UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR PARTIAL SUMMARY RELIEF GRANTED;
APPELLANT'S MOTION FOR PARTIAL SUMMARY RELIEF DENIED:
October 3, 2007

CBCA 440

INVERSA, S.A.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Jason A. Levine and Ty J. Cottrill of McDermott Will & Emery LLP, Washington, DC, counsel for Appellant.

Luisa M. Alvarez and Thomas D. Dinackus, Office of the Legal Advisor, Buildings and Acquisitions, Department of State, Rosslyn, VA, counsel for Respondent.

Before Board Judges **BORWICK**, **DeGRAFF**, and **GOODMAN**.

BORWICK, Board Judge.

Background

This appeal involves two separate claims by appellant, Inversa, S.A., against respondent, Department of State. The first--the Cerro Corona claim--is for breach of a purported lease, evidenced by a letter of intent, for United States Embassy employee housing in the contemplated, but not built, Cerro Corona project in or near Panama City, Panama. The second--the Torre Miramar claim--is for alleged breach of respondent's lease 1030-040003 of office space for portions of the Torre Miramar building in Panama City, Panama. By decision of December 7, 2005, the contracting officer denied both claims.

An appeal was originally docketed at the General Services Board of Contract Appeals (GSBCA) as GSBCA 16837-ST. On January 6, 2007, pursuant to section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat 3136, 3393 (2006), the GSBCA was terminated and its cases, personnel, and other resources were transferred to the newly-established Civilian Board of Contract Appeals (CBCA). The appeal was re-docketed as CBCA 440.

Respondent has submitted a motion for partial summary relief on the Cerro Corona claim, which appellant opposes because it contends there exist genuine issues of material fact making summary relief inappropriate. Earlier, respondent had submitted a motion to dismiss the Cerro Corona claim for lack of jurisdiction, or alternatively for summary relief, which the GSBCA denied because of the existence of genuine issues of material fact. *Inversa, S.A. v. Department of State*, GSBCA 16837-ST, 06-2 BCA ¶ 33,411. That decision continues in effect in this case. *See* National Defense Authorization Act for Fiscal Year 2006 § 847(c)(2)(B).[1] Having taken the depositions of the Government official and appellant's representative who signed the letter of intent, respondent has submitted a second dispositive motion on that claim. Appellant opposes respondent's motion for partial summary relief on the basis that there remain disputed issues of material fact.

Appellant has also submitted a motion for partial summary relief, but on the Torre Miramar claim, which respondent opposes for the same reason that appellant opposes respondent's motion--the existence of genuine issues of material fact.

We grant respondent's motion for partial summary relief on the Cerro Corona claim and dismiss that claim for lack of jurisdiction. Undisputed facts establish that the letter of intent is not a cognizable procurement contract under the Contract Disputes Act (CDA), 41

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[1] Section 847(c)(2)(B) provides:

> In the case of any such proceedings pending before an agency board of contract appeals other than the Armed Services Board of Contract Appeals or the board of contract appeals of the Tennessee Valley Authority, the proceedings shall be continued by the Civilian Board of Contract Appeals, and orders which were issued in any such proceeding by the agency board shall continue in effect until modified, terminated, superseded, or revoked by the Civilian Board of Contract Appeals, by a court of competent jurisdiction, or by operation of law.

U.S.C.A. §§ 601-613 (2007). The same is true for a subsequent settlement agreement. We deny appellant's motion for partial summary relief on the Torre Miramar claim because there exist genuine issues of material fact.

The Cerro Corona claim

Appellant's Cerro Corona claim is based in large part on a letter of intent signed by Embassy official John Ivie. Appeal File, Exhibit 5(b).[2] Appellant claims damages of $33,500,000 for respondent's "failing to honor [respondent's] commitment to give reasonable and serious consideration to the [Cerro Corona] project." Complaint, ¶ III.F.

