

In the United States Court of Federal Claims

No. 09-122C

(Filed May 23, 2012)

**ROSS M. PONTIE and
GRACE Y. PONTIE,**

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

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Todd P. Lewis, Conner & Winters, LLP, Fayetteville, Arkansas, attorney of record for plaintiffs.

Michael D. Snyder and *Cameron Cohick*, Department of Justice, Civil Division, Washington, D.C., with whom was *Tony West*, Assistant Attorney General for Defendant. *Jeanne E. Davidson*, Director, *Martin F. Hockey, Jr.*, Assistant Director, and *Joseph Anzalone*, of counsel.

OPINION & ORDER

Futey, Judge.

This case comes before the Court following a trial held on January 10–12, 2012 in New Orleans, Louisiana. In the wake of Hurricane Katrina, the United States Postal Service (“the Postal Service”) had certain repairs done to a postal facility in Kiln, Mississippi that it leased from plaintiffs, Ross and Grace Ponthie (“the Ponthies”). The Postal Service claims that the Ponthies are responsible for the cost of those repairs under the lease.

I. Background

The following section constitutes findings of fact in accordance with Rule 52(a) of the Rules of the United States Court of Federal Claims (“RCFC”), and other findings of fact are contained within later sections of this Opinion.

A. *The Lease Makes the Ponthies Responsible for Hurricane Repairs.*

On June 18, 1996, the Ponthies and the Postal Service signed a twenty-year lease for the post office in Kiln. JX 19 at 263.¹ Rent was set at \$60,000 per year, payable at \$5,000 per month. *Id.* The lease's term began on August 22, 1997 and is scheduled to run until August 21, 2017. *Id.*

Under the parties' lease arrangements, the Postal Service owned the land under the post office building and leased it to the Ponthies, while the Ponthies constructed and owned the post office building and leased both it and the land to the Postal Service. *See* Tr. 113:13–14 (“There’s a ground lease involved, because the Postal Service owns the land under the building.”)²; JX 19 at 291 (“The purpose of this Ground Lease . . . is to allow Ground Lessees to build a building upon said land and Lease said building and lands to USPS.”). At the end of twenty years, the post office building would become property of the Postal Service, and the ground lease would terminate. JX 19 at 291. This was the first time Ross Ponthie had worked with such a lease arrangement. Tr. 113:19–20. He estimates that he had a “[t]otal development cost” of approximately \$300,000 to \$325,000 and that he spent “roughly” \$175,000 on the “structure itself.” Tr. 42:11–15.

As the ground lessees, the Ponthies were required to maintain \$500,000 in both personal injury and property damage insurance, but they were not required to maintain hurricane insurance. *See* JX 19 at 292; Tr. 132:15–19. At the time of Hurricane Katrina, the Ponthies did not have “[i]nsurance for hurricane damage” and were aware of this fact. Tr. 120:20–21; *see also* Tr. 121:25–122:1 (“I got caught in between that period of not having insurance.”). The cost of insurance had recently gone up, and Ross Ponthie testified that not carrying it was a “risk” that he took. Tr. 119:7.

The Ponthies also had certain maintenance responsibilities for the post office. *See* Tr. 46:14–16. Paragraph A.23 of the lease provides:

A.23 DAMAGE OR DESTRUCTION OF PREMISES

If the demised premises or any portion thereof are damaged or destroyed by fire or other casualty, Acts of God, of a public enemy, riot or insurrection or are otherwise determined by the Postal Service to be unfit for use and occupancy, the Postal Service may:

¹ Citations to “JX” refer to the Joint Exhibits submitted at trial. Citations to “DX” refer to Defendant’s Exhibits submitted at trial. The Ponthies did not submit individual exhibits.

² Citations to “Tr.” refer to the trial transcript. *See* Tr. vol. 1, Jan. 11, 2012, ECF No. 61; Tr. vol. 2, Jan. 12, 2012, ECF No. 63.

- a. terminate this lease as of the date the premises became unfit for use and occupancy,
- b. require the Lessor to repair or rebuild the premises as necessary to restore them to tenantable condition to the satisfaction of the Postal Service. For any period the premises, or any part thereof, are unfit for use and occupancy, the rent will be abated in proportion to the area determined by the Postal Service to be untenable. Unfitness for use does not include unsuitability arising from such causes as design, size, or location of the premises, or
- c. accomplish all repair necessary for postal occupancy and deduct all such costs, plus administrative burden from future rents.

JX 19 at 277. This paragraph is contained within the “General Conditions to USPS Lease” section. *Id.*

The lease also contained a more specific “Maintenance Rider.” *Id.* This rider states that “[t]he Postal Service is responsible for ordinary repairs to, and maintenance of the demised premises except for those repairs that are specifically made the responsibility of the Lessor in this Lease.” *Id.* The term “demised premises” is defined to include “the premises described in the Lease, the improvements and appurtenances to such premises and all equipment and fixtures furnished, or to be furnished, by the Lessor under this Lease.” *Id.*

The Maintenance Rider makes the lessor responsible for certain repairs, including “[r]epairs resulting from Acts of God.” *Id.* In general, the rider requires notice in situations when the lessor is responsible for repairs: “When the need arises for repairs which are the responsibility of the Lessor . . . the Postal Service will (except in emergencies) give the Lessor written notice of the needed repairs and will specify a reasonable deadline for completion of the work.” *Id.* The rider also outlines what happens if the lessor does not make the needed repairs:

If [the lessor does not] proceed with the work with such diligence so as to ensure completion within the time specified in the notice . . . or actually fails to complete the work within said time, the Postal Service has the right to perform the work, by contract or otherwise, and withhold the cost of such work (which may include administrative cost and/or interest) from payments due under this Lease.

Id. This provision, which allows the Postal Service to deduct the costs for repair work, mirrors Paragraph A.23 of the main body of the lease. *See id.* at 277 (allowing the Postal Service to “accomplish all repair necessary” and “deduct all such costs” from future rents).

