Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

CROSS-MOTIONS FOR SUMMARY RELIEF DENIED:
May 31, 2002

GSBCA 14511

DEEP JOINT VENTURE,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

John Paul Johnson, San Antonio, TX, counsel for Appellant.

Dalton Phillips, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **DeGRAFF**.

HYATT, Board Judge.

Deep Joint Venture, appellant, has appealed a contracting officer's decision assessing excess reprocurement costs following the termination for default of a lease entered into between appellant and the General Services Administration (GSA). The lease was to supply office space to house the Drug Enforcement Agency (DEA) in El Paso, Texas. In its appeal, Deep Joint Venture has challenged both the assessment of excess costs of reprocurement and the underlying default termination for failure to make progress. GSA has filed a motion for summary relief as to the propriety of the default termination. Deep Joint Venture opposes GSA's motion and has cross-moved for summary relief – alleging that the joint venture never properly entered into the lease, asserting various defenses to the default termination, and contending that one of the remaining principals, Kay Turner of Tarco Investments, is not liable to pay reprocurement costs under Texas law.

Background[1]

On June 17, 1992, GSA issued a solicitation for offers (SFO) for the acquisition of at least 21,560 square feet of office space with eighty on-site secured parking spaces in El Paso, Texas. This space was intended to house the DEA. The solicitation was subsequently superseded in its entirety by amendment 2, which was issued on April 28, 1993. Appeal File, Exhibits 6, 18.

Some initial interest in the project was expressed to GSA by an entity known as Santa Fe Village Joint Venture (Santa Fe VJV). One of the members of that joint venture was Clifford Woerner, Vice-President of Ontrak Management Systems, Inc. In July of 1993, GSA proceeded to negotiate with Santa Fe VJV and was considering awarding the lease to it. Appeal File, Exhibits 36-40. On August 2, the lease proposed to be awarded to Santa Fe VJV was returned to the contracting officer with an explanation that the proposed building to be leased by GSA would instead be built and owned by a to-be-formed joint venture which would be known as Deep Joint Venture.[2] Id., Exhibit 45.

Appellant, Deep Joint Venture, was formed in August 1993 by Wagner Construction Company and Tarco Investments, Inc. The agreement was signed on August 3, by Doyle Wagner, Jr., president of Wagner Construction Company, and by Kay H. Turner, president of Tarco Investments, Inc. The purpose of the joint venture, as stated in the joint venture agreement, was to engage in the development of an office building in the city of El Paso, Texas. Appeal File, Exhibit 45. The joint venture agreement specifically identified the joint venture's project as the construction of an office building with approximately 21,000 usable square feet of space on the second floor and some eighty parking spaces inside the first floor, on the property located at 140 Paragon Lane, El Paso, Texas. Id.

The joint venture agreement identified Wagner Construction Company, acting by and through Doyle Wagner, Jr., as the joint venture's managing partner. At the time the joint venture was formed, Mr. Wagner appointed Clifford Woerner as attorney-in-fact, to act in Mr. Wagner's place for the purpose of executing "documents relating to the entering into a lease agreement with the General Services Administration by Deep Joint Venture, as may be required and appropriate." Appeal File, Exhibit 45 at 3, 9.[3]

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[1] The background findings consist largely of the proposed undisputed facts propounded by each party.

[2] The letter informing GSA that the building would be owned by Deep Joint Venture stated that the joint venture partners would be Doyle Wagner, Jr. and Tarco Investments, Inc., a small, woman-owned corporation, and further stated that the joint venture would have sufficient financial resources to construct the proposed building. Appeal File, Exhibit 45.

[3] Specifically, the special power of attorney document executed by Doyle Wagner, Jr., stated that :

> I, DOYLE WAGNER, JR., as Managing Partner of DEEP JOINT VENTURE, a Texas Joint Venture, located at

On August 19, 1993, GSA contacted Deep Joint Venture, in correspondence addressed to the attention of Doyle Wagner, and requested information concerning the joint venture's capability to perform the lease requirements, including information relating to the financial condition of the prospective lessor. Appeal File, Exhibit 53. In a letter dated August 30, 1993, Doyle Wagner and Kay Turner jointly represented that they would jointly and severally "provide, on behalf of Deep Joint Venture, the funds necessary to construct the building in El Paso, Texas." The letter also represented that they were currently negotiating with prospective lenders and anticipated accepting a permanent loan commitment in the near future. Id., Exhibit 56. A pre-award survey completed just prior to award of the lease reflected that GSA investigated the financial histories of both Wagner Construction and Tarco Investments as the principals of the newly formed joint venture. The survey report concluded that financial references, including Dun & Bradstreet reports and balance sheets submitted by Tarco, for the individual joint venture partners were sufficient in conjunction with the August 30 "letter of intent" furnished by Mr. Wagner and Ms. Turner. The survey recommended that the contracting officer closely monitor the financing aspects of construction funding, but stated that "based on positive financial indicators subject should be able to obtain the necessary financial resources for this award." Id., Exhibit 58.