In its motion for partial summary relief, respondent argues, as it did previously, that respondent did not enter into a lease for embassy housing with appellant, and that the letter of intent was not a contract for the procurement of goods and services as required by the CDA. Respondent argues there was no offer and acceptance of goods and services, but rather, a generalized statement of future intent. Respondent's Memorandum in Support of Motion for Partial Summary Relief (Respondent's Memorandum) at 9-12. Respondent argues that the letter of intent does not contain all the necessary terms and conditions to be considered an actual lease and that the letter of intent was only conditional upon the satisfaction of uncertain future conditions. Respondent's Memorandum at 15-21.

Respondent also repeats its earlier argument that if the Board should find that the letter of intent was a procurement contract, it would have been invalid as violative of statutory prohibitions limiting authority of agency embassy officials from entering into short-term leases. Respondent's Memorandum at 37-51.

Appellant does not dispute the following uncontested facts put forth by respondent in its motion for partial summary relief.

The letter of intent, dated September 23, 1987, provided in pertinent part:

> Whereas, the U.S. Government has a legal requirement to provide safe, secure and comfortable quarters for all U.S. Mission employees and families which

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[2] Appellant also maintained that respondent breached a subsequent settlement agreement, but the GSBCA held that the settlement agreement could not be the basis for the CDA claim, because standing alone, the agreement did not involve a procurement contract, that is, a contract for the acquisition of goods or services. *Inversa, S.A.*, 06-2 BCA at 165,657. That holding remains the law of the case.

adhere to current residential security requirements as set forth by the Department of State Bureau for Diplomatic Security and the fire, life safety specifications and floor space guidelines of the Department of State Office of Foreign Buildings Operations [FBO]; and,

Whereas, there are currently no apartment buildings or facilities in the greater Panama City area known to us which conform to the aforementioned Department of State security, fire, life safety specifications of the FBO guidelines; and

Whereas, you have indicated your intention to build an apartment complex in Altos del La Corona, Betania, consisting of approximately 200 units with recreational facilities consisting of a swimming pool, tennis courts, children's playground and other appropriate appurtenances; and

Whereas, you have expressed the willingness that the buildings should be designed and constructed to conform to these Department of State Buildings standards;

The Embassy of the United States in Panama confirms its intention that the U.S. Diplomatic Mission to Panama will lease and occupy apartments in these premises immediately upon completion, provided there are no other adequate apartments available at the time the lease is executed and signed. The Embassy of the United States is willing to enter into a lease for the requisite number of U.S. Government-leased residential units when approved construction drawings and the building permit issued by appropriate municipal authorities are presented to the Embassy's Contracting Officer. The lease will be effective upon execution with rental payments commencing on a unit by unit basis as each is completed, inspected and declared ready for occupancy. The U.S. Mission currently leases 125 apartments under its Government-leased program and this number is not expected to decrease before your project would be under lease and occupied. The initial period of the lease will be 9 years and 11 months. After the initial lease period of 9 years and 11 months the Embassy will continue to lease and assign occupants to these apartments exclusively until such time as other apartments which meet the aforementioned Department of State Specifications, should become available, at which point the exclusivity factor would have to be weighed against competitive pricing.

. . . .

> This letter of intent carries the full weight of a contractual agreement entered into and adhered to [by] the Embassy of the United States in Panama.

Respondent's Statement of Uncontested Facts ¶ 1; Appeal File, Exhibit 5(b). The letter of intent was signed by John Ivie, an employee of the United States Department of State, and Juan Arias, for appellant. Respondent's Statement of Uncontested Facts ¶ 1. The project described in the letter of intent was not constructed and United States Embassy personnel did not occupy any residential property at the location described in the letter of intent. Respondent's Statement of Uncontested Facts ¶ 2; Appeal File, Exhibit 60 at 15-16; Respondent's Motion for Partial Summary Relief, Exhibit 1 at 7.

