

In the United States Court of Federal Claims

CULLY CORPORATION,)	No. 19-339 C
)	
Plaintiff,)	Judge Tapp
)	
v.)	
)	
THE UNITED STATES,)	
)	
Defendant.)	

SECOND AMENDED COMPLAINT

COMES NOW Cully Corporation, by and through counsel, and for its second amended complaint states and alleges as follows:

PARTIES

1. Plaintiff, Cully Corporation (“Cully”), is the Village Corporation for the federally-recognized Native Village of Point Lay, organized within the meaning of § 3(j) of the Alaska Native Claims Settlement Act (“ANCSA”), 43 U.S.C. § 1602(j) “[t]o hold, invest, manage and/or distribute lands, property, funds, rights and other assets on behalf of [the Native Village of Point Lay] in accordance with the terms of [ANCSA codified at 43 U.S.C. § 1601, et seq.].”

2. The Defendant is the United States of America, acting through the Department of Defense (“DOD”), and the United States Air Force (“USAF”) which has appeared in this matter.

JURISDICTION

3. Jurisdiction is proper in this Court pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), because the claims are founded upon the Fifth Amendment to the United States Constitution and a contract with the United States.

FACTS AND GENERAL ALLEGATIONS

4. In 1971, the passage of ANCSA entitled Cully, as the Village Corporation for the Native Village of Point Lay, to select 90,000 acres of land in and around the Native Village of Point Lay. 43 U.S.C. §§ 1611(a) and (b).

5. The United States of America, pursuant to a series of public land orders, withdrew public lands for military purposes in and near Point Lay, Alaska, including the slightly more than 1,400 acres described as Lots 1 & 2, United States Survey 5251 (the “Site”). The Site was used as a Distant Early Warning (“DEW”) location and lays immediately adjacent to the Native Village of Point Lay.

6. Although the Point Lay DEW location has been deactivated for years, the Site was contaminated and to this day continues to be contaminated with hazardous materials.

7. Between the passage of ANCSA and 2004, Cully was foreclosed from selecting the DEW Site at Point Lay for conveyance because ANCSA § 3(e), codified at 43 U.S.C. § 1602(e), prohibited Cully from selecting public lands reserved by public land orders. Section 1602(e) defines public lands to exclude “the smallest practical tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation.”

8. The State of Alaska, pursuant to section 906(e) of the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified at 43 U.S.C. § 1635(e)), was permitted to select federal lands and top filed on the reserved lands within U.S.S. 5251, which included the Site

9. In 1996, the USAF leased the airstrip that had been constructed at the DEW Site to the North Slope Borough, the Alaska municipal body for the North Slope (“NSB”), on a 5-year lease.

10. Commencing on or about the year 2000, the USAF, NSB, and Cully negotiated with the Federal Aviation Administration (“FAA”) for funding to improve and lengthen the runway at Point Lay.

11. In order to assist the NSB in obtaining funding necessary to improve and lengthen the Point Lay runway, following an interagency meeting that included representatives from Cully, NSB, USAF, the Bureau of Land Management (“BLM”) (the federal agency responsible for the management and conveyance of public lands), and the FAA, the Cully Board of Directors adopted Resolution 2002-6 that, *inter alia*, supported leasing the airstrip to the NSB. Attached as Exhibit 1. The meeting notes and subsequent correspondence show that the parties present understood the proposed lease would be specifically for the runway to allow for runway improvement.

12. In Resolution 2002-6, Cully memorialized the parties’ agreement that upon receiving the Site from the USAF, Cully would reconvey the runway portion to the North Slope Borough, with the understanding that (i) NSB was eligible for FAA grant funds to extend the runway under the condition that it either owned the land or held a long-term lease of more than twenty years and (ii) the USAF’s anticipated relinquishment of the property was conditioned on the contaminated lands being remediated to standards set by the Alaska Department of Environmental Conservation (“ADEC”).

13. At all times material to this action, Cully requested of the USAF and BLM that the three buildings known colloquially as the garage, the hangar, and the warehouse (collectively, the “Buildings”), be maintained and not destroyed or demolished, and that the ownership of the Buildings be transferred to Cully at the earliest possible time.

14. Notwithstanding that the Buildings were considered eligible as historic buildings due to the significance and uniqueness of the mission of Point Lay Long Range Radar System, on

or about January 2005 the USAF developed a draft Work Plan that included demolition of all of the buildings on the Site, including the Buildings.