Prior to Hurricane Katrina, the Postal Service had never invoked the emergency exception in dealings with the Ponthies. Tr. 55:16–19. Normally, when dealing with lessors, the Postal Service’s real estate office would call and then send a letter if repairs needed to be completed. Tr. 143:8–13. The Postal Service’s only interactions with the Ponthies related to repairs had been through that normal process.

B. Hurricane Katrina Damaged the Kiln Post Office.

Hurricane Katrina hit the Gulf Coast on August 29, 2005. DX 5 at 1. According to the Federal Emergency Management Agency, it “was the most destructive—and costly—natural disaster in U.S. history.” *Id.* Hundreds of thousands of local residents were displaced. *Id.*; Tr. 60:1–7. Travel was difficult or impossible. Tr. 60:20–21, 122:23. Laborers were difficult to find. Tr. 122:25–123:5. In total, more than sixty postal facilities were affected by the hurricane. Tr. 269:9.

Katrina’s effects extended to Kiln, Mississippi, a small town approximately sixty miles northeast of New Orleans. The high-water mark there reached twenty feet above sea level. Tr. 130:17–21. Kiln also experienced a groundwater flood. Tr. 127:10. This type of flood occurs when water flows into a building from the ground, instead of coming through the roof, as rain might. Tr. 274:23–275:2. Groundwater floods can be particularly dangerous because the water entering a building may have come into contact with dead bodies and other disease-carrying environmental contaminants. Tr. 275:11–276:1. This puts workers at a risk for hepatitis and other diseases. Tr. 275:17.

Jerry Goddard was the first person to arrive at the Kiln post office and observe the damage there. Goddard has been a Postal Service employee since 1986, Tr. 262:10, and has been involved in construction projects for over 400 post offices, Tr. 265:17, as well as repairs at approximately 4,000 different facilities. Tr. 266:16–25. Prior to Katrina, he had worked to restore postal facilities after four different hurricanes. Tr. 272:15. During Katrina, he was personally involved with restoration work at approximately two dozen facilities. Tr. 192:22–23.

Goddard first arrived at the post office on September 7, 2005, but the building was locked. Tr. 194:1–7. He came back the following day and met Postmaster Rick Baker and was able to enter the building. Tr. 194:16. When he entered the post office, he could see wet carpets, Tr. 285:18, ducts dripping water, Tr. 286:13, wet mail on pallets, Tr. 196:21–25, and toppled hampers of mail. Tr. 197:4–5. The water line on the walls was approximately four feet high. Tr. 280:18–22. A layer of mud was spread throughout the building. Tr. 197:10–13.

At times, that layer was thin, but it was also substantial around equipment. Tr. 198:8–9. Where the mud had exited the building, it was two to three inches deep. Tr. 197:11–12. The fixtures inside had also delaminated and been severely damaged by the water. Tr. 281:4–9. On the grounds of the post office, trees had toppled, and there were substantial piles of brush, branches, and other debris. Tr. 199:24–200:2. Standing water also remained on some parts of the property. Tr. 279:11–23.

C. Contacts Between the Ponthies and the Post Office, as the Kiln Facility is Repaired.

The first attempt to contact the Ponthies also occurred on September 7. JX 38 at 119. Deborah Echols, the Postal Service employee in charge of contacting the Ponthies regarding maintenance needs, called the Ponthies but only got their voicemail. The call log notes that she “[l]eft message on home and cell numbers regarding damage and to call me back.” *Id.* Two days later, on September 9, Ross Ponthie called her back. *Id.* According to the call log, he “said he was in the area and wanted to check on all the damages to this facility” and that “he would try to contact [the Postmaster] because the State police had turned them away and it is hard to find workers in the area.” *Id.* Ross Ponthie recalls that they discussed “some minor roof damage” and that he “just assumed there wasn’t much” damage and thought Echols “would have told [him] more” if the damage had been extensive. Tr. 57:19–24. According to Ponthie, Echols had told him that he needed to “get down here right away and do whatever it is” he needed to do. Tr. 65:1–2.

Also on September 9, Goddard asked the URS Group, a contractor the Postal Service was using for hurricane cleanup at other facilities, to begin to mobilize a repair of the Kiln facility. JX 37 at 1313. Using a subcontractor, Clean Harbors Environmental Services, Inc., URS Group performed substantial work at the Kiln facility from September 13 through September 16. *Id.* at 1313–16. No Postal Service employee contacted the Ponthies about these repairs before they were completed, nor did Ross Ponthie visit the post office before their completion. The cost of this work would eventually reach \$241,538.76, and is detailed below. *See* JX 48. During this same time period, the Postal Service also hired Tony Watson Electric, Inc. to perform work at the Kiln facility. As discussed below, that work began with emergency repairs to the roof and then continued through April 2006.

As work progressed, the Kiln facility gradually began to re-open. By mid-September, the Postal Service served customers out of a pop-up tent outside of the facility. Tr. 242:1. Customers could pick up their mail, but there was no delivery, no access to postal boxes, and no computer access. Tr. 242:3–4. The next step in the reopening was to set up mail tables inside the actual facility and serve customers through the front door, although customers still could not enter the building. Tr. 243:17–25. By the end of September, as the building dried and was cleaned, customers could enter the building to pick up their mail. Tr. 244:3.

Postal equipment for selling stamps and inventorying had not yet been put back. Tr. 251:15–22. The facility’s computers were hooked up by Tony Watson Electric sometime between October 7 and October 21. *See* JX 51 (including “[h]ooking up power for computers” on an October 21 invoice).

Contact with the Ponthies was sporadic, as the repairs progressed and the facility reopened. As noted above, Deborah Echols and Ross Ponthie spoke about needed repairs on September 9, but the next attempt at contact did not occur until September 19, after URS had completed their work. Tr. 59:16–20 (testimony of Ross Ponthie that he had “[n]o notice whatsoever and no knowledge” that URS Group was working at the facility). Echols called Ponthie on September 19, September 20, September 21, and September 22 but was not able to reach him. JX 38 at 118. According to the call log, she left several messages regarding the repairs, and sent a fax on September 22, although that document has not been submitted to the Court. *Id.* Echols finally spoke with Ponthie on Friday, September 23, and he said that he had been out of a zone with cell phone coverage, and told Echols that “he has not had the opportunity to get to the facility to see what the damages are to know what he will be able to do.” *Id.* He did, however, plan to head to Kiln on the following Monday and told Echols he would call the day after that. The call log does not indicate that a call took place, nor does Echols' testimony. *Id.*

Ponthie was able to visit the facility around October 7, although it was not established that he met with any Postal Service employees during that visit. The next entry in the log, on October 17, notes that Chris Hosford, a project manager for the Postal Service, had spoken with Ponthie, who “indicated that he anticipated bringing a crew into Kiln this week to make roof replacement.” *Id.* That crew never arrived at Kiln. A November 15, 2005 email to Hosford from another Postal Service employee, Bryan Pease, notes that Pease has “two more messages in with Ross Ponthie asking for status” and asking “why the roofer did not show up or why they are not on the roof today.” JX 59 at 729. The record also reveals continuing concern by Hosford and others about the leaking roof putting the other repairs at risk. *See id.* at 730 (“\$350,000 of dry-up/clean-up is at risk I say we get a roofer.”).

The next attempted contacts with the Ponthies occurred in December. The call log notes numerous attempted calls and voicemails left for Ross Ponthie on December 13, 14, 15, and 16. On December 14, Echols wrote, “Called lessor again, someone had me holding for Ross, then the call was disconnected. Called back, no answer. Called his cell phone and left a message regarding the work being completed by 12/30/05 or USPS will have to go forward and complete the job.” JX 38 at 118.

Echols then sent written notice on December 15, 2005. JX 63 at 137. The notice said, “We have been unable to reach you by phone regarding the roof work at the above facility.” *Id.* The letter requested work to be completed by December 30, 2005, and stated that the Postal Service would contract to have the

work completed by a third-party and then withhold the cost. Ponthie, however, apparently did not receive this notice until January 3, 2006, when he signed a certified mail receipt for the letter. *Id.* at 138.

After Ponthie received the letter, he did not complete the work. A January 23 email from Echols to Jody Sloan, a Postal Service contracting officer, notes that Ponthie had said that “he is working as hard as he can to take care of the remaining repairs which he feel[s] are minor compared to what is happening in the area.” JX 71 at 738. He also had told Echols that “it is extremely hard finding workers to make small repairs.” *Id.*; *see* Tr. 181:15–23. The Postmaster at Kiln, Richard Baker, wrote back that “[w]hether the remaining repairs are minor or not has no bearing on this” and expressed his frustration that Ponthie “has been aware of what needed to be taken care of since right after the hurricane.” JX 71 at 737.

Since the work was not completed, the Postal Service sent more notices and then proceeded to have the work completed. Jody Sloan asked Echols on January 24 to send Ponthie a letter with a “drop dead” date demanding that the repairs be made by a certain date. *Id.* This letter, dated January 26 and received on February 2, asked for completion by February 16 of certain itemized repairs and informed Ponthie that the Postal Service would have the repairs completed themselves and the cost withheld, if he did not complete them. JX 75. Ponthie did not complete this work, and the Postal Service sent a letter on March 3 notifying him that they would complete the requested repairs themselves. JX 85. In April 2006, the Postal Service used Tony Watson Electric to complete these repairs. *See* JX 95; JX 96.

After these repairs were made, the Postal Service started the process of trying to collect the cost of the repairs from the Ponthies. An October 19, 2006 letter from Sloan to the Ponthies stated that “the Postal Service has commenced deferred maintenance repairs” and that the “current cost of the repairs, plus administrative costs and appropriate interest, is \$204,033.73.” JX 115 at 108. In response, Ross Ponthie sent a letter on November 27, 2006 objecting to the charges because “the Postal Service is on track to spend more to repair the alleged damage than the costs to build the entire facility in the first place.” JX 116 at 107. The Postal Service again demanded payment on December 11, 2006. JX 119 at 105.

Contracting Officer Jean Scholl Berg eventually issued a final decision on March 3, 2008 and held the Ponthies responsible for \$371,526.47, which includes \$320,908.11 for the repair costs and \$50,618.36 in interest. JX 132 at 87. She found that the Ponthies were “responsible to repair the facility following Hurricane Katrina” and “were provided ample notice and opportunity to complete the required repairs but failed to do so.” *Id.* The Postal Service began withholding \$4,953.69 in rent per month, out of the \$5,000 monthly rent, in April 2008. JX 134 at 154. The deductions will continue until April 2014. *Id.*

The Ponthies filed suit in this Court on March 2, 2009. The government filed an answer and counterclaim on June 30, 2009. After discovery, the government filed a Motion For Partial Summary Judgment on November 22, 2010, and the Ponthies filed a Motion For Summary Judgment on the same day. The Court denied both on April 12, 2011. Trial proceedings began with a site visit to the Kiln post office on January 10, 2012 and continued in New Orleans, Louisiana on January 11 and 12, 2012. The parties each submitted post-trial briefs on March 1, 2012, responses to those briefs on March 26, 2012, and replies to the briefs on April 5, 2012.

II. Discussion

The Postal Service claims that the Ponthies are responsible for the entire cost of repairs done to the Kiln post office. These repairs total \$371,526.47, including interest. The Ponthies assert that the repairs were, for the most part, not covered by the terms of the lease, and that the Postal Service never gave them written notice of most of the needed repairs, as the lease requires. They also claim a breach of the implied covenant of good faith and fair dealing.

A. *Under the Lease, the Ponthies are Financially Responsible for Hurricane Repairs, and the Postal Service must Give them Written Notice, Except in Emergencies.*

“Contract interpretation begins with the plain language of the written agreement.” *McHugh v. DLT Solutions, Inc.*, 618 F.3d 1375, 1380 (Fed. Cir. 2010). A court construes a contract in order to “effectuate its spirit and purpose” and “giving reasonable meaning to all parts of the contract.” *Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002). Unless a provision is ambiguous, a term’s “plain and ordinary meaning” controls. *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 824 (Fed. Cir. 2010). A court may use dictionary definitions when interpreting a contract. *See Metro. Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1259 (Fed. Cir. 2006).

Under the lease’s Maintenance Rider, the Postal Service bears general responsibility for “ordinary repairs” to the “demised premises.” JX 19 at 287. These premises include “the premises described in the Lease, the improvements and appurtenances to such premises and all equipment and fixtures furnished, or to be furnished, by the Lessor under this Lease.” *Id.* As noted in the Court’s earlier opinion, “repair” can mean “to restore by replacing a part or putting together what is torn or broken” or “to restore to a sound or healthy state.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1923 (2002); *see Ponthie v. United States*, 98 Fed. Cl. 339, 344 (2011) (discussing what a “repair” can be).

The Ponthies, however, do have responsibility for certain types of repairs in the Maintenance Rider. This includes “[r]epairs resulting from Acts of God.” JX 19 at 287. Acts of God include hurricanes. *See BLACK’S LAW DICTIONARY* 39 (9th ed. 2009) (defining “Act of God” as an “overwhelming, unpreventable event

caused exclusively by forces of nature”). Furthermore, in the main body of the lease, paragraph A.23 states that the Postal Service may “require the Lessor to repair or rebuild the premises as necessary to restore them to tenantable condition to the satisfaction of the Postal Service” after damage or destruction by an Act of God. JX 19 at 277.

The Postal Service normally must give the Ponthies “written notice” of repairs for which the Ponthies are responsible. *Id.* at 287. The notice must also give them a “reasonable deadline” for completion of the work. *Id.* If the work is not completed on time or if the Ponthies do not “proceed with the work with such diligence so as to ensure completion” by the deadline, then the Postal Service may have the repairs done, and withhold the cost. *Id.*

In an “emergency,” however, the Postal Service is not obligated to give the Ponthies written notice before completing a repair. *Id.* An “emergency” is “an unforeseen combination of circumstances or the resulting state that calls for immediate action.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 741 (2002). The Ponthies argue that, even if written notice is not required in an emergency, the lease “does not address whether the costs of repairs made during an emergency may be deducted from rent.” Pl.’s Post-Trial Br. 4 n.6. The Maintenance Rider, however, tasks the Ponthies with general financial responsibility for “[r]epairs resulting from Acts of God.” JX 19 at 287. The lease also allows the Postal Service to “withhold the cost” of uncompleted repairs “from payments due under this Lease.” *Id.* Although the Ponthies are normally protected by the notice provision, the Postal Service is not obligated to provide them notice in the limited situation of an emergency. *See id.* (requiring notice “except in emergencies”). Nothing in the Maintenance Rider indicates that their normal financial responsibility for repairs would change if the emergency exception applies. This reading of the Maintenance Rider is consistent with Paragraph A.23, which simply states that “[i]f the demised premises . . . are damaged [by] Acts of God . . . the Postal Service may . . . accomplish all repair necessary for postal occupancy and deduct all such costs, plus administrative burden from future rents.” *Id.* at 277.

Thus, under this lease, the Ponthies are responsible for repairs to the premises needed because of hurricane damage. The Postal Service must give them written notice, unless there is an emergency that requires immediate action. If the Ponthies were due written notice and not given it, they are not financially responsible for the repair. If the Ponthies were not due written notice because of an emergency, they are responsible for emergency repairs.

B. Work Performed on the Kiln Facility

The Postal Service had work performed on the Kiln facility by two different contractors, URS Group and Tony Watson Electric, between mid-September 2005 and April 2006. The Postal Service is now deducting the cost of these repairs from rent owed to the Ponthies. For each repair expenditure, it is

necessary to determine: (1) whether this was the type of “[r]epairs resulting from Acts of God” for which the Ponthies are responsible; (2) whether the Ponthies were due written notice of the repair, or whether an “emergency” situation relieved the Postal Service of that obligation; and (3) if the Ponthies were due written notice, whether they performed the repair, or whether the Postal Service was able to perform the repair itself due to the Ponthies’ failure.

1. The Ponthies are Responsible for the Majority of URS Group’s September 2005 Work.

URS Group with its subcontractor Clean Harbors Environmental Services, Inc. (collectively, “URS Group”) performed extensive work at the Kiln facility from September 13–16, 2005. URS originally asked for \$386,119.16 in payment, but Jerry Goddard negotiated this price down to \$241,538.76. JX 48. Goddard authorized payment on March 21, 2006 in that amount. JX 87. Goddard also observed this work as it was being done. Tr. 321:17. As discussed below, the Ponthies are responsible under the Maintenance Rider for most of URS Group’s work, except for work involving the cleaning of the Post Office’s personal property.

a. URS Group Completed Extensive Repairs of the Kiln Facility from September 13 through September 16.

URS Group’s work involved primarily removing material from the building and its exterior, disposing of or cleaning that material, cleaning and drying the inside of the building, and then reintroducing salvageable material to the building. The Maintenance Rider makes the Ponthies responsible for “[r]epairs” to “the improvements and appurtenances to such premises and all equipment and fixtures furnished” by the Ponthies. JX 19 at 287. Those premises include the “one-story masonry building” as well as the floor space, platform, parking and maneuvering area, driveway, landscaping, sidewalks, and joint use/common areas. *Id.* at 263. The Ponthies also are responsible for furnishing the “Heating System, Air Conditioning Equipment, Light Fixtures, Sewerage [sic] System, Electrical System, Water System.” *Id.* at 264; *see also* JX 139 at 1141–42 (detailing fixtures to be provided by the Ponthies). Except for certain work related to the Postal Service’s personal property, the Ponthies are responsible for this work.

URS Group began their work on September 13, 2005. On that day, they cleaned the exterior of the facility, which included “the cutting and removal of broken tree branches, the removal of excessive leaves and trash . . . , debris that drifted onto the property, and the removal of silt and standing water from all of the parking areas.” JX 37 at 1315. This exterior falls under the Ponthies’ lease obligations, and they are responsible for these repairs. *See* JX 19 at 263 (including “driveway” and “landscaping” and “sidewalks” within the leased premises). On that first day, URS Group also removed all of the water-laden material from inside of the building, as well as furniture and fixtures. JX 37 at

1315. If this material had not been removed, mold growth would have continued inside the building. The Ponthies are thus responsible for the costs related to removing this material from the building. Finally, on the first day, URS Group “cleaned, restored, and disinfected” the “letter cases, work stations, and salvageable furniture.” *Id.* The Ponthies’ responsibility for these items, which includes the cleaning of purely personal property, is discussed below.

The next part of URS Group’s work, which began on September 14, focused on the removal of debris and cleaning of the interior of the post office. The workers removed “water-impacted building materials, such as damaged dry wall, Masonite™ (pegboard), wood finishes, paper, etc.” *Id.* As the workers disposed of the material, an intensive drying and cleaning took place of the inside of the facility. The company used a “vacuum truck” to “remove the silt, sludge, and liquids from the facility” and the exterior areas. *Id.* The waste filled five 25-yard roll-off containers. *Id.* The Postmaster also attempted to restore water service to the building, but the pipes were still leaking and had to be capped. *Id.* at 1315–16. All of this work falls under the Maintenance Rider. The Ponthies are responsible for repairs to the “building” and exterior, JX 19 at 263, and to the “Water System.” *Id.* at 264. These repairs were aimed at fixing those areas, and the Ponthies are responsible for the bills related to them.

The final part of URS Group’s work was moving “the cleaned work stations, furniture, and letter cases back into the facility.” JX 37 at 1316. This work also involved personal property.

b. The Ponthies are not Responsible for Cleaning the Postal Service’s Personal Property.

Some of the work that URS Group performed involved cleaning the Postal Service’s personal property, but the Ponthies are not financially responsible for the repairs of this property. The lease does not include personal property within the Ponthies’ responsibilities, and Postal Service witnesses at trial essentially agreed with this. *See also* Tr. 45:14–22 (noting that the Ponthies did not provide “personal property” of the Postal Service). For instance, Contracting Officer Berg, when asked whether she had considered reducing the amount of the URS Group bill that she asked the Ponthies to pay for because of the “work done on the personal property of the Postal Service,” responded that she did not because it was only an “insignificant” portion of the bill. Tr. 526:19–527:4. When asked why she would “ask the Ponthies to pay something that they’re not obligated to pay,” she responded that it was because the URS bill “was not broken down.” Tr. 527:17–22; *see also* Tr. 533:8–9 (“In my determination, the majority, if not all, the work was the obligation of the Ponthies.”).

Repairing the building, for which the Ponthies are responsible, necessarily involved removing water-laden personal property from it. *See* Tr. 455:15–17 (“[Personal property] had to be removed in order to be able to take the rest of the debris out of the building.”); Tr. 526:3–9 (“It would, of course, involve moving it

out, because there's no way you can replace floor covers and do the kind of work that was done in that building, removing drywall and stuff, without removing it. It's kind of like if you put carpet in your house, you move your couch out. Well, you would move everything out to do the work in the building.”).

URS Group also, however, cleaned and reintroduced this personal property into the building. *See* Tr. 407:24–408:1 (noting that the personal property was removed both “to afford room in the workroom to remove the wet materials” and “to clean and sanitize” it); Tr. 296:4–7 (“We didn’t bring in new equipment. We simply cleaned what was there. It was hard metal surfaces for the most part, so we were able to clean it and disinfect it, and reintroduce it into the building.”). Since cleaning the personal property and bringing it back into the building was not a necessary part of repairs for which the Ponthies are responsible under the lease, they are not financially responsible for the cleaning and reintroduction of the personal property.

At trial, testimony established that the work involving personal property represented about five percent of the total bill, and the Court will thus reduce the amount owed by the Ponthies for the URS Group’s work by five percent. The personal property cleaning was a rather “insignificant” portion of that total bill. Tr. 527:4. Jerry Goddard, who witnessed the URS Group work, testified that “less than 5 percent, maybe 3 or 4 percent” of the work was related to personal property. Tr. 338:20–22. The work did not involve cleaning “upholstered furniture” that might be complex to clean, but instead involved the “wiping down of metal cases.” Tr. 526:23–527:4. In October 2006, Contracting Officer Jody Sloan had asked the Ponthies to pay only half of the URS Group bill and noted on a chart with a breakdown of repairs that, of the URS Group bill, there was “1/2 attributable to USPS personal property.” JX 115 at 109. The letter that this note was attached to, however, was not a Final Decision. *See* JX 114 at 116 (noting that this letter was “not the CO final decision letter”). Furthermore, testimony established that contracting officers frequently offer to accept less than the full amount from a lessor in an effort to settle disputes. Tr. 412:5–10 (“[T]his could have been considered a part of the negotiation process” by offering “less to try to settle.”); Tr. 548:20–23 (noting that contracting officers “sometimes make offers as part of settlements”). The descriptions of work done also contain minimal references to cleaning personal property. *See* JX 37 at 1315–16. The Court therefore will reduce the URS Group bill by five percent.

c. An Emergency Existed at the Time the URS Group Completed its Work.

Although the Ponthies are normally due “written notice” of repairs needed, this notice does not need to be provided where, as here, an “emergency” exists. JX 19 at 287. As noted above, an emergency situation is one that requires “immediate action.” *See* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 741 (2002) (defining “emergency” as “an unforeseen combination of circumstances or the resulting state that calls for immediate action”). An

emergency situation certainly existed in Kiln in early September because of the general chaos caused by Hurricane Katrina and because of the specific dangers and damage done to the Kiln post office.

As described above, the chaos following Katrina was well established at trial. *See* DX 5 at 1 (Katrina “was the most destructive—and costly—natural disaster in U.S. history.”); Tr. 58:7–10 (roads to Kiln “blocked” by the police); Tr. 60:5–7 (“And at that time, it was pretty chaotic down there. I mean, New Orleans had been destroyed. People were displaced.”); Tr. 60:19–21 (“I couldn’t even get out of my own street for three, four days, because there were trees down all over it.”); Tr. 122:25–123:5 (“And it was difficult to find laborers . . . [E]verybody’s lives were, you know, in disarray because of the destruction that happened.”); Tr. 269:5 (Katrina was “[t]he mother of all hurricanes.”); Tr. 192:14–15 (testifying that 50 to 60 postal buildings were damaged); Tr. 294:2–12 (stating that contractors were having a hard time securing “places to dump” trash).

