BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF TRANSPORTATION AND PUBLIC FACILITIES

In the Matter of:	)	
	)	
SILVER BOW CONSTRUCTION	)	
	)	
v.	)	
	)	
DIVISION OF GENERAL SERVICES	)	
	)	OAH No. 12-0024-CON
	)	Contract No. 209-0222-8489

DECISION AND ORDER ON SUMMARY ADJUDICATION

I. Introduction

Silver Bow Construction was awarded a contract to make alterations to two elevators in the Court Plaza Building in Juneau, Alaska. After completing the alterations, both elevators vibrated when in motion. The Division of General Services (DGS) withheld the final $30,000 payment for the alterations because the vibration was excessive.[1] Silver Bow filed a contract claim asserting that it was entitled to full payment. The contracting officer rejected the claim, and this appeal followed.

DGS filed a motion for summary adjudication asserting that there were no genuine issues of material fact, and that the contracting officer's decision should be upheld as a matter of law. Silver Bow opposed that motion, arguing that there are two issues of material fact to be resolved at a hearing: 1) whether the vibration in the elevators is excessive; and 2) whether the vibration existed prior to the upgrade.

Based on the admissible evidence in the record, and the language of the contract between DGS and Silver Bow, DGS is entitled to a ruling in its favor.

II. Facts

A. Relevant Contract Provisions

A contract was awarded to Silver Bow for the Court Plaza Building Roof Replacement and Elevator Upgrade project.[2] Bidders were required to conduct a pre-bid inspection, including an examination to "determine condition of all retained components" and making "all surveys

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[1] The contract also called for roof repairs, and there was at one time a dispute as to whether those repairs were properly completed. The roof repair issue is not addressed in this decision.

[2] Agency Record at 60.

necessary to meet the requirements of this specification."[3] The elevator cab enclosures were a retained component.[4] However, rubber isolation blocks were to be installed between the car frame and the car enclosure.[5] Silver Bow was also required to "[c]lean down and tighten all frame and side stays bolts."[6]

The contract required Silver Bow to meet certain criteria relative to the operation of the elevators:

> 2. Operating Qualities: Elevator Consultant will judge the riding quality of car and enforce the following requirements. Make all necessary adjustments as requested.
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> a. Acceleration and Deceleration: Starting and stopping shall be smooth and comfortable, without any obvious steps of acceleration. Slowdown, stopping and leveling shall be without jars or bumps. Stopping upon operation of emergency stop switch shall be rapid but not violent.
>
> 1 Vertical Acceleration: Maximum of 4 ft per second squared. Maximum jerk 8 ft per second cubed.
>
> 2) Full speed Riding: Free from vibration and sway[7]

B. Undisputed Facts Related to Vibration

There is no dispute that both elevators vibrate while in motion. DGS' consultant, Paul Pitfield of Pitfield & Associates, noted excessive vibration several times while Silver Bow was working on the upgrade.[8] Silver Bow's subcontractor, ThyssenKrupp Elevator, reviewed the vibration issue and prepared a report dated January 17, 2011.[9] ThyssenKrupp summarized its findings, stating:

> The data provided by the vibration analysis indicates that the platform/cab isolation is compromised. Rather than providing a dampened vibration level, the current status of the platform/cab isolation is magnifying the vibration of the car sling. Rather than expected levels of 25 to 40% reduction of vibrations, the data indicates amplifications of vibration varying from 30 to 88%. The data in the graphs following will indicate the levels of vibration measured at the rigid structure of the elevator car and the platform/cab based on these readings, it is clear that the isolation has failed. The platform/cab frame needs to have new

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3 Agency Record at 501.
4 Agency Record at 481.
5 *Id.*
6 Agency Record at 477.
7 Agency Record at 478 – 479. (Portions of the agency record are numbered in reverse order; the quoted language begins at the bottom of page 479 and ends at the top of page 478.
8 Agency Record at 130, 585, 590, 592, 608, 614.
9 Agency Record at 572 – 576.

> isolation pads and/or adjustment of contact points to achieve the desired dampening of fundamental vibrations.[10]

Silver Bow acknowledges in its opposition that vibrations from the elevator motors must be dampened to provide a smooth ride.[11] Here, instead of dampening, the vibration from the motors is amplified. Thus, it is undisputed that there is some level of vibration while the elevators are in motion.

III. Discussion

A. Summary Adjudication

DGS has moved for summary adjudication. Summary adjudication in administrative proceedings is the equivalent of summary judgment in a civil matter.[12] The party moving for summary adjudication has the initial burden of showing the absence of a genuine factual dispute as to material facts and that the moving party is entitled to judgment as a matter of law.[13] The non-moving party is not obligated to demonstrate that there is a genuine issue in dispute unless the moving party makes its prima facie showing.[14]

> If a prima facie case is established by the movant, then the nonmoving party must set forth specific facts showing that admissible evidence could be produced that reasonably tends to dispute or contradict the moving party's evidence in order to demonstrate the existence of a dispute of material fact and prevent entry of summary judgment. Any admissible evidence in favor of the nonmoving party concerning a material fact is sufficient to render summary judgment inappropriate.[15]

Silver Bow asserts there are two material factual issues to be resolved at a hearing. First, whether the vibration in the elevator is "excessive" as defined by the contract, and second, whether any excessive vibration was pre-existing.

