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 7576

ABDUL MUTAKABER,

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.

Abdul Mutakaber (Mutakaber or appellant) appealed the decision of the contracting officer for the Department of State (DOS) on appellant's claim 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 Mutakaber's contention that DOS was required, but failed, to return physical control of the properties upon termination of the lease. Consistent with *Hamidullah, Son of Mohammad Rajab v. Department of State*, CBCA 7502, et al. (Jan. 17, 2024), which involves parallel

issues, we hold that DOS terminated the leases for convenience and that DOS was not obligated to return physical control of the property to Mutakaber.

Statement of Undisputed Facts

I. Lease Contracts and Their Relevant Provisions

Between 2016 and 2020, DOS entered into four leases with Mutakaber for residential properties in Kabul, Afghanistan. Appellant's Statement of Undisputed Material Facts ¶¶ 1-4. In September 2016, DOS entered into the first lease, for property referred to as the Maryland house, for one year at an annual rent of $420,000. Respondent's Statement of Undisputed Material Facts ¶¶ 1, 3, 5. With several renewals, the lease term was extended to September 1, 2025. *Id.* ¶ 4.

DOS entered the second lease, for property referred to as the PA+CT house, for one year beginning January 2017 at an annual rent of $1,020,000. Respondent's Statement of Undisputed Material Facts ¶¶ 7, 9, 11. With several renewals, the lease term was extended to December 31, 2021. *Id.* ¶ 10.

DOS entered the third lease, for property referred to as the Guam house, for one year beginning February 2017 at an annual rent of $144,000. Respondent's Statement of Undisputed Material Facts ¶¶ 13, 15, 17. With several renewals, the lease term was extended to January 31, 2022. *Id.* ¶ 16. The leases for the Maryland, PA+CT, and Guam houses were renewable for additional periods, provided that DOS gave notice "at least 60 days prior to the date" the lease term would otherwise expire. *Id*. ¶¶ 3, 9, 15.

In April 2020, DOS entered the fourth lease, for property referred to as the Champagne house, for five years at an annual rent of $168,000. Respondent's Statement of Undisputed Material Facts ¶¶ 19, 21, 22. The Champagne lease did not contain a renewal provision and was to end on March 31, 2025. *Id.* ¶ 21.

The leases contained two termination provisions that control the resolution of the parties' dispute. The first provision, article 12, "Destruction of Premises," was identical for the Maryland, PA+CT, and Guam leases. Article 12 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 Material Facts ¶¶ 36, 49, 62. Article 12 requires the landlord to "refund any advance rental payments in excess of rental liabilities accrued to the date of termination" within forty-five days after termination. *Id.*

Article 12 of the Champagne lease varies slightly from the other three leases but gave DOS the same 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, 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 Material Facts ¶ 74. The provision also requires the landlord to "refund any advance rental payments in excess of rental liabilities accrued to the date of termination" within forty-five days after termination. *Id.*

The second termination provision, article 14, Termination, was identical in the Maryland, PA+CT, and Guam leases. Article 14 allowed DOS to terminate the lease for its convenience by giving sixty days' notice of its intent to terminate:

> 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 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 Material Facts ¶¶ 37, 50, 63. 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 of the Champagne lease was the same as the other leases except that DOS was only required to provide thirty days' notice of termination. *Id*. ¶ 75.

Article 8, Tenant Rights and Responsibilities, was also the same in the Maryland, PA+CT, and Guam leases and 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.

Respondent's Statement of Undisputed Material Facts ¶¶ 34, 47, 60. Article 8 of the Champagne lease similarly specified that DOS would "not be responsible for restoring the Premises to any condition or for any changes or damages to the Premises. The Premises are leased in 'as is' condition and may be returned in the 'as is' condition as of the date of lease expiry or termination." *Id.* ¶ 72. In addition, article 8 of the Champagne lease 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 new structures, additions, and annexes, install utility infrastructure, post signs, make alterations, and attach fixtures in or upon the Premises. This includes the right to affix a flagstaff, a U.S. flag, a U.S. seal, and office signs and insignia on the Premises leased.
>
> Such fixtures, additions, annexes or structures placed in or 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 at TENANT'S discretion. TENANT may choose to leave the improvements for the LANDLORD and there will be no requirement for the LANDLORD to pay any compensation.

Id.

All the 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 would be construed in accordance with the laws of Afghanistan. Respondent's Statement of Undisputed Material Facts ¶¶ 38-39, 51-52, 64-65, 76-77.

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 ¶ 79. On August 15, 2020, the Taliban entered Kabul. *Id*. ¶ 88. Subsequently, the Ghani administration, which led the Government of the Islamic Republic of Afghanistan, collapsed. *Id.*

In the period leading up to the Taliban advance, DOS evacuated properties peripheral to the embassy, including those at issue here. Respondent's Statement of Undisputed Material Facts ¶¶ 81, 86-87. When it left the properties, DOS did not dismantle some of the fixtures that it had installed. Appellant's Statement of Undisputed Material Facts ¶ 81. On August 31, 2021, the U.S. embassy suspended its operations in Kabul. *Id.* ¶ 56. After DOS left the properties, Mutakaber's representative made two attempts to access the properties, but the Taliban prevented the representative from gaining access. Respondent's Statement of Undisputed Material Facts ¶¶ 117-18.

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 ¶¶ 83-84. 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 ¶¶ 59-61. The four properties were not included in this arrangement. *Id*. ¶ 62.

On September 23, 2021, DOS issued termination notices for the leases, referencing article 12 of the lease in each notice. Appellant's Statement of Undisputed Material Facts ¶¶ 65-68. DOS did not explain why it was terminating the leases pursuant to article 12. *Id.* For the Maryland lease, DOS had paid rent through September 1, 2021, and DOS did not request the refund of any rent. *Id.* ¶ 65. For the PA+CT lease, DOS requested a refund of $276,657.53 for the period September 24, 2021, the termination date, through December 31, 2021, the date through which DOS had paid rent in advance. *Id.* ¶ 66. For the Guam lease, DOS requested a refund of $51,287.67 for the period September 24, 2021, through January 31, 2022, the date through which DOS had paid rent in advance. *Id.* ¶ 67. For the Champagne lease, DOS requested a refund of $86,991.78 for the period September 24, 2021, through March 31, 2022, the date through which DOS had paid rent in advance. *Id.* ¶ 68.

On June 8, 2022, Mutakaber filed a claim contesting the terminations of the leases and DOS's requests for refunds. Respondent's Statement of Undisputed Material Facts ¶ 126. The contracting officer denied the claim on August 8, 2022, and reiterated DOS's demand

that Mutakaber refund DOS $384,306.84 for rent paid in advance past the termination date. Notice of Appeal, Attachment A at 6. Mutakaber timely appealed the contracting officer's final decision to the Civilian Board of Contract Appeals on November 7, 2022. Notice of Appeal.

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. Respondent's Motion for Summary Judgment (Respondent's Motion) at 8-9. 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 each of the 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 article 12 clause, "Destruction of 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 article 12 clauses 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 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 at 9. 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 almost a month to terminate the Maryland, PA+CT, Guam, and Champagne leases. 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 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 the four leases did not arise from any destruction or damage to any of the houses themselves. DOS has not met its burden of justifying its terminations pursuant to the requirements of article 12 in the leases.

B. Terminations Were Proper Under Article 14

DOS argues in the alternative that its terminations were proper pursuant to article 14 of the 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 court finds constructive termination 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 leases on September 23, 2021. Because DOS had the right to terminate the leases for convenience under article 14 on that date, we construe the terminations to be terminations for convenience pursuant to article 14, with notice given on the date that DOS issued the terminations. *Maxima*, 847 F.2d at 1553-54.

In light of this conversion to terminations for convenience, what remains in dispute is the amount of rent either owed to Mutakaber or to be refunded by Mutakaber 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. Article 14 of the Maryland, PA+CT, and Guam leases provided that DOS will pay rent for sixty days after the notice of the termination for convenience while article 14 of the Champagne lease provided for thirty days.

For the Maryland lease, because DOS paid rent only through September 1, 2021, twenty-three days before the notice of termination, Mutakaber is entitled to an additional eighty-three days' rent. The parties shall determine this amount. Mutakaber is also entitled to receive CDA interest on the determined amount, calculated from June 8, 2022, the date Mutakaber filed the claim with DOS.

For the PA+CT lease, DOS sought a refund of $276,657.53. Mutakaber is entitled to rent for sixty days past the date of the termination notice. The parties shall determine the amount Mutakaber owes DOS, an amount that will include CDA interest starting on August 8, 2022, the date the contracting officer issued the final decision asserting the right to a refund.

For the Guam lease, DOS sought a refund of $51,287.67. Mutakaber is entitled to rent for sixty days past the date of the termination notice. The parties shall determine the amount Mutakaber owes DOS, along with CDA interest starting on August 8, 2022.

For the Champagne lease, DOS demanded a refund of $86,991.78. Mutakaber is entitled to rent for thirty days past the date of the termination notice. The parties shall determine the amount Mutakaber owes DOS, an amount that will include CDA interest starting August 8, 2022.

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

Mutakaber contends that DOS did not terminate the leases because DOS failed to return physical control of the properties. We find the leases contained no such requirement.

Determination of this issue again requires us to first 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).

Neither article 12 nor article 14 contained any language placing a duty on DOS to return the property after termination. Other clauses in the leases suggest that no such duty existed. Article 4 of the Maryland, PA+CT, and Guam leases (the Champagne lease does not contain a renewal provision) stated the tenant must give sixty days' notice of renewal or "any renewal period would otherwise expire." Article 4 required 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 in each of the leases permitted DOS to install fixtures and make modifications to the property and allowed that such modifications "may be removed" at the end of the lease. "May" is permissive and therefore imparted no duty on DOS to alter the property upon the end of the lease term. Moreover, pursuant to article 8 of the Maryland, PA+CT, and Guam leases, 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 similar lease provision, DOS determined not to be responsible for damage to property that occurred during Libyan civil war after DOS vacated the property). Article 8 of the Champagne lease stated that DOS would not be responsible for *any* damage to the property and the premises could be returned in an "as is" condition. These provisions belie Mutakaber's contentions that DOS still possesses the property because of the fixtures and equipment left behind or that DOS was obligated to protect the property from the Taliban.

We will not read duties into the lease that do not exist. Because the plain text of the leases placed no turnover requirement on DOS, we 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.

Mutakaber 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 Motion for Partial Summary Judgment (Appellant's

Motion) at 10-13 (citing 15 FAM 344). As concluded above, the terminations were proper under article 14 of the leases. Mutakaber has not established that this DOS policy was created for its benefit or that it provides a cause of action for Mutakaber. *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 Mutakaber with a basis to overturn the terminations for convenience. Mutakaber also cites to language from a sample lease termination agreement within the FAM 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 Motion at 11. This language does not expand the requirements of the leases found in article 8.

Finally, Mutakaber 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. Mutakaber 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)). Mutakaber'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

Mutakaber's motion for partial summary judgment 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