The lease was signed on August 31, 1993, by GSA and Deep Joint Venture, with Mr. Woerner acting as attorney-in-fact for the joint venture. The lease identified the lessor as "Deep Joint Venture, composed of Wagner Construction Co. Inc., and Tarco Investments, Inc., both Texas corporations." Appeal File, Exhibit 59.

The lease required Deep Joint Venture to submit working drawings to the City of El Paso within three weeks of transmittal of the Government layout. The lessor was also required to provide a copy of dated, approved building permits to the Government within three days of approval. The building was to be constructed within 120 days after the lessor's receipt of approved building permits. Appeal File, Exhibit 59 at 4.

Paragraph 552.270-28 of the lease is the Default in Delivery - Time Extensions clause.

> 8833 Tradeway, in the City of San Antonio, County of Bexar, State of Texas, hereby do APPOINT, CLIFF WOERNER, of the City of Austin, County of Travis, State of Texas, as my Attorney-In-Fact, to act in my place and stead, for the following special and singular purpose:
>
> > To execute documents relating to the entering into a Lease Agreement with the General Services Administration by DEEP JOINT VENTURE, as may be required and appropriate.
> >
> > This Special Power of Attorney shall be valid for the period beginning on August 3, 1993, and ending at midnight on August 31, 1993.

Appeal File, Exhibit 45.

This clause provided that if the lessor failed to prosecute the work with diligence so as to ensure its substantial completion by the delivery date or failed to substantially complete the work by the delivery date the Government could terminate the lease. Specifically, the clause provided, in pertinent part:

> (a) With respect to Lessor's obligation to deliver the premises substantially complete by the delivery date (as such date may be modified pursuant to this lease), time is of the essence. If the Lessor fails to prosecute the work with the diligence that will insure its substantial completion by the delivery date or fails to substantially complete the work by such date, the government may by notice to the Lessor terminate this lease, which termination shall be effective when received by Lessor. The Lessor and the Lessor's sureties, if any, shall be jointly and severally liable for any damages to the Government resulting from such termination, as provided in this clause. The Government shall be entitled to the following damages:
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> (1) The Government's aggregate rent and estimated real estate tax and operating cost adjustments for the firm term and all option terms of its replacement lease or leases, in excess of the aggregate rent and estimated real estate tax and operating cost adjustment for the term; provided, if the Government procures replacement premises for a term (including all option terms) in excess of the term, the Lessor shall not be liable for excess Government rent or adjustments during such excess part of such term.
>
> (2) All administrative and other costs borne by the Government in procuring a replacement firm;
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> (3) Such other, additional, relief as may be provided for in this lease, at law or in equity.
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> (4) Damages to which the Government may be entitled under this clause shall be due and payable thirty (30) days next following the date Lessor receives notice from the Contracting Officer specifying such damages.
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> . . . .
>
> (c) Notwithstanding paragraph (a) of this clause, this lease shall not be terminated under this clause nor the Lessor charged with damages under this clause, if (1) the delay in substantially completing the work arises from excusable delays and (2) the Lessor within 10 days from the beginning of any such delay (unless extended in writing by the Contracting Officer) provides notice to the Contracting Officer of the causes of delay. The

> Contracting Officer shall ascertain the facts and the extent of delay. If the facts warrant such action, the delivery date shall be extended by the Contracting Officer, to the extent of such delay at no additional cost to the Government. A time extension is the sole remedy of the Lessor.

Appeal File, Exhibit 59 at 97-98.

On November 12, 1993, the contracting officer notified Mr. Woerner in writing that the plans that the contracting officer had delivered to him earlier in the week were the approved plans from the tenant, DEA, and with a few minor changes would be incorporated into the lease. The letter stated that appellant could use the plans to proceed with construction drawings. Mr. Woerner was reminded that the lease provided for three weeks, from November 15, for the submission of working drawings to the City of El Paso to obtain applicable building permits. Appeal File, Exhibit 69.

Deep Joint Venture filed the plans and specifications needed for a building permit with the El Paso Department of Public Inspection on December 6, 1993. A copy of the receipt issued by the City of El Paso for the application was provided to the contracting officer on December 7, 1993. Appeal File, Exhibit 74. On December 9, 1993, a grading permit was issued for the site. Id., Exhibit 75.

A preconstruction meeting was held on January 11, 1994, in Fort Worth, Texas. Appeal File, Exhibit 77. The lessor and contracting officer met on February 18, 1994. In the February 18 meeting the lessor told the contracting officer that the City of El Paso had returned the plans with redlining, that the redlined items had been addressed, and the plans had been returned to the city for issuance of a final permit. Id., Exhibit 85. In a follow-up letter to DEA, also written on February 18, the GSA contracting officer noted that the lessor had not yet received the building permit but expected it would be forthcoming. Id., Exhibit 83.

Also on February 18, 1994, a supplemental lease agreement was entered into, increasing the net usable office space to be leased. The supplemental lease agreement was signed by Cliff Woerner on behalf of the joint venture. The increase in net usable office space was to be accomplished principally by converting inside parking space to office space. The lease was also amended to provide for a higher monthly rental in light of the added office space. Appeal File, Exhibit 84.

In a memorandum for the file dated March 1, 1994, the contracting officer memorialized a telephone conversation with Cliff Woerner about the project. At that time, the permits had not been received and site work had not begun. In a memorandum for the file dated March 17, 1994, the contracting officer memorialized a subsequent conversation with Mr. Woerner in which Mr. Woerner confirmed that the status of permits and site work was unchanged. Appeal File, Exhibits 86, 88.

By letter dated March 30, 1994, Kay Turner, on behalf of Deep Joint Venture, informed GSA's contracting officer that the architect had been given the responsibility of seeing that the building permit was in order and ready for issuance by the city of El Paso.

The architect, in a memorandum issued on March 29, 1994, noted that the permit application was still pending with the City of El Paso, awaiting correction of certain items including fire code issues, the lack of electrical plans, the need for a draining and grading plan, and the addition of plumbing items to the plans. Appeal File, Exhibits 91-92.

On April 7, 1994, the contracting officer received a letter from KPH Corporation, a company interested in purchasing Deep Joint Venture. KPH suggested that the Government had delayed in issuing the layout plans needed to obtain permits and that the contract should be modified to extend the time for completion and increase the rental rate to compensate for the delays and increased costs of construction. The contracting officer responded that because KPH was not a party to the lease it would be improper to discuss changes to the lease with that entity. Appeal File, Exhibits 93-94.

On April 21, 1994, the contracting officer sent a letter to Deep Joint Venture notifying it that it had failed to prosecute the work with sufficient diligence to ensure issuance of the final permit and that it had accordingly delayed the project. The contracting officer warned Deep Joint Venture that if the permit was not received within fourteen days and the construction work not begun in thirty days, the Government would have to consider termination of the lease for default. Appeal File, Exhibit 95.

On May 3, 1994, Deep Joint Venture, through Kay Turner, writing on Tarco letterhead, responded to the contracting officer's letter of April 21. Ms. Turner stated that Deep Joint Venture was actively seeking a solution to several problems it had encountered in getting the building for the DEA constructed. The letter alluded to an attached list of "minor items" remaining in order to obtain a permit. Ms. Turner averred that these items, which included various plumbing, electrical, and fire safety issues, would prevent Deep Joint Venture from obtaining the permit as quickly as GSA wanted it to, but added that Deep Joint Venture wanted to complete the project and requested that GSA allow it additional time to work out the problems and finalize the project. Appeal File, Exhibit 96.

By letter dated May 19, 1994, Ms. Turner notified GSA that Cliff Woerner's power of attorney to act for the joint venture had been revoked. A copy of the instrument revoking Mr. Woerner's power of attorney was enclosed. Appeal File, Exhibit 98.

On June 2, 1994, GSA was provided a copy of the grading permit issued for construction of the building. A note accompanying the permit stated that construction trailers would be on the site that same day. Appeal File, Exhibit 100.

On June 9, 1994, Kay Turner wrote to the contracting officer to report that the joint venture was in the process of securing another major investor that would have the monies to fund construction of the DEA building. She asked that GSA cooperate with the consulting firm that was serving as the joint venture's consultant for construction and real estate matters. Appeal File, Exhibit 103.

The contracting officer responded to Ms. Turner's June 9 letter on June 13. She agreed to contact the consulting firm regarding any questions that it might have, and requested that Ms. Turner confirm that the process for obtaining interim funding was still on track. Appeal File, Exhibit 106.

Deep Joint Venture received a commitment letter, dated June 16, 1994, for a construction loan from First Interstate Bank in the amount of $1,450,000. Appeal File, Exhibit 109.

In a letter dated June 23, 1994, the contracting officer informed Deep Joint Venture that it must provide evidence that the construction drawings had been resubmitted to the City of El Paso for the building permit. Deep Joint Venture was also asked to provide a copy of the construction schedule. The letter further warned that failure to submit the requested documents by June 30 could result in an action to terminate the contract for default. Appeal File, Exhibit 111.

On June 28, 1994, the contracting officer received a cashier's receipt for the corrected building plans and specifications, reflecting that the documents had been submitted to the city on that date. A construction schedule from the joint venture's general contractor, showing site work to begin in July, with completion of construction in December 1994, was also provided. Appeal File, Exhibits 112-13.

On July 27, 1994, the contracting officer called the Office of Public Inspection in El Paso to check on the status of the building permit. She was told that the plans had still not been approved because of deficiencies. Appeal File, Exhibit 116.

On August 10, 1994, the contracting officer met with the joint venture's attorney, and with Basic Capital, Inc., a company that was negotiating to purchase the joint venture. Appeal File, Exhibit 122.

In a letter dated August 11, 1994, the GSA contracting officer wrote to Ms. Turner and Deep Joint Venture expressing interest in Basic Capital's proposal to complete the project. In the same letter she pointed out that while the architect had told Deep Joint Venture that it needed to file corrected plans with the City of El Paso on March 29, corrected drawings were not resubmitted until June 28, a ninety-one day delay. The contracting officer calculated that GSA was entitled to liquidated damages at a rate of $650 per day, for a total of $54,600. Stating that the Government preferred not to delay the project further, however, the contracting officer advised that the Government would settle for its actual verifiable damages based on storage costs for systems furniture, which would amount to $15,000 through August 1994. In response to Basic Capital's interest in purchasing the joint venture, the contracting officer suggested that in consideration for the request to extend the construction phase to a total of 150 days, Basic Capital should agree to reduce the rent by the additional amounts of storage that GSA would incur for the furniture until such time as it could be installed in the new building. Appeal File, Exhibit 121.

On August 24, 1994, the contracting officer visited the El Paso Office of Public Inspection. She was initially told that the DEA building permit had not been approved and referred to another part of the office. She was subsequently told that the plans had been approved on August 9, but apparently misfiled. She was then advised that the permit was ready to be pulled. She conveyed this information to Ms. Turner's attorney. Appeal File, Exhibits 128-29.

On August 30, 1994, the contracting officer requested that Deep Joint Venture provide a copy of an approved building permit by September 1, 1994. On August 31, 1994, the contracting officer sent a letter to the joint venture pointing out that while a grading permit had presumably been issued on December 9, 1993, no site work had begun. The letter also asserts that the contractor had failed to diligently pursue issuance of the final building permits and that no evidence of an executed construction contract had been forthcoming from the joint venture, either. The letter stated that these failures endangered performance of the contract and if the conditions were not cured within ten days the lease would be terminated for default. Appeal File, Exhibits 131-31.

On behalf of Deep Joint Venture, Ms. Turner responded to GSA's cure letter on September 8, 1994, offering a detailed chronology of the circumstances and difficulties incurred in performing under the lease, and describing specifically certain problems caused by the other joint venture partner, Wagner Construction. She further noted that because of these difficulties the joint venture had been unable to obtain interim construction financing and that there was an agreement in the works to sell the project. Ms. Turner asserted that GSA had been kept apprised of the progress and status of the project and that, by allowing the joint venture to proceed with the project, GSA had acquiesced and provided its tacit approval of any delays in completion of construction. Appeal File, Exhibit 133.

The contracting officer responded to Ms. Turner's letter on September 15, 1994. She pointed out that copies of the permit and proof of a construction contract with a firm completion date had still not been provided. She also noted that, based on the agreements of the principals of the joint venture partners and in light of financial references provided, GSA had determined that the joint venture had the cash to construct the necessary building. Moreover, since the time she notified the joint venture that the permits were approved, a month had elapsed with no evidence of progress with respect to construction of the building. The contracting officer pointed out that given the failures to provide the requested documentation and make progress with construction, the joint venture stood in default under the contract. Additionally, under the lease, the lessor was to provide copies of the building permits within three days after approval on August 9, 1994. The lease required delivery of the building within 120 days thereafter. Finally, the contracting officer cautioned the lessor that if substantial progress was not made on construction before December 11, 1994, the lease would be terminated for default. Appeal File, Exhibit 136.

Ms. Turner responded to this letter by advising the contracting officer that Basic Capital management was willing to buy the project from the joint venture. She proposed that construction begin in October, with an extended delivery term of 164 (as opposed to 120) days. If this arrangement were accepted Tarco/Deep Joint Venture would pay to the Government a total of $37,000. Of this amount, $12,000 would be paid to the new owner as increased rent in the first year. Appeal File, Exhibit 137.

In mid-October Ms. Turner and Deep Joint Venture proposed a sale of the project to Transatlantic DEA, Inc., with a 164 day delivery term. Ms. Turner and the joint venture offered to pay the Government $90,000 in consideration for an extended delivery date and for liquidated damages. Appeal File, Exhibit 153.

Yet another proposal, from the Raymond Mallooly Trust, was presented to GSA on November 30, 1994. This proposal set eight months as the construction period and provided for payment of $60,000 to GSA as full and complete settlement of all penalties. Appeal File, Exhibit 151.

On December 6, 1994, the contracting officer sent a letter to Deep Joint Venture informing it that the terms proposed in the latest offer extended the delivery date beyond what had previously been agreed to and were unacceptable. She further stated that the Government would be proceeding with a default termination of the lease. Appeal File, Exhibit 153.

In a letter dated December 7, Kay Turner sought to reach a compromise with GSA. She noted that the parties were only $30,000 apart on the issue of damages and that the Raymond Mallooly Trust continued to be interested in acquiring the assets of Deep Joint Venture and would be receptive to adjusting the proposed time for construction. Appeal File, Exhibit 155. The next day, the Raymond Mallooly Trust also wrote to the contracting officer, suggesting that, with the Government's concurrence and willingness to enter into a novation agreement, it was prepared to close the transaction with Deep Joint Venture and commence construction on December 12, 1994. Id., Exhibit 157.

On December 12, 1994, GSA terminated the lease for default, stating the following in support of its action:

> On August 31, 1993, DEEP Joint Venture (DEEP) was awarded Lease GS-07B-14029 under which lease DEEP was to construct a building at 140 Paragon Lane, El Paso, Texas, in which to house Drug Enforcement Administration (DEA). The lease was to run through 15 years.
>
> The lease provides that DEEP deliver the building within 120 days of DEEP's receipt of the City of El Paso-approved building permits. Paragraph 9 of the Standard Form 2 of the Lease requires in part that you provide a copy of dated, approved building permits to the Government within 3 days of approval.
>
> On August 23, 1994, we notified you by telephone that the permits were approved and had been approved since August 9, 1994. By letter of August 30, 1994, you were again notified, among other issues, that the permits had been approved. By letter of August 31, 1994, you were notified of DEEP's noncompliance with the lease requirements and were granted a ten (10) day period, after the receipt of the letter, to cure, to the satisfaction of the Contracting Officer, all deficiencies and to comply with all lease requirements. As indicated by the certified return receipt, you received subject letter on September 2, 1994. As of this date the deficiencies still exist and lease requirements are not being met. By letter of September 15, 1994, we notified you that if substantial progress was not made

> in construction before December 11, 1994, the lease would be terminated for default. The certified return receipt indicates you received this letter on September 19, 1994. As of today, construction has not begun.

Id., Exhibit 161.

Prior to terminating the lease for default, the contracting officer prepared a memorandum for the file in accordance with Federal Acquisition Regulation (FAR) 49.402-3(f), analyzing the factors relevant to making a determination whether to terminate the lease for default. After summarizing difficulties encountered by the joint venture in commencing with construction of the building, the contracting officer noted that when Wagner Construction would not agree on certain aspects of the project, Tarco Investments, which was not in the construction business, essentially took over the project and attempted to find other contractors to undertake construction of the building. Tarco's attempts to procure interim financing were hindered because its new construction contractor alleged that construction costs had increased. The contracting officer concluded that the contractor had in fact defaulted on its obligations. In addition, in considering other factors relevant to the termination decision, the contracting officer noted that the need for the space had become less urgent because a large tenant had vacated the existing federal building, temporarily freeing up space for DEA, and easing crowded conditions for this agency. Since this lease was not delivered timely, GSA would revise its plans and procure space for the FBI rather than for DEA. Although the FBI's final plans were not then available, it was anticipated that the procurement would be similar to the one being terminated for default. Appeal File, Exhibit 158.