B. Excessive Vibration

In its motion, DGS states: "The contract plainly does identify a specific vibration level – no vibration is permitted."[16] This is an overstatement of the contract requirement, as recognized elsewhere in DGS' motion where DGS states the elevators must be "free from vibration to the

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10 Agency Record at 573.
11 Silver Bow's Opposition at 2. *See also* Agency Record at 2.
12 *In re General Mechanical*, OAH No. 06-0146-INS (Division of Insurance 2007), page 4.
13 *Shade v. Co & Anglo Alaska Service Corp.*, 901 P.2d 434, 437 (Alaska 1995). *See also* 2 AAC 64.250(a).
14 *Id.*
15 *Greywolf v. Carroll*, 151 P.3d 1234, 1241 (Alaska 2007) (internal footnotes omitted). *See also*, 2 AAC 64.250(b) (nonmoving party must show by affidavit or other evidence that a genuine dispute exists).
16 DGS' Motion at 5.

satisfaction of the state's elevator consultant."[17] The contract does permit vibration in the elevators, but only to the extent that DGS' consultant determines is a reasonable or not excessive amount of vibration.

Silver Bow interprets the contract differently. Citing *Kennedy Associates, Inc. v. Fischer*,[18] Silver Bow asserts that in determining whether the amount of violation is reasonable, an objective test – whether a reasonable person would consider the amount of vibration to be excessive – should be used rather than the consultant's judgment.[19]

In *Kennedy*, Richard Fischer, a building owner, was attempting to refinance a construction loan used to add an addition to an existing building.[20] Kennedy Associates, an advisor for several pension trusts, had agreed to provide 90% of the loan funds subject the "inspection and approval" of representatives of the lender.[21] After conducting that inspection, Kennedy Associates decided not to participate in the loan.[22] Fischer sued for breach of contract.[23] The Superior Court found that Kennedy Associates' actions were an anticipatory repudiation of the loan agreement and awarded Fischer damages and attorney fees.

One issue on appeal was whether Kennedy Associates acted reasonably in terminating the contract, and whether Kennedy Associates exercised honest judgment and good faith.[24] The court characterized the agreement as being a classic example of a satisfaction clause: a contract provision that makes an obligor's duty contingent upon the obligor's satisfaction with the obligee's performance.[25] The court held that in the commercial context, whether a condition had been satisfied should be judged by an objective standard.[26]

As in *Kennedy*, the contract in this case contains a satisfaction clause. That clause, however, specifically provides that DGS' consultant would "judge the riding quality of car and enforce the following requirements."[27] One of the requirements to be enforced was that the

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17 Motion at 1 (emphasis added). *See also* Motion at 3 and 4.
18 667 P.2d 174 (Alaska 1983).
19 Opposition at 4.
20 *Kennedy*, 667 P.2d at 177.
21 *Id.*
22 *Id.*
23 *Kennedy*, 667 P.2d at 178.
24 *Kennedy*, 667 P.2d at 180.
25 *Id.*
26 *Kennedy*, 667 P.2d at 181.
27 Agency Record at 479.

elevator be free from excessive vibration.[28] An objective test is not used if, as in this contract, the parties' contract specifically provides for a different method of determining satisfaction.[29] As long as Mr. Pitfield exercised his judgment honestly and in good faith, that judgment is binding on both parties to the contract.

There is evidence that Mr. Pitfield was exercising his judgment in good faith as he ultimately concluded that one elevator did not have excessive vibration.[30] If he were not acting honestly and in good faith, he would have concluded that both elevators had excessive vibration, since both had some vibration and it would be to his client's benefit to have Silver Bow improve the ride quality of both. No evidence has been presented that the consultant's judgment was not exercised honestly and in good faith. There is no genuine factual dispute that the vibration in one of the two elevators is excessive.[31]

In the alternative, even under an objective test of reasonableness there is still no genuine factual dispute concerning excessive vibration. As noted in section II B above, both Mr. Pitfield and ThyssenKrupp agreed that there was vibration. Mr. Pitfield has been a consultant for other elevator projects over the past six years and would be familiar with the expected ride quality of elevators.[32] Mr. Pitfield raised concerns about excessive vibration in both elevators several times, but ultimately concluded that the vibration in Elevator No. 1 was acceptable while the vibration in Elevator No. 2 was not acceptable.[33] This is sufficient evidence to support a finding of an unreasonable amount of vibration under an objective test.[34]

Since DGS made its prima facie case of excessive vibration, Silver Bow needs to come forward with admissible evidence or legal authority to show that DGS is not entitled to prevail as a matter of law. Silver Bow successfully rebutted any claim that the contract required elevators completely free of vibration and instead permitted a reasonable amount of vibration. It did not, however, rebut DGS' evidence that the amount of vibration was not reasonable. Nowhere in Silver Bow's opposition does it even assert that the level of vibration is reasonable in Elevator

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[28] Agency Record at 478.

