah is entitled to retain sixty days of rent post-termination. The parties shall determine the amount Hamidullah owes DOS, an amount that will include CDA interest starting July 19, 2022, the date the contracting officer issued the final decision asserting the right to a refund.

II. DOS Was Not Required to Return Physical Control of the Property After Termination

Hamidullah contends that DOS did not terminate the leases because DOS failed to return physical control of the property. We find no such requirement in the provisions of the lease relied upon by Hamidullah.

Determination of this issue again requires us to look to the plain language of the contracts. *Foley*, 11 F.3d at 1034; *Gould*, 935 F.2d at 1274. When the provisions of the contract are "clear and unambiguous, they must be given their plain and ordinary meaning," and the Board "may not resort to extrinsic evidence to interpret them." *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996) (citations omitted).

Article 14 of the Qasemi lease reads in part: "The [tenant] will return the property in which [sic] it was received minus normal wear and tear. No unnecessary make-ready will be accomplished unless the damages is [sic] the result of negligence by the [tenant]." Although Hamidullah argues that the clause imparts an obligation on the tenant to perform some kind of physical transfer of control or walk-through of the leased property, the word "return" is simply used to describe the condition the property must be in at the end of the lease and does not impart any additional transfer duties.

Other clauses of the Qasemi lease support this interpretation. Article 4 states the tenant must give thirty days' notice of renewal or "any renewal period would otherwise expire." Article 4 requires no action from DOS for turnover of the property at the end of the lease. We cannot construe a requirement to undertake an action upon termination for convenience that does not exist at the end of the lease. Similarly, article 8 of the lease permits DOS to install fixtures and make modifications to the property and allows that such modifications "may be removed" at the end of the lease. "May" is permissive and imparts no duty on DOS to alter the property upon the end of the lease term. Pursuant to article 8, DOS is only responsible for damage that it caused, not for the actions of third parties, including the Taliban. *See Ieyada M. Ahirir v. Department of State*, CBCA 6644, 22-1 BCA ¶ 38,044, at 184,752 (based upon a similar lease provision, DOS was determined not to be responsible for damage to property that occurred during a Libyan civil war after DOS vacated the property). Article 8 also releases DOS from any responsibility for damage caused by third parties. This provision belies Hamidullah's contentions that DOS still possesses the property because of the fixtures and equipment left there or that DOS was obligated to protect the property from the Taliban.

This analysis also applies to the terms of the Polaski lease. Article 14 does not contain any "return" language and does not specify any condition in which it must be returned. Again, we will not read duties into the lease that do not exist and need not look to the Afghan Civil Code to supplement the terms of the lease. *McAbee Construction*, 97 F.3d at 1435; *cf. The Heirs of Bahwouddin, Son of Neyaz Mohammad v. Department of State*, CBCA 7135, 22-1 BCA ¶ 38,212, at 185,565.

Hamidullah cites to DOS's Foreign Affairs Manual (FAM), which requires, in part, that "[t]ermination of all leases must be executed in accordance with the specific terms of the lease and local laws." Appellant's Reply to Respondent's Response to Appellant's Motion for Partial Summary Judgment (Appellant's Reply) at 14-15 (citing 15 FAM 344). As concluded above, the terminations were proper under article 14 of the leases. Moreover, Hamidullah has not established that this DOS policy was created for its benefit or that it provides a cause of action for Hamidullah. *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1365 (Fed. Cir. 2000) (citing *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1451-52 (Fed. Cir. 1997)). Therefore, the purported failure to follow this DOS policy does not provide

Hamidullah with a basis to overturn the termination for convenience. Hamidullah also cites to language from a sample lease termination agreement that provides that "the Landlord hereby acknowledges that the Premises (and furnishings) were returned by the Tenant to the Landlord on [date], in a condition acceptable to the Landlord, free of any and all claims against the United States Government." Appellant's Reply at 15. This language does not expand the requirements of the lease found in article 8.

Finally, Hamidullah argues that the covenant of good faith and fair dealing created an obligation that DOS protect and maintain the premises to ensure that the premises were returned to the landlord following termination. Hamidullah asserts that DOS breached this duty when it failed to terminate the leases prior to the Taliban taking over Kabul or by not placing the properties under the protection agreement DOS reached with Qatar. The covenant of good faith and fair dealing imposes a duty on both parties "not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). However, the covenant "cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Metcalf Construction, Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014) (quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010)). Hamidullah's argument fails because, as we have determined, the lease contained no duty to return the property or protect the properties from third parties. Instead, article 8 specifically relieved DOS of responsibility for damages to the properties caused by third parties not under DOS's control. Because there is no duty in the express terms of the contract, we find no violation of the duty of good faith and fair dealing.

Decision

Hamidullah's motion for partial summary judgement is **DENIED,** and DOS's motion is **GRANTED IN PART**. The Board will issue a separate order scheduling further proceedings to determine the amounts owed based upon this decision.

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge