UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY RELIEF DENIED: November 4, 2010

CBCA 1802

6TH AND E ASSOCIATES, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Brett D. Orlove of Grossberg, Yochelson, Fox & Beyda, LLP, Washington, DC, counsel for Appellant.

Lesley M. Busch, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

SOMERS, Board Judge.

On March 3, 2006, 6th and E Associates, LLC (appellant or lessor) and the General Services Administration (respondent or the Government) entered into a lease agreement for office space in the Washington, D.C., area. Under the terms of the lease, the annual rent includes the utilities and preventative maintenance (PM) cost for all government equipment installed on the premises, as adjusted annually based on actual PM and energy costs.

The building is equipped with a total of six chillers, which provide chilled water to the air conditioning systems. Two of the chillers, identified as chiller number 4 and chiller number 5, provide chilled water to specific portions of the building. The dispute concerns

the interpretation and application of the lease agreement clauses governing repair or replacement of this equipment.

The lessor contends that the Government should pay to replace the two chillers. It states that chiller numbers 4 and 5 are only in place to serve the "supplemental tenant special system," providing chilled water to tenant special air handling units and tenant special fan coil units, which cool the government computer rooms, training rooms, and conference rooms. The lessor points to rider number 4 of the lease, which it asserts requires the Government to pay PM and energy costs for all government equipment installed on the premises, including the cost of PM and energy for chiller numbers 4 and 5. The lessor asserts that the Government has been paid for these PM costs since the inception of the contract, and should be required to pay for repair or replacement of these items. Finally, the lessor contends that rider number 3, which the Government claims excuses it from payment in this case, was never intended to be an exhaustive list of all government equipment installed on the premises.

The Government disagrees. The Government asserts that it is only required to compensate the lessor for the actual PM and energy costs of the government equipment specifically listed in rider number 3. The Government argues that, under the terms of the lease, the lessor had the obligation to pay for the maintenance, repair, and replacement of all equipment except for that equipment identified specifically in rider number 3. The Government believes that the chillers provided service to the entire base building, and not just to the special tenant heating, ventilating, and air conditioning systems, as alleged by appellant.

It is well established that summary relief will not be granted if the moving party fails to establish the absence of any genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 10-2 BCA ¶ 34,479. The fact that both parties have moved for summary relief does not mean that the Board must grant relief in favor of either party; if there are any issues of material fact, then summary relief is not proper for either one of the parties. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987).

While both parties are of the opinion that this dispute is ultimately one of contract interpretation, they have, nonetheless, supported their motions with multiple affidavits, an expert report, discovery responses, and statements identifying genuine issues of material fact. The material indicates considerable disagreement regarding the circumstances leading up to the negotiation and execution of the lease under which this dispute has arisen, as well as whether PM costs that had been previously paid were properly charged to the Government's expense.

We find that several of the unresolved factual issues are material to the ultimate issue of how the lease provisions should be interpreted. Accordingly, we do not consider that the issue of entitlement is appropriate for disposition on motions for summary relief based upon the record before us.

Decision

Appellant's motion for summary relief is **DENIED**, and respondent's cross-motion for summary relief is **DENIED**.

_____
JERI KAYLENE SOMERS
Board Judge

We concur:

_____
HOWARD A. POLLACK
Board Judge

_____
RICHARD C. WALTERS
Board Judge