When Mr. Ivie executed the letter of intent, he was serving as the administrative counselor at the United States Embassy in Panama. Respondent's Statement of Uncontested Facts ¶ 4; Appeal File, Exhibits 1, 5(b), 6. Mr. Ivie was never the Secretary of State, the Deputy Undersecretary of State for Administration, or the Director of the Office of Foreign Buildings. Respondent's Statement of Uncontested Facts ¶ 5; Appeal File, Exhibits 356-58. Mr. Ivie is a former employee of the United States Government. Respondent's Statement of Uncontested Facts ¶ 3; Respondent's Motion for Partial Summary Relief, Exhibit 2.

At his deposition, Mr. Ivie did not recall seeking authorization to execute the letter of intent, nor did he recall whether the respondent's Office of Foreign Buildings ratified the letter of intent. Respondent's Statement of Uncontested Facts ¶¶ 6-7; Respondent's Motion for Partial Summary Relief, Exhibits 3-4. He did not remember sending the letter of intent to anyone in Washington, D.C., for approval. Respondent's Statement of Uncontested Facts ¶ 8; Respondent's Motion for Partial Summary Relief, Exhibit 4.

The parties entered into a settlement stipulation on August 17, 1990, to resolve all claims and disputes between them. Appeal File, Exhibit 11. As to the Cerro Corona project, the settlement provided:

> It is expressly acknowledged that the United States has no present liability for or interest in the Cerro Corona Project, and that no person will be misled by either signatory to this Agreement that such present or potential interest exists. Notwithstanding the foregoing, because it is within the realm of possibility that in the future, the Department of State may have a need for housing which could be met by one or more units which might be constructed at the site of the Cerro Corona project, the United States will designate a representative to attend a presentation at which the Owners or their representatives can present information about the Cerro Corona site and plans as well as any other project data that they may care to offer.

Respondent's Statement of Uncontested Facts ¶ 11; Appeal File, Exhibit 11.

The Torre Miramar claim

Appellant claims that respondent breached its obligation to restore premises it occupied under lease 1030-040003 to its original condition. In its motion for partial summary relief, appellant argues that respondent does not dispute that it failed to restore the premises to its original condition as defined in the lease and that respondent owes appellant $1,016,528.49 as the agreed-upon cost of restoration. Appellant also maintains that because respondent failed to restore the premises, under article 27(b) of the lease, it is deemed to be a holdover tenant and liable for two years rent for the ground floor, floors one through five, six through seven, and fourteen and fifteen. Appellant's Motion for Partial Summary Relief at 2-3; Appellant's Reply Brief at 16-17.

In its opposition to appellant's motion, respondent agrees that it did not restore the building to its original condition. However, respondent presents evidence that raises genuine issues of material fact. Those genuine issues are whether: (1) respondent left the premises in good tenantable condition; (2) the original condition was defined by attached drawings to the lease; (3) respondent was ready, willing, and able to restore the premises it occupied; (4) appellant refused to allow respondent to restore the premises by imposing restoration conditions upon respondent that were not part of the lease; (5) appellant represented to respondent that it would restore the occupied premises to its original condition and submit a claim for restoration costs, but then failed itself to restore the building; and (6) the so-called restoration amount to which respondent supposedly agreed was only a settlement amount with attached conditions that appellant rejected. Respondent's Opposition Memorandum at 6-8, 9-13, 14-16, 17-20.

Appellant itself, in replying to the prevention defense raised in respondent's opposition memorandum, raises genuine issues of fact as to whether respondent's delays in commencing restoration planning, instead of the restoration conditions imposed by appellant, prevented respondent from restoring the premises. Appellant's Reply Memorandum at 9-13.

Discussion

Concerning motions for summary relief, we held recently:

> Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp.*

> *v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A fact is considered to be material if it will affect the Board's decision, and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the nonmovant after a hearing. *Fred M. Lyda v. General Services Administration*, CBCA 493 [07-2 BCA ¶ 33,631]; *John A. Glasure v. General Services Administration*, GSBCA 16046, 03-2 BCA ¶ 32,284.

George P. Gobble v. General Services Administration, CBCA 528 (Sept. 11, 2007).

Cerro Corona claim

The Board has jurisdiction under the CDA over procurement contracts. 41 U.S.C. § 602. The United States Court of Appeals for the Federal Circuit has noted that a "procurement" includes the "acquisition by . . . lease . . . of property. . . for the direct benefit or use of the Federal Government," i.e., "an exchange of property for money." *Wesleyan Co. v. Harvey*, 454 F.3d 1375, 1378 (Fed. Cir. 2006) (purchase orders are procurement contracts, while unsolicited proposals and bailments are donative, not contractual). In the GSBCA's earlier decision in this case, the board held that appellant would have to establish that the letter of intent was a valid CDA procurement contract:

> It is hornbook law that the existence of a Government contract depends upon an unconditional offer by a purported contractor and an unconditional acceptance by the Government. *Russell Corp. v. United States*, 537 F.2d 474, 481-82 (Ct. Cl. 1976), *cert., denied*, 429 U.S. 1073 (1977).

Inversa, 06-2 BCA at 165,657. An offer must be a promise, and a mere expression of intention or a general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer. *Estate of Bogley v. United States*, 514 F.2d 1027, 1032-37 (Ct. Cl. 1975).

Consequently, an informal agreement, such as a letter of intent, may be considered an enforceable contract only if the agreement contains the essential terms and conditions, the agreement is made or approved by an authorized official, and the execution of a formal agreement is regarded by all parties as a technicality. *Penn-Ohio Steel Corp. v. United States*, 354 F.2d 254, 266-67 (Ct. Cl. 1965).

In *Essen Mall Properties v. United States*, 21 Cl. Ct. 430 (1990), the Government issued a letter of intent to the plaintiff which stated the Government's intention to lease space the plaintiff had offered, conditioned upon the mutual agreement concerning several items,

including "final approval of [plaintiff's] offer, cost of improvements, . . . and mutual agreement concerning drawings and construction." *Id*. at 433. The Court granted the Government's motion for partial summary judgment on whether the letter of intent constituted a binding contract, holding:

> A mere statement of intention, however, is not enough to manifest an unambiguous acceptance of an offer, especially when coupled with a condition precedent. The Court of Claims has stated that "the obligation of the government, if it is to be held liable, must be in the form of an undertaking, not as a mere prediction or statement of opinion or intention." *Cutler-Hammer, Inc. v. United States*, 194 Ct. Cl. 788, 794, 441 F.2d 1179, 1182 (1971). "'A notice of acceptance that is in any respect conditional *or that reserves to the party giving it a power of withdrawal is not an operative notice of acceptance*.'" *Uniq Computer Corp. v. United States*, 20 Cl. Ct. 222, 231 (1990) (emphasis added by *Uniq* court) (quoting 1A A. Corbin, *Corbin on Contracts*, *A Comprehensive Treatise on the Working Rules of Contract Law* § 264 (1963)). The written correspondence from the [Government] to plaintiff clearly reflects the fact that no meeting of the minds ever took place, because the [Government's] acceptance of plaintiff's offer to lease space in Essen Mall was contingent upon the [Government's] receipt of a bid for tenant improvements that was acceptable in terms of cost.

Essen Mall Properties, 21 Cl. Ct. at 440.

In this case, the letter of intent merely states appellant's intention to construct residences, which is not a binding offer. *Bogley*. The letter of intent states that respondent "will lease and occupy apartments in these premises immediately upon completion, provided there are no other adequate apartments available at the time the lease is executed and signed." The letter of intent also states that "the Embassy of the United States is willing to enter into a lease for the requisite number of U.S. Government-leased residential units when approved construction drawings and the building permit issued by appropriate municipal authorities are presented to the Embassy's Contracting Officer." Respondent did not agree in the letter of intent to be immediately bound to lease residences. The stated willingness to lease was based upon the fulfillment of future conditions--that there is no adequate housing when the lease is executed and signed, and only when approved construction drawings and the building permit issued by appropriate municipal authorities are presented to the Embassy's contracting officer. Respondent's conditional willingness to lease space in the future is not a binding acceptance. *Essen Mall Properties*.