15. On or about March 23, 2005, the BLM informed the State of Alaska and the USAF that the Site would be conveyed to Cully, and of Cully's request that the conveyance include the Buildings, which the USAF agreed to accommodate, subject to further testing.

16. In oral and written statements, the USAF told Cully that transfer of the Buildings was dependent upon completion of the remediation of the garage, and stated that if remediation was not successfully accomplished, the Buildings would be destroyed.

17. Understanding that Cully was willing to accept the Buildings, USAF officials sought funding to remediate contamination within the garage subfloor to residential levels. USAF requested that Cully aver to the possibility of residential use in order to secure support.

18. On or about May 3, 2005, the NSB and USAF executed a long-term lease, ("2005 Lease"). Attached as Exhibit 2. Prior to the execution of the 2005 Lease, on information and belief, the NSB had been notified that all of the Buildings were planned for demolition. NSB vacated the garage and warehouse with the understanding that the Buildings were to be demolished pursuant to Operation Clean Sweep.

19. When the USAF and NSB executed the 2005 Lease, of the three Buildings only the hangar was in use, as a remediation workspace by USAF contractors and by NSB and USAF for cold storage.

20. The 2005 Lease, at Attachment C, provided that the Buildings were "in cold storage status and . . . scheduled for Clean Sweep demolition" pursuant USAF's Operation Clean Sweep. Ex. 2 at 30.

21. The 2005 Lease, at paragraph 2.1, expressly reserved to the Air Force the right to grant outgrants. Ex. 2 at 4.

22. On May 10, 2005, the BLM confirmed to the USAF that pursuant to the enactment of the Alaska Land Transfer Acceleration Act of 2004 (“ALTAA”), Pub. L. 108–452, 118 Stat. 3575 (2004), Cully had a special statutory entitlement to select the Site in fulfillment of its ANCSA land selection rights. The BLM further stated that Cully would receive conveyance of the Site upon completion of environmental remediation. BLM informed the USAF that Cully’s request included conveyance of the Buildings. On information and belief, BLM sent a copy of the letter to NSB.

23. In July 2005, USAF granted Cully a license to enter and remediate the garage. The license, No. 611-CES-LIC-05-14, specifically authorized the excavation and removal of contaminated soil and replacement of contaminated soil with clean fill, and specified at ¶ 2.1: “the use, operation and occupation of the premises pursuant to this License shall be without cost or expense to the Department of the Air Force.”

24. Between March and August 2005, Cully remediated the garage. Over 100 cubic yards of contaminated soil were removed from underneath the garage, and an equal amount of clean gravel installed, at a cost to Cully in excess of \$45,000.

25. Because the Buildings remained in place at Cully’s request, the USAF was able to deviate from its Operation Clean Sweep work plan and reduce its expenditures for the demolition and removal of the Buildings.

26. On or about September 30, 2005, the Alaska Department of Environmental Conservation approved Cully’s remediation of the garage.

27. On or about November 14, 2005, Lt. Col. Kenneth Smith, an authorized officer of an executive department of the federal government, authorized a USAF Form DD-1354 to transfer

the Buildings to Cully (the “DD-1354”). Elsie Hendryx, the President and CEO of Cully, signed the form and accepted the Buildings. Attached as Exhibit 3.

28. On or about March 1, 2006, Col. Joseph Skaja, commander for the Air Force 611th and an authorized officer of an executive department of the federal government, upon obtaining approval from the Installations Facilities Board of the Pacific Air Command for the USAF at Hickam Air Force Base, Hawaii, executed final approval for the USAF Facility Disposal Form for the Buildings. Attached as Exhibit 4.

29. On March 27, 2006, Col. Skaja executed a Letter of Transfer, and Cully through its authorized agent signed an acceptance. Attached as Exhibit 5 (“Transfer Letter”). The Transfer Letter stated, *inter alia*, that the DD 1354 served to “transfer physical custody and accountability of the Facilities to the Cully Corporation.” Ex. 5 at 1.

30. The Air Force transmitted the Transfer Letter to Cully on or about March 28, 2006, indicating that the Buildings had been transferred in “as is” and “where is” condition. Attached as Exhibit 6.

31. Relying upon the Transfer Letter, DD-1354, Facilities Disposal Form, and federal law, as of 2006 Cully undertook care and custody of the Buildings, and at some point subsequently began insuring the same.