Shortly after terminating the lease for default, the contracting officer wrote to Deep Joint Venture, through Ms. Turner, setting forth the Government's position with respect to liquidated damages and expressing an interest in negotiating a settlement. Appeal File, Exhibit 162. No response to that letter was forthcoming. On October 10, 1995, GSA sent a letter to Ms. Turner notifying her that the Government had proceeded with procuring replacement space for the terminated lease and advising that the administrative costs of reprocurement would be added to any other damages and costs to which the Government might be entitled under the lease and the terms of the default termination provision. Id., Exhibit 168.

By letter dated July 27, 1997, addressed to Deep Joint Venture, to the attention of both Kay Turner and Cliff Woerner, the contracting officer formally demanded payment of the amount of $2,783,456.25 in excess costs of reprocurement associated with the defaulted lease. The costs assessed consisted of increased rental, increases in operating costs, storage costs attributable to delay in the DEA move, liquidated damages, and administrative costs. Appeal File, Exhibit 185.

By letter dated October 14, 1997, Kay Turner, on behalf of Deep Joint Venture, responded to GSA's demand letter, disclaiming liability for the debt asserted by GSA. Deep Joint Venture asserted, inter alia, that the terms and conditions of the project as completed differed from those bid upon by Deep Joint Venture and that delays in performance were caused and contributed to by GSA and, therefore, that mitigating circumstances existed for

which GSA bore some responsibility. Appeal File, Exhibit 190. By letter dated November 24, 1997, GSA responded to Deep Joint Venture's disclaimer letter, disagreeing with appellant's contentions. Id., Exhibit 192.

On December 1, 1997, the contracting officer sent another demand letter, this time addressed not only to Deep Joint Venture, but also to Kay Turner, Tarco Investments, Inc., Doyle Wagner, Jr., and Wagner Construction Company. The letter pointed out that the lease was entered into with Deep Joint Venture, which was formed by Tarco Investments and Wagner Construction. In addition, Kay Turner and Doyle Wagner had personally guaranteed financing to deliver the premises ready for occupancy. On January 7, 1998, yet another demand letter, this time signed by the Chief of the Public Buildings Service Accounts Receivable and Financial Analysis Branch for the Greater Southwest Region, was sent to the same five addressees. Appeal File, Exhibits 193-94. Thereafter, Deep Joint Venture's appeal of the contracting officer's assessment of excess reprocurement costs was timely filed with the Board.

Discussion

In appealing GSA's assessment of excess costs of reprocurement, Deep Joint Venture has asserted as a defense that the underlying default termination was invalid. GSA, in its initial motion for partial summary relief, and in its response to appellant's opposition and cross-motion for summary relief, contends that the default termination action should be summarily sustained because no material facts as to its propriety are in dispute and the Government is entitled to prevail on this issue as a matter of law. At the same time, however, GSA also contends, on jurisdictional grounds, that the Board should not even entertain Deep Joint Venture's challenge to the propriety of the default termination decision. For its part, appellant cross-moves for summary relief, arguing, inter alia, that the lease was not properly entered into on behalf of the joint venture and thus was not binding; that, in violation of the FAR, the contracting officer failed to properly ascertain that the joint venture had adequate financial resources to perform the lease; and that, as a matter of Texas law, GSA has no legal basis to obtain a judgment against Ms. Turner.

GSA's Jurisdictional Argument -- The Fulford Doctrine

Respondent contends that the Board should revisit and overrule past decisions adopting and adhering to the principle originally enunciated in Fulford Manufacturing Co., ASBCA 2143, et al., 6 CCF ¶ 61,815 (1955), now commonly referred to as the Fulford Doctrine. The Fulford decision was issued by the Armed Services Board of Contract Appeals many years prior to the effective date of the Contracts Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601- 613 (1994 & Supp V 1999) and was based on the terms of the disputes clause in the contract giving rise to that board's jurisdiction. Under this tenet, a timely appeal from an assessment of excess reprocurement costs permitted the contractor to challenge the propriety of the default for purposes of avoiding liability for the assessment of reprocurement costs. This Board has determined that it will continue to adhere to this doctrine under the Contract Disputes Act. Primepak Co., GSBCA 10514, 90-3 BCA ¶ 23,280. GSA invites us to reconsider our position with respect to this doctrine because, in respondent's view, it is contrary to the strict time frames set forth in the CDA -- under which a contracting officer's default termination decision would ordinarily be considered to be final and conclusive if not

appealed within ninety days to the cognizant board of contract appeals or within one year to the United States Court of Federal Claims. See Ra-Nav Laboratories, Inc. v. Widnall, 137 F.3d 1344 (Fed. Cir. 1998). Thus, GSA asserts that to the extent Deep Joint Venture maintains that the default termination action was improper, we should reject that argument out of hand as untimely raised and proceed with considering whether the excess costs of reprocurement may properly be assessed against the lessor.