Furthermore, the letter of intent lacked definite terms and conditions to be properly considered a fully formed contract. Without sufficiently definite terms, there can be no contract. *Modern Systems Technology Corp. v. United States*, 979 F.2d 200, 202 (Fed. Cir. 1992) (basic pricing agreement lacked sufficient terms to be considered a contract). Here, the letter of intent did not state the number of units to be leased. At most it predicted a minimum number of units based upon the housing needs of embassy employees as of September 23, 1987. Nor did the letter of intent state the maximum number of apartments to be leased, or the configuration, layouts, amenities, or occupancy dates of the apartments under the purported lease. The letter of intent failed to include provision for utilities and janitorial services, parking, security of common areas, maintenance, or improvements or repairs.

In summary, the letter of intent merely records the willingness of the parties to enter into a lease or leases at a future, but indeterminate, date, for an unknown number of apartments of unknown design, at undefined rental rates, with undefined rental periods, when the project was built, if ever. Additionally, there were no binding provisions for amenities, cleaning, or services stated in the letter of intent. The letter of intent is simply too empty a vessel from which to conjure up a binding offer and acceptance which would form a procurement contract cognizable under the CDA.

Appellant opposes respondent's motion on this ground by stating that there exist genuine issues of material fact.[3] Appellant says that Mr. Ivie was instructed by cable from respondent early in 1987 and that respondent was required to lease or otherwise occupy housing that met the residential handbook standards. Appellant's Statement of Genuine Issues ¶ 2.[4] Appellant also notes Mr. Ivie's statements that his intent in signing the letter of intent was to provide appellant with the ability to obtain financing and to make a record that

[3] In replying to respondent's motion, appellant mislabels the Statement of Genuine Issues required by Board Rule 8(g)(3) as a "Statement of Material Contested Facts." Additionally, appellant failed to follow the required format in submitting what should have been a Statement of Genuine Issues. Appellant neglected to identify by reference to respondent's Statement of Uncontested Facts those facts it claimed were genuine issues which needed to be litigated. Nevertheless, since its statement is usable, we give appellant the benefit of the doubt and accept its submission as a proper Statement of Genuine Issues. We use the proper label, however, when referring to individual paragraphs of its "Statement of Material Contested Facts."

[4] Appellant mis-cites to page 40 of the Ivie Deposition. The citation should be to pages 49-50 of that deposition. *See* Appellant's Opposition, Exhibit 2; Deposition of Mr. John Ivie (May 10, 2007).

when the project was completed and ready for occupancy respondent would be compelled to lease the units because only those units would meet security requirements. Appellant's Statement of Genuine Issues ¶ 3. These facts, if proven, are not material to our determination that the letter of intent does not incorporate either a binding offer by appellant or binding acceptance by respondent for the procurement of residential leases. The fact that all residences for embassy employees, whether leased or otherwise occupied, were required to meet Department of State security standards is not material to the question of whether the letter of intent memorialized a procurement contract. For the same reason, Mr. Ivie's intention to bind the agency in the future if the project ever was built is not material to whether a binding contract for the procurement of goods or services came into existence when he executed the letter of intent. At best, giving appellant the benefit of every doubt, those statements establish that the letter of intent was a commitment to consider a procurement contract in the future, upon the happening of certain conditions.