32. On March 19, 2007 the USAF, through the 611th Realty Officer, confirmed to Cully in a Summary of Real Estate Actions that Cully owned the Buildings. Attached as Exhibit 7.

33. In January 2013, Cully learned that AECOM, Inc., had entered into a contract with the Air Force for further remediation work and that AECOM was intending to stage heavy equipment in the Cully hangar. Cully contacted AECOM in order to enter into a lease agreement,

explaining that Cully owned the Buildings pursuant the 2006 transfer. On information and belief, AECOM then contacted the USAF.

34. By letter dated March 6, 2013 (the “Takings Letter”), the USAF informed Cully that it had determined the Transfer Letter was not effective and demanded that Cully immediately vacate the Buildings. Attached as Exhibit 8.

35. On information and belief, the Takings Letter was not posted to Cully until weeks later and not received by Cully until on or about April 11, 2013.

36. Cully responded to the Takings Letter by letter on or about April 17, 2013 (“Cully’s Response Letter”) and included copies of the Transfer Letter, the DD-1354, and the approved Facilities Disposal Form as evidence of the transfer. Attached as Exhibit 9.

37. On information and belief, the USAF gave permission to use the Buildings to AECOM and NSB’s contractors without regard to Cully’s ownership rights.

38. Between 2013 and 2019, prior to the filing of this lawsuit, Cully incurred substantial ownership-related expenses, including but not limited to a lawsuit against AECOM in which the Air Force assisted AECOM, all to the great expense and business loss of Cully on account of AECOM’s use of the Buildings and unwillingness to pay rent, and to AECOM and the USAF’s substantial benefit through rent-free use of the Buildings and avoidance of the costs of mobilization and demobilization at Point Lay, to the tune of several million dollars.

39. In September 2019, after this lawsuit was filed, the USAF notified Cully that the Air Force intended to demolish the Buildings (the “Demolition Letter”). Attached as Exhibit 10.

40. The Transfer Letter, the DD-1354, and the approved Facilities Disposal Form effected legal transfer of the Buildings to Cully. Federal law at 40 U.S.C. § 544 provides in relevant part:

A deed, bill of sale, lease, or other instrument by or on behalf of an executive agency purporting to transfer title or other interests on surplus property . . . is conclusive evidence in compliance with the provisions of this Chapter concerning title, or other interest of a bona fide grantee or transferee for value and without notice of lack of compliance.

41. The USAF, as a part of the Department of Defense, is an executive agency.

42. The Transfer Letter was executed by or on behalf of the USAF through the commander of the USAF's 611th CES, under the appropriate chain of command under the Pacific Air Command at Hickham Air Force Base in Pearl Harbor, Hawaii.

43. Cully accepted the USAF's transfer of ownership of the Buildings in good faith, as a transferee for value, and without notice of lack of compliance.

44. Cully has incurred the loss of its property, the Buildings.

45. Cully has incurred expenses in protecting, inspecting and insuring the property, the loss of valuable lease and rental payments, the loss of beneficial income from the funds that Cully expended to remediate the garage, and the litigation expenses incurred with respect to Cully's good faith belief in its exclusive ownership and possession of the property, all pursuant to Cully's reliance on the oral and written manifestations of agreement, the Transfer Letter, the DD-1354, and the Facility Disposal Form, through which the Air Force transferred ownership of the Buildings to Cully.

46. The USAF's use and possession of the Buildings has prohibited Cully's negotiations with the United States Coast Guard, Conoco Phillips, Shell Petroleum, and other potential lessors of the utilization of the Buildings, resulting in present and future business losses.

47. Point Lay, Alaska is located on the coast of Chukchi Sea in the Arctic, with no road access, and limited water access over a few summer months, due to sea ice barring access for most of the rest of the year.

48. Because of the location, structures the size of the Buildings the USAF transferred to Cully have an estimated rebuild value of \$250/sq. ft., or:

Vehicle maintenance shop:	\$ 861,000.00
Hangar:	\$4,398,000.00
Warehouse:	<u>\$1,000,000.00</u>
Total	\$6,259,000.00

based upon 2015 insurable value estimates. Attached as Exhibit 11.

49. Because of the USAF's conduct, actions, and exclusion of Cully from possession of Cully's property, the Buildings have fallen into disrepair, deteriorated, and become unusable.