Although respondent is correct that under the CDA contracting officer decisions are final once the time frames set forth under the CDA have lapsed, and there is no dispute that considerably more time than the maximum time for appeal -- one year -- had lapsed between the termination for default decision and the filing of this appeal, respondent has not offered a compelling justification to depart from the now-settled Fulford doctrine. In addition to this Board, most of the other boards of contract appeals that have considered the application of the doctrine have adopted it under the CDA. E.g., Southwest Marine, Inc., DOT BCA 1891, 96-1 BCA ¶ 27,985 (1995); Bulloch International, Inc., ASBCA 44210, 93-2 BCA ¶ 25,692; Tom Warr, IBCA 2360, 88-1 BCA ¶ 20,231; but see Ace Forestation Inc., AGBCA 84-272-1, 87-3 BCA ¶ 20,218 (adopting restrictive application of Fulford Doctrine under which it would not be applied in cases where the Default clause in the contract required the contracting officer to consider excusability prior to terminating the contract for default). The United States Court of Federal Claims has similarly recognized the continued validity of the Fulford Doctrine under the CDA. Z.A.N. Co. v. United States, 6 Cl. Ct. 298 (1984); D. Moody & Co. v. United States, 5 Cl. Ct. 70 (1984). The Moody decision contains a particularly thorough analysis exploring the reasons why adherence to the Fulford Doctrine continues to be appropriate under the CDA.

As both the court and the boards have recognized, the rationale underlying the doctrine's origin -- preservation of principles of judicial economy -- remains sound under the CDA. It makes little sense to require a contractor who does not want to contest the validity of a termination action in the absence of the assessment of excess reprocurement costs to challenge the default action immediately in order to preserve its ability to defend against a later contracting officer decision to seek reimbursement of costs from the defaulted contractor. There is usually no way to determine shortly after a default termination whether the reprocurement action will result in such a claim. Furthermore, as the court observed in Moody, the Fulford Doctrine simply does not run afoul of jurisdictional time limitations in either its intention or its effect: "Fulford simply recognizes that the Default clause can allow the defense of excusability to be raised when the contracting officer assesses extra costs, provided that the challenge is timely made." 5 Cl. Ct. at 70. It does not permit the contractor to otherwise disturb the finality of the contracting officer's decision to default terminate the contract. Thus, while we would not permit a contractor solely to seek, more than ninety days after receiving a default termination decision, a conversion of the default termination to one for the convenience of the Government, or to seek to recover convenience termination costs once the decision is final, we do permit the contractor to challenge the propriety of the termination action in defending against an assessment of excess costs of reprocurement.

The Default Termination

Applicable Law

Summary relief is properly granted when there is no genuine issue of material fact and the movant is clearly entitled to judgment as a matter of law; the moving party bears the burden of establishing the absence of any genuine issue of material fact. Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); Armco, Inc. v. Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986); Jo-Ja Construction, Ltd. v. General Services Administration, GSBCA 14786, 00-2 BCA ¶ 30,964. In considering motions for summary relief, all reasonable inferences are drawn in favor of the non-moving party. Parcel 49C Limited Partnership v. General Services Administration, GSBCA 15222, 00-2 BCA ¶ 31,073; Executive Construction, Inc. v. General Services Administration, GSBCA 15224, 00-2 BCA ¶ 30,977. Summary relief is properly denied when it appears that further development of the record is needed. See Jo-Ja Construction, Ltd., 00-2 BCA at 152,793; Griffin Services, GSBCA 11171, 91-3 BCA ¶ 24,156, at 120,873; cf. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("Nor do we suggest that the trial courts should act with other than caution in granting summary judgment, or that the trial court may not deny summary judgment where there is reason to believe that the better course would be to proceed to a full trial.") .