Even if, by virtue of fertile imagination, the letter of intent was regarded as a procurement contract, it would have been illegal as violating statutory authority. Mr. Ivie lacked authority to execute a short-term lease on respondent's behalf. Statute at the time the letter of intent was executed provided:

> (a) Authority of Secretary of State
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> The Secretary of State is empowered to acquire by purchase or construction in the manner hereinafter provided, within the limits of appropriations made to carry out this chapter, by exchange, in whole or in part, of any building or grounds of the United States in foreign countries and under the jurisdiction and control of the Secretary of State, sites and buildings in foreign capitals and in other foreign cities, and to alter, repair, and furnish such buildings for the use of the diplomatic and consular establishments of the United States, or for the purpose of consolidating within one or more buildings, the embassies, legation, consulates, and other agencies of the United States Government there maintained. The space in such buildings shall be allotted by the Secretary of State among the several agencies of the United States Government.

22. U.S.C. § 292 (1984). This authority also included leases. *Id.* § 297.

Statute also contained a limitation on subordinate officials' authority to enter into short-term leases:

> (a) Leases

> Notwithstanding the provisions of this chapter or any other Act, no lease or other rental arrangement for a period of less than ten years, and requiring an annual payment in excess of $25,000[5] shall be entered into by the Secretary of State for the purpose of renting or leasing offices, buildings, grounds, or living quarters for the use of the Foreign Service abroad, unless such lease or other rental arrangement is approved by the Secretary. The Secretary may delegate his authority under this section only to the Deputy Under Secretary of State for Administration or to the Director of the Office of Foreign Buildings. The Secretary shall keep the Congress fully and currently informed with respect to leases or other rental arrangements approved under this section.

22 U.S.C. § 301. It is undisputed that Mr. Ivie, when he executed the letter of intent, was not the Secretary of State, the Deputy Under Secretary of State for Administration, or the Director of the Office of Foreign Buildings, and thus statutorily authorized to execute short-term leases.

When a contracting officer enters into a contract in violation of statute, the Government is not estopped from denying the validity of the contract:

> It is a well recognized principle of procurement law that the contracting officer, as agent of the executive department, has only that authority actually conferred upon him by statute or regulation. If, by ignoring statutory and regulatory requirements, he exceeds his actual authority, the Government is not estopped to deny the limitations on his authority, even though the private contractor may have relied on the contracting officer's apparent authority to his detriment, for the contractor is charged with notice of all statutory and regulatory limitations.

Prestex Inc. v. United States, 320 F.2d 367, 371 (Ct. Cl. 1963) (footnotes omitted); *see also City of Alexandria v. United States*, 737 F.2d 1022 (Fed. Cir. 1984) (Government not estopped from denying existence of contract for sale of land which would violate statutory "report and wait" provision); *Maykat Enterprises, N.V.*, GSBCA 7346, 84-3 BCA ¶ 17,510 (Government bound by only those agreements of its agents that are within the scope of their actual authority and not contrary to statutory and regulatory requirements).

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[5] In 1991, the statutory dollar limit was increased from $25,000 to $50,000. Pub. L. No. 102-138, 105 Stat. 647 (1991). We refer to the dollar limit in effect when the letter of intent was signed.

In a case similar to the instant appeal, the United States Court of Federal Claims held that a purported short-term lease for housing made by the Deputy Chief of Mission of the United States Embassy in the Bahamas violated the statutory authorities quoted above and dismissed the breach of lease claim. *Sam Gray Enterprises, Inc. v. United States*, 43 Fed. Cl. 596 (1999), *aff'd*, 250 F.3d 755 (Fed. Cir. 2000) (table).

Appellant argues that unidentified officials in Washington, and certain named individuals from the Embassy in Panama City, participated in meetings with architects to review architectural plans for the Cerro Corona project. Appellant's Statement of Genuine Issues ¶ 11.

Here, 22 U.S.C. § 301 provided authority to enter into short-term leases only to the Secretary of State or, through the Secretary's delegation, to the Deputy Under Secretary of State for Administration or to the Director of the Office of Foreign Buildings. Appellant has not persuaded us that a preliminary examination of architectural drawings represents a ratification of an otherwise unauthorized lease. Further, appellant has not presented any evidence, in opposition to respondent's motion for partial summary relief, that the officials statutorily authorized to enter into short-term leases participated in such an examination.