The situation at Kiln was similarly dire. The groundwater flood posed a large danger of environmental contamination, and required use of workers with specialized knowledge. Tr. 304:7–9; Tr. 305:16–17. The damage to the inside of the building, as well as the grounds around it, was extensive. *See* Tr. 285:18 (soaked carpets); Tr. 286:13 (ducts dripping water); Tr. 197:10–13 (mud throughout the interior); Tr. 199:24–200:2 (toppled trees, branches, brush, and debris around the exterior); Tr. 280:18–22 (four-foot water line); JX 37 at 1323 (picture showing “[e]vidence of mold damage” under the water line). If the removal work was not performed quickly, “the humidity . . . would promote mold growth” and cause further damage to the building. Tr. 277:10–24; *see also* Tr. 299:6–7 (testifying that if the damaged materials were not removed “then we will continue to have the mold growth in there”).

Jerry Goddard, who had previous hurricane experience and had worked thousands of different repair projects, testified that the work had to be done “as quickly as possible.” Tr. 299:5–7. He also testified that he was unhappy with the slow speed of the demolition work, since he had not initially realized the severity of the damage. Tr. 300:21–25 (“If I had known that it was this wet, I would have wanted it out quicker than we got it out. I mean, we literally try to hit the building, get the wet materials within hours to several days, because—and as you saw, we had already begun to get some mold growth in there.”). A delay in working at Kiln not only jeopardized the integrity of the facility itself and risked further damage, but imperiled the access of local residents to social security checks, subsistence assistance, and other important governmental services. Tr. 301:10–13. It was thus critical that the building be repaired immediately, before damage worsened. The Court finds that the emergency exception to the notice provision applied.

d. The Postal Service Negotiated the URS Group Bill Down to a Reasonable Level.

URS Group initially asked the Postal Service for \$386,119.16, but the Postal Service negotiated this bill downwards by nearly forty percent. Jerry Goddard stated that the Postal Service “refused” to pay the original proposal because they felt it was too high. Tr. 220:25. According to Goddard, there were far “too many people working” at Kiln, and the original proposed price was thus unjustified. Tr. 229:1–2. While a company did need “a certain amount of manpower,” Tr. 277:5–7, to be able to quickly remove all of the damaged material from a building, Goddard felt that there were “30 to 40 percent too many people” at the site. Tr. 331:15–16. Therefore, the Postal Service negotiated that “initial proposal” down to a level that they felt was reasonable. Tr. 220:20–22. Goddard, who was in charge of the negotiations, also testified that it was common to negotiate prices down. Tr. 222:12–13 (“We normally have to have them reduce their bill. Yes. It’s part of the negotiation process.”). The end result of the negotiations was something that Goddard felt was a “reasonable number for the work that had been accomplished.” Tr. 226:21–22. The amount that the Postal Service finally agreed upon, \$241,538.76, was approximately a 40 percent reduction from the original \$386,119.16. JX 48. This reduction is comparable to Goddard’s assessment that URS Group had 40 percent more workers than were actually needed.

Much of the Ponthies’ concern with the work done by URS Group focuses on that final cost. Ross Ponthie testified at trial that he thought he could have done the repair work to the roof for \$40,000 and cleaned inside for \$10,000. Tr. 89:6–22. He also thought that he “could have torn the whole building down and built it back for 175,000.” Tr. 78:3–4. Jerry Goddard, who has much more extensive experience with repair work at postal facilities than Ross Ponthie, disagreed. Tr. 362:23–24. Goddard also did not think the Postal Service would have allowed a nonprofessional group to do the environmental cleanup of Kiln due to the potential dangers from the groundwater flood. Tr. 363:7–9. Furthermore, Ross Ponthie’s estimates are not based on first-hand knowledge, since he was not able to see the Kiln facility until a month after Hurricane Katrina had hit and several weeks after URS Group had performed their work. When he finally saw it, “much of the repairs had been performed.” Tr. 127:1–3. His estimates are far more relevant to what repair work might cost in an ordinary situation, but this repair work occurred in a most extraordinary situation. As Ponthie himself testified, Katrina created “chao[s],” and it is unsurprising that emergency work would come at a higher cost. Tr. 60:1–7. Finally, even if Ross Ponthie could have himself performed the work at a lower cost, that fact is legally irrelevant. The legally relevant question is whether the requirements of the lease were followed: whether this is work the Ponthies were responsible for and whether notice was needed.

The Ponthies are thus responsible for the URS Group bill. This bill totaled \$241,538.76. JX 48. As noted above, the Court will reduce this bill by five

percent because the Ponthies are not responsible for cleaning the Postal Service's personal property. The Ponthies thus bear responsibility for \$229,461.82 of the URS Group bill.

2. The Ponthies are Responsible for some of Tony Watson Electric, Inc.'s Work.

Unlike URS Group, Tony Watson Electric performed work on multiple occasions.

a. September 21, 2005 Invoice

Tony Watson billed the Postal Service \$1,066.34 on September 21, 2005, JX 41 at 68, and Jerry Goddard authorized payment for this work on October 17, 2005. JX 49. The exact date of this work was not established, but it was the first work performed on the building. Tr. 343:8–9 (testifying that “nothing had been done” prior to this work). The work thus must have been performed before September 13, 2005, when URS Group began its repairs.

The work represented on the invoice is the type of repair the Ponthies are responsible for under the lease. The work included initial repairs to the roof: cleaning debris off of the roof, rolling felt, labor, and travel expenses. JX 41 at 68. Under the lease, the Ponthies are responsible for repairs to the premises, which includes the “building.” JX 19 at 263. The Ponthies apparently agree that emergency repairs to the roof would fall under their obligations. *See* Pl.'s Post Trial Br. 16 (“[T]he placing of felt on the roof . . . is a classic example of how the system is supposed to work.”). They, however, contest the \$70.16 in grocery expenses and \$241.62 in fuel expenses that Tony Watson included on the invoice. JX 41 at 68. The invoice acknowledged that Watson had “averaged out the grocery/fuel/miscellaneous for all offices and put a portion on each invoice where TWE worked.” *Id.* These costs are part and parcel of the repair work done. At the time these initial repairs were done, it was difficult to find laborers, and many roads were closed. *See* Tr. 60:20–21; 122:23–123:5. Higher expenses are thus not unexpected.