[29] *See*, *Kennedy*, 667 P.2d at 182 (objective test used unless "precluded by the express terms of the parties' agreement.")

[30] Agency Record at 244.

[31] Just as Silver Bow is bound by Mr. Pitfield's determination as to one of the elevators, DGS is bound by his determination that the other elevator has an acceptable level of vibration.

[32] Agency Record at 613.

[33] Agency Record at 244.

[34] Statements from both Mr. Pitfield and from ThyssenKrupp are considered reliable evidence for the truth of the matter asserted pursuant to 2 AAC 64.290(a)(1).

No. 2, and nowhere does it cite to any evidence that the amount of vibration is reasonable. DGS has made a prima facie case that the amount of vibration is excessive and Silver Bow has not rebutted DGS' evidence.[35] Given the evidence in the record, no reasonable juror could conclude that the amount of vibration is reasonable. DGS is entitled to a ruling in its favor on this issue as a matter of law.[36]

C. Pre-existing Condition

Silver Bow also asserts that a hearing is needed to determine whether the elevators had excessive vibration prior to the work on this project. ThyssenKrupp found that efforts had been made in the past to quiet the elevators, including the addition of "make shift" acoustical panels.[37] ThyssenKrupp also found

- The support rods were not isolated
- Cab walls directly bracketed to Stiles half way down with no isolation.
- Tube steel stringers running alongside platform directly welded to stiles, no isolation
- Platform appeared to have some sort of make shift channel placed between safety plank/stringers running side to side under platform with small pieces of rubber stuffed into it. Feeble attempt at Isolation but not affective [sic].[38]

It could reasonably be inferred from this evidence that the excessive vibration existed prior to any work performed by Silver Bow or ThyssenKrupp.[39] There is a genuine factual dispute as to whether the excessive vibration was a pre-existing condition.

Not all factual disputes are material, however. Silver Bow was required to provide elevators that were free from excessive vibration.[40] It knew that DGS' consultant would be the judge of whether the elevators met that standard. As discussed above, Silver Bow did not meet that requirement.[41]

Silver Bow had an opportunity to inspect the elevators before bidding on the project, including an opportunity to conduct "all surveys necessary to meet the requirements of this specification."[42] Silver Bow had reason to survey at least some elements of the car frame and

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35 *See* 2 AAC 64.250(b) (party opposing summary adjudication must show that a genuine dispute exists).

36 *See Airline Support, Inc. v. ASM Capital II, L.P.*, ___ P.2d ___, Slip Op. No. 6685, at 11 – 12 (Alaska June 29, 2012) (questions of reasonableness should only be resolved on summary judgment if no reasonable juror could reach a different conclusion).

37 Page numbered 758 to Motion to Supplement Agency Record.

38 *Id.*

39 DGS disputes this, and there is evidence to support a contrary conclusion as well.

40 Agency Record at 478.

41 It did not meet Mr. Pitfield's subjective assessment or an objective reasonable level of vibration standard.

42 Agency Record at 501.

enclosure since the contract specified installation of isolation blocks between the frame and the enclosure, and tightening of frame and side stay bolts.[43] Assuming there was excessive vibration during the pre-bid inspection, Silver Bow could have built the cost of correcting that problem into its bid amount, or it could have asked for clarification as to the level of vibration that would be acceptable. Silver Bow knew that it had to provide elevators free of excessive vibration, and that

> Any Work, materials or equipment that may reasonably be inferred from the Contract Documents as being required to produce the intended result will be supplied, without any adjustment in Contract Price or Contract Time, whether or not specifically called for.[44]

Vibration free elevators were specifically called for in the contract, so taking steps to reduce any pre-existing vibration without any adjustment in price could be reasonably inferred as required by the contract. Whether there was excessive pre-existing vibration is not a material fact in this case because Silver Bow was required to correct any excessive pre-existing vibration as part of the contract requirements.

IV. Conclusion

There are no genuine issues of material fact in this matter. Silver Bow was required, as part of the elevator alterations, to provide elevators without excessive vibration. Elevator No. 2 operates with excessive vibration. Accordingly, Silver Bow has not fulfilled all of its requirements under the contract. The contractor properly denied the claim for payment of the retained $30,000.[45] DGS' Motion for Summary Adjudication is GRANTED.

DATED this 29th day of June, 2012.

By: *Signed*
Jeffrey A. Friedman
Administrative Law Judge

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[43] Agency Record at 477 and 481.

[44] Motion for Summary Adjudication, Exhibit J.

[45] Neither party addressed whether the amount retained was appropriate. However, ThyssenKrupp's estimate to fix the vibration problems in both elevators was $80,000. It is reasonable to assume it will cost at least $30,000 to fix the problems in Elevator No. 2, which is the only one with excessive vibration as determined by Mr. Pitfield.

Adoption

This Decision and Order is issued under the authority of AS 36.30.675. The undersigned, on behalf of the Commissioner of the Department of Transportation and Public Facilities and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this 8th day of August, 2012.

By: *Signed*
Name: Marc A. Luiken
Title: Commissioner

[This document has been modified to conform to the technical standards for publication.]