As the GSBCA earlier held, the subsequent settlement stipulation standing alone does not provide CDA jurisdiction. The commitment the Government made in that agreement regarding the Cerro Corona project was to attend within 120 days a presentation on the merits of the project. Indeed, the stipulation confirmed the understanding of the parties that the earlier letter of intent was not a binding contract because both parties recognized that the Government had no present liability or interest in the project.

The Torre Miramar claim

With respect to the Torre Miramar claim, respondent has presented evidence that establishes genuine issues as to whether respondent was willing and able to restore the leased premises in accordance with the terms of the Torre Miramar lease, and whether appellant hindered respondent's restoration efforts. These issues are relevant to respondent's defense of prevention. That defense, which respondent maintains is also found in Panamanian law, holds that the nonperformance of one party to the contract is excused when the other party hinders that performance. *See Precision Pine & Timber, Inc. v. United States*, 75 Fed. Cl.

80, 92 (2006); 13 Richard A Lord, *Williston on Contracts* § 39:6 (4th Ed. 2000); Panama Civil Code Art. 985.[6]

In its reply memorandum to respondent's opposition, appellant urges the Board to summarily dismiss respondent's invocation of the prevention doctrine, by arguing that the prevention defense "is extra-contractual and is not based on any provision in the lease or the settlement agreement nor does it require any interpretation or construction of terms in either document." Appellant's Reply Memorandum at 3. Appellant is mistaken in its view that the prevention defense is extra-contractual, since the defense is based on the other party's obligation not to hinder performance. It is an implied obligation of every party to a government contract not to hinder the other party's performance. *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1291 (Fed. Cir. 2000).

Appellant, quoting *Corbin on Contracts,* also argues that the prevention defense does not apply when the alleged hindrance was necessary to carry on a party's other business, Appellant's Reply Memorandum at 7, implying that the hindrances cited by respondent were necessary for appellant's business. Appellant's quotation is incomplete. *Corbin* does state that the prevention doctrine would not apply in that circumstance, but in cases where "both parties contemplated the possibility of such prevention . . . when the contract was made." 9 Arthur L. Corbin, *Corbin on Contracts* § 947. There may be disputed issues of fact as to whether the parties, when the lease was executed, contemplated the restoration conditions subsequently imposed by appellant when the time came for restoration. However, the Board will not summarily deny respondent the opportunity to present that defense.

Additionally there are issues as to the amount of the restoration costs due, if any, and whether respondent is to be considered a holdover tenant if it left the Torre Miramar lease premises in habitable condition. For the Torre Miramar claim, the record will be fully developed at the scheduled hearing on the merits.

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[6] Article 22B of the lease provides that the lease is to be construed and interpreted in accordance with the laws of the Republic of Panama. Appeal File, Exhibit 12. Appellant's expert in Panamanian law states that there is no explicit statement of the doctrine of prevention in the Panama Civil Code, but that the under Panama Civil Code article 1109 the concept of good faith binds each party to perform its own obligation and to allow the other party to perform its own. Appellant's Reply Memorandum, Exhibit 2 (Declaration of Eloy Alfaro, Esq. (Sept. 14, 2007)) ¶ II5.

Decision

RESPONDENT'S MOTION FOR PARTIAL SUMMARY RELIEF on the Cerro Corona claim is **GRANTED**. The Cerro Corona claim is dismissed for lack of jurisdiction. **APPELLANT'S MOTION FOR PARTIAL SUMMARY RELIEF** is **DENIED**.

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ANTHONY S. BORWICK
Board Judge

We concur:

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MARTHA H. DeGRAFF
Board Judge

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ALLAN H. GOODMAN
Board Judge