The Ponthies were not provided written notice of the need for these repairs, but at the time these repairs were done, there was an ongoing emergency. Without protection, the roof would continue to leak, and damage inside would intensify. Tr. 342:22–343:1. Furthermore, Deborah Echols' September 9 phone call, which may have been made before some of these repairs were completed, informed the Ponthies that there had been roof damage, and thus provided verbal notice of needed repairs.³

³ The Ponthies have argued that the Postal Service's attempts to notify the Ponthies by phone are inconsistent with the emergency exception removing the notice requirement. In their post-trial brief, the Ponthies ask, “[I]f the Postal Service believed that it was not required to provide notice to Ponthies, then why

The Ponthies are thus obligated to pay this \$1,066.34 bill for repair work.

b. October 7, 2005 Invoice

Tony Watson billed the Postal Service \$5,068.09 on October 7, 2005. JX 41 at 69. Jerry Goddard authorized payment for this work on October 17, 2005. JX 49.

The bill includes labor and costs for four items: checking for a roof leak, building back electrical service, painting the drywall, and restoring electrical service to the postal counters. The work was performed sometime before October 7, but it was not established exactly on which dates. *See* Tr. 344:22–23 (“Well, I don’t know the exact date, but the billing date was 10/7. It was certainly done before that.”). These repairs—to the building itself and to the fixtures—are those covered by the lease. *See* JX 19 at 287 (including the building and “fixtures” within the Ponthies’ maintenance responsibilities).

The Ponthies were not provided written notice of the need for these repairs, which they were due, unless an emergency existed. At this point, it was “acceptable for the public to come in” the building. Tr. 243:17–25. Operations inside were limited, however, and Jerry Goddard testified that “the equipment, everything that allows us to sell the stamps under normal procedures and quantify our inventory and make a daily accounting” was not present and that it was only a “bare bones operation” in early October. Tr. 251:15–22. Goddard also stated that the public could “conduct part of the business that they normally do” inside. Tr. 244:12–13. A second powerful storm, Hurricane Rita, made landfall on September 24 and complicated repair efforts. *See* DX 4 (declaring Rita a “major disaster”). On September 26, Deborah Echols and Ross Ponthie spoke on the phone, and Ponthie told her that he would “not be able to go down to the facility until maybe later this week” because he currently had “no gas, no power or water.” JX 44 at 1153. He had told Echols that he wanted “to know who USPS has that can start work” and was “willing to coordinate with them as much as he can by phone since he is unable to drive.” *Id.*

Although Hurricane Rita prevented Ross Ponthie from leaving where he lived to access the Kiln facility, the Court finds that the emergency had abated by

did Ms. Echols contact Mr. Ponthie to tell him about the roof damage just days after Katrina made landfall?” Pl.’s Post-Trial Br. 12. Echols’ contact with the Ponthies is not, however, inconsistent with the application of the emergency exception. The lease’s notice provision defines the Postal Service’s legal obligations, but the Postal Service is free to go above and beyond those obligations. In this case, the Court finds that, for some of the repairs done, the emergency exception applied, and the Postal Service did not *need* to provide the Ponthies written notice. Even though they did not need to provide written notice, the Postal Service was still allowed to attempt to notify the Ponthies.

the end of September. At that point, the public was coming into the building and could “conduct part of the business that they normally do” inside. Tr. 244:12–13. Furthermore, Ross Ponthie and Deborah Echols were in contact, and the Postal Service did not establish why, a month after Hurricane Katrina hit, the Postal Service could not have simply sent written notice of what needed to be done. That notice could have specified a fairly short deadline of just a few days, since a “reasonable deadline” under the lease could be quite short in situations calling for a quick response. The Postal Service, however, did not establish that the work from the October 7 invoice was performed at a time when “immediate action” had to take place. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 741 (2002). Since the Ponthies were due written notice of this work and not provided it, they are not liable for the \$5,068.09 in repairs on the October 7 invoice. JX 41 at 69.

c. October 21, 2005 Invoice

Tony Watson billed the Postal Service \$27,261.05 on October 21, 2005. JX 51 at 81. Jerry Goddard authorized payment for the work on November 14, 2005. JX 57 at 79; Tr. 348:24–349:1.

This bill included repairs to drywall, hooking up power to computers, and ordering fixtures from Fixture World. JX 51 at 81. This is the type of work that the Ponthies are responsible for under the lease. JX 19 at 287. The work was performed between “10/07/05–10/20/05.” JX 51 at 82. At that time, the Kiln office still had “limited operations.” Tr. 347:13–15. Computers and service counters had not yet been hooked up, Tr. 347:17–20, and the Postal Service was unable to do money orders for customers. Tr. 348:9–11.

The Ponthies were also not provided written notice of the need for these repairs. As with the October 7 invoice, no emergency existed at this time. By the time of this work, conditions in the area had abated enough so that Ross Ponthie could visit the Kiln facility. Tr. 60:21–24; 102:17–23. The Postal Service did not establish that there was such a need for “immediate action” that they could not have contacted the Ponthies by written notice, as the lease requires. WEBSTER’S THIRD NEW INT’L DICTIONARY 741 (2002). The Ponthies are therefore not liable for the \$27,261.05 represented on the October 21 invoice. JX 51 at 81.

d. December 5, 2005 Invoice

The final bill from Tony Watson during 2005 was a December 5 invoice for \$28,919.74. JX 60 at 75. Payment for the invoice was authorized on December 20, 2005 by Jerry Goddard. JX 65; Tr. 352:4–6.

The work on this bill was for a “continuation of painting the drywall and the existing walls that were there, as well as the installation of the fixtures.” Tr. 349:13–16. The invoice itself refers to “painting and furniture repairs,” JX 60 at 75, but it was established at trial that “furniture” here is a reference to the fixtures for which the Ponthies generally bear responsibility. Tr. 350:2–5.