FIRST CAUSE OF ACTION – FIFTH AMENDMENT TAKING

50. Cully realleges all previous allegations as if fully restated herein.

51. The Tucker Act, 28 U.S.C. §. 1490(a)(1), provides exclusive jurisdiction in the United States Court of Federal Claims for any claims against the federal government to recover damages founded on the Constitution, a statute, a regulation, or an express or implied in-fact contract.

52. The Fifth Amendment of the United States Constitution provides: “[n]or shall private property be taken for public use without just compensation.” Permanent physical occupation of property is a per se taking.

53. Cully had private property interests in the Buildings pursuant to the USAF's transfer to Cully of ownership of the Buildings, as manifested by oral and written manifestations of agreement, the duly and properly authorized Transfer Letter, DD-1354, and the Facilities Disposal Form

54. In reliance upon the USAF's promises that the conveyance of the Buildings was conditioned on successful remediation of the garage, Cully undertook costly remediation efforts to meet applicable environmental standards.

55. The USAF ousted Cully and took exclusive physical dominion and control over Cully's property interests in the Buildings for public use, which falls within the actionable purview and protection of the Fifth Amendment of the United States Constitution.

56. The USAF's permanent physical occupation of the Buildings has caused direct harm to Cully's private property interest, which injury was foreseeable by the government upon receipt of Cully's Response Letter, and at the same time secured a valuable benefit to the USAF.

57. Cully is owed just compensation for the taking from the United States and has not been paid such compensation.

58. Just compensation in these circumstances includes the value of the Buildings, together with all benefits Cully bestowed on the USAF, including but not limited to the saved expenses of mobilization and demobilization of its remediation contractors, Cully's expenses incurred in legal fees to defend title, Cully's insurance expenses, Cully's loss of future business opportunities and interest accruing from the date Cully received the Takings Letter.

SECOND CAUSE OF ACTION - QUANTUM MERUIT

59. Cully realleges all previous allegations as if fully restated herein.

60. The Court of Claims has jurisdiction over *quantum meruit* claims "when a contractor provides goods or services in good faith under an express contract that is later rescinded for invalidity." *Lee v. United States*, 895 F.3d 1363, 1366 (Fed. Cir. 2018) (internal quotations omitted).

61. Cully in good faith and in reasonable reliance on the USAF's promises, assurances, Transfer Letter, DD-1354, and Facilities Disposal Form, performed remediation and accepted the Buildings as is and where is.

62. In so accepting the Buildings as is and where is, and in reliance upon the USAF's promises, assurances, Transfer Letter, DD-1354, and Facilities Disposal Form, Cully incurred costs, lost the beneficial use of the funds that were expended, and conferred significant benefits on the USAF, including savings of the costs the USAF would have otherwise incurred in remediation and demolition of the Buildings, including demobilizing and remobilizing its environmental contractors.

63. In addition to conferring benefits on the USAF in reliance on the promises, assurances, Transfer Letter, DD-1354, and Facilities Disposal Form, Cully incurred expenses in the defense of what it reasonably believed was its good title to the Buildings, and in addition, in advertising and marketing the Buildings for use and lease by Shell Oil, Conoco Petroleum and the United States Coast Guard.

64. The USAF received the benefit of some or all of the services alleged on account of and arising out of Cully's reliance on the promises, assurances, Transfer Letter, DD- 1354, and Facilities Disposal Form, constituting a contract, one the government has declared is rescinded on account of invalidity.

65. Cully is entitled, in *quantum meruit*, to the benefits Cully in good faith conferred on the USAF and that were accepted by the government in an amount as will be established upon the evidence at trial.

PRAYER FOR RELIEF

WHEREFORE, Cully respectfully requests that upon trial on the merits of this case it have and recover from the Defendant:

- A. Actual and economic damages as indicated above;
- B. Attorney's fees;
- C. Fees and costs;
- D. Prejudgment and post judgment interest; and
- E. All other relief to which Cully may be justly entitled.

RESPECTFULLY SUBMITTED this 30th day of June, 2020.

FORTIER & MIKKO, P.C.
Attorneys for Plaintiff Cully Corporation

s/Samuel J. Fortier
Samuel J. Fortier, Alaska Bar No. 8211115
sfortier@fortiermikko.com

s/ Naomi Palosaari
Naomi Palosaari, Alaska Bar No. 1711068
naomip@fortiermikko.com

1600 A Street, Suite 101
Anchorage, Alaska 99501
(907) 277-4222 (phone)
(907) 277-4221 (fax)