The Ponthies were also due written notice of the need for this work under the lease, and were not provided it. As with the prior two bills, no emergency existed to lift the necessity for that notice. Jerry Goddard argued at trial that there was still an emergency because the Kiln facility was not functioning at “full capacity” and because the Postal Service was “still being limited as to what we could do in the facility and the stuff that we were doing was hampered by the fact that we were having to work around people that were trying to restore” the area. Tr. 351:1–5. Frequently, however, when repairs are needed, workmen will have to displace those in a facility, and the mere fact that Postal Service employees had to “work around” repairmen does not establish the need for immediate action that would relieve the Postal Service of their notice responsibility.

Since written notice was not provided of the need for these repairs, the Ponthies are not liable for the \$28,919.74 on the December 5, 2005 invoice. JX 60 at 75.

e. April 2006 Work

Tony Watson also performed work at Kiln during April 2006. Since the situation at Kiln had “normalized” by that time, the Postal Service did not use a sole source solicitation for this work, but instead switched back to their normal contracting style. JX 91 at 709; Tr. 352:22–353:8. The work eventually totaled \$16,241.17. JX 95. Payment was made on June 7, 2006 and July 19, 2006. JX 104; JX 108. As part of the job order system that the Postal Service used, payment was also made to the Gordian Group for \$812.06. JX 96 at 718.

The work for this bill included the final stages of roof and flooring repairs. Goddard testified that the work constituted “the soffit fascia, repair work, as well as some of the flooring[,] ceiling tile, base, commercial carpet.” Tr. 353:19–25; *see also* JX 91 at 709–10. All of these repairs were needed due to hurricane damage, and they are the type of repairs for which the Ponthies are responsible. The bill from the Gordian Group was a necessary part of the contracting process. Tr. 357:10–14.

The Ponthies were due written notice of these repairs, and the Postal Service gave them the required noticed on multiple occasions. The first written notice was sent on December 15, 2005 and asked for completion by December 30, 2005, but the Ponthies did not receive this until January 3, 2006. The second written notice was sent January 26 and received on February 2, and asked for completion by February 16. JX 75 at 127 (calling for repairs to “Carpet-Postmaster’s Office,” “Damaged Ceiling Tiles,” “Soffia/Facia,” “Smoke Detectors,” and cleaning of floors). The Ponthies did not complete the work, and the Postal Service informed them by a March 3, 2006 letter that they would complete the work themselves and withhold the cost from rent. JX 85.

At trial, Ross Ponthie testified that he did not arrange to have the work done represented in the January 26 letter. Tr. 86:19–21. He refused to do the work because he believed that “the whole process broke down” after the Postal Service hired URS Group without contacting him. Tr. 75:17–25. As brought out at trial, Ponthie also testified in deposition that he ““had no intention of doing”” the work in the final letter ““because this was the last pieces. These are the last pieces. This is the nitty-gritty. They’d already done 80 to 90 percent of the repair and clean-up. Why would you . . . send me the last few things on the list?”” Tr. 112:4–18. He also had told Deborah Echols around January 23 that it was “extremely hard” to find workers “to make small repairs.” JX 71 at 738.

The Ponthies were responsible for this work, and whether or not the work was small has no bearing on that responsibility. Since they did not complete the work after being given written notice of it, the Postal Service was within their rights to have the work completed and to withhold the cost of the repairs. The Ponthies are thus liable for the \$16,241.17 and \$812.06 bills.

C. *Total Amount for which the Ponthies are Responsible.*

As discussed above, the Ponthies are liable for a portion of the URS Group work. They are also liable for the September 21, 2005 and April 2006 bills from Tony Watson Electric, as well as the April 2006 bill from the Gordian Group. All of these bills together total \$247,581.39. They are not liable for the five percent of the URS Group bill that relates to personal property, or the October 7, October 21, or December 5 bills from Tony Watson Electric.

The Ponthies are also responsible for interest at the standard Department of Treasury rate. See Tr. 545:4–6; JX 134 at 156 (4.75% interest rate). The Postal Service originally held them responsible for \$320,908.11 in work done and \$50,618.36 in interest. Since the Court finds that they are only responsible for \$247,581.39 of that work done, the portion of interest that they are responsible for is proportionally reduced to \$39,052.17.

D. *The Postal Service Did Not Violate the Implied Covenant of Good Faith and Fair Dealing.*

The Ponthies have argued at times that the Postal Service violated the covenant of good faith and fair dealing. This covenant inheres in every contract. See *Peninsula Group Capital Corp. v. United States*, 93 Fed. Cl. 720, 732 (2010) (citing *Precision Pine*, 596 F.3d at 828). The “underlying principle” of the covenant is that “neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” *First Nationwide Bank v. United States*, 431 F.3d 1342, 1349 (Fed. Cir. 2005) (quoting 5 WILLISTON ON CONTRACTS § 670 (3d ed. 1961)). The Federal Circuit has described the covenant as imposing “obligations on both contracting parties that include the duty not to interfere with the other party’s performance and 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).

The Postal Service did not violate this covenant. They responded to the chaos of Hurricane Katrina by repairing the post office at Kiln, and they hired a professional contractor with the ability to respond to the environmental hazards posed by a groundwater flood. The end of the day cost was high, but Katrina’s devastation was also high. Furthermore, as Ross Ponthie himself acknowledged, his decision to not carry hurricane insurance, which might have covered the repair bills, was a “risk” that he took. Tr. 119:5–23. The Court finds nothing within the record to suggest that the Postal Service did anything to “destroy the reasonable expectations” of the Ponthies. *Centex Corp.*, 395 F.3d at 1304.

III. Conclusion

For the above-mentioned reasons, the Court GRANTS judgment for the government in the amount of \$286,633.56. This includes the Ponthies’ liability of \$229,461.82 for the URS Group work, \$1,066.34 for the September 21, 2005 Tony Watson work, \$16,241.17 for the April 2006 Tony Watson work, \$812.06 for the Gordian Group work, and \$39,052.17 in interest.

The Clerk is directed to enter judgment for defendant in the stated amount.

No costs.

IT IS SO ORDERED.

s/Bohdan A. Futey
BOHDAN A. FUTEY