The fact that both parties have moved for summary relief does not necessarily dictate that the Board must grant one party's motion. Rather, each party's motion is to be evaluated independently on its own merits, with all reasonable inferences being resolved against the party whose motion is under consideration. Prineville Sawmill Co. v. United States, 859 F.2d 905, 911 (Fed. Cir. 1988); Spirit Leveling Contractors v. United States, 19 Cl. Ct. 84, 89 (1989); Parcel 49C Limited Partnership, 00-2 BCA at 153,405-06; Deval Corp., ASBCA 47132, et al., 95-1 BCA ¶ 27,537, at 137,233. Here, moreover, each party's claimed entitlement to judgment as a matter of law is premised on different facts and entirely different legal theories from those advanced by the other party.

Respondent's Motion

In moving for summary relief, respondent maintains that, as a matter of law, the default termination action was proper and that appellant has no valid basis for challenging the propriety of the action so as to avoid the imposition of excess costs of reprocurement. It is the Government's initial burden to show that its default termination action was proper. The Government can meet its burden by showing that the contractor failed to perform in accordance with the contract terms and that timely performance was beyond its reach. See, e.g., Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 765 (Fed. Cir. 1987); Florida Engineered Construction Products Corp. v. United States, 41 Fed. Cl. 534, 538-39 (1998); American Sheet Metal Corp. v. General Services Administration, GSBCA 14066, et al., 99-1 BCA ¶ 30,329; SAE/Americon, Inc. v. General Services Administration, GSBCA 12294, et al., 98-2 BCA ¶ 30,084, at 148,906. Here, respondent has adduced a considerable body of essentially undisputed evidence confirming that, as of the date of termination, appellant had not yet built the building to be leased and, indeed, had not even begun the construction process, despite the fact that the permits needed had been issued by the City of El Paso. More than fifteen months after award of the lease, respondent points out, appellant had not accomplished any meaningful work on the project. See Yucca, GSBCA 6768, et al., 85-3 BCA ¶ 18,511, reconsideration denied, 86-3 BCA ¶ 19,076, aff'd, 833 F.2d 1022 (Fed. Cir. 1987) (table). In addition, GSA contends, there is no evidence that the Government

interfered with appellant in any way or that the Government otherwise materially breached the lease.

Here, respondent has met its initial burden by showing that appellant had not performed in accordance with the terms of the lease at the time of termination. To avoid a summary decision that the default termination action was valid as a matter of law, the burden shifts to appellant to show that it has a viable possibility of defending against the Government's action by introducing evidence that the default was excusable. E.g., Lisbon; DCX, Inc. v. Perry, 79 F.3d 132, 134 (Fed. Cir.), cert. denied, 519 U.S. 992 (1996); Interstate General Government Contractors, Inc. v. United States, 40 Fed. Cl. 585, 606 (1998); Rowe, Inc. v. General Services Administration, GSBCA 14211, 01-2 BCA ¶ 31,630, at 156,273. We thus turn to appellant's arguments opposing respondent's motion and seeking summary relief on its own behalf. Deep Joint Venture has asserted a number of grounds on which it claims entitlement to summary relief in this case, which are addressed in detail below, several of which are relevant to the inquiry as to whether appellant has a basis for arguing that there are disputed facts or issues sufficient to establish it is entitled to proceed with its defense based on the assertion that the default action was improper.

Appellant's Motion

Appellant's motion focuses on seven "questions of law" comprising its contentions that the Government's claim for excess reprocurement costs should be rejected summarily. First, appellant states that the individual who actually signed the lease, Clifford Woerner, was not properly empowered to act as attorney-in-fact for Deep Joint Venture. Second, appellant contends that, as a matter of law, Doyle Wagner, Jr., as an individual, had no authority to execute a power of attorney on behalf of the partners comprising the joint venture. Third, appellant maintains that GSA's "damages" were caused by the contracting officer's violation of the FAR's mandate that the contracting officer obtain acceptable evidence of a prospective contractor's financial ability to perform the contract. 48 CFR 9.104 (1994) (FAR 9.104-3). That is, appellant asserts that the contracting officer improperly determined that Deep Joint Venture was a responsible lessor and that this failure to abide by this mandatory regulation is the real cause of any damages incurred by the Government. As such, appellant maintains, Deep Joint Venture should be excused from liability. Fourth, appellant contends that no contractual duties were incurred by Deep Joint Venture pursuant to the August 30, 1993, letter concerning financing of the project. Fifth, appellant asserts that as a matter of Texas law, the corporate veil cannot be pierced to impute contractual liability to the shareholders of the partners comprising the joint venture. Sixth, appellant contends that GSA is not entitled to recover money damages as a matter of law. Seventh, appellant asserts that Deep Joint Venture did not "breach" the contract.

In determining the rights and liabilities of the parties pursuant to litigation under the CDA, we look first to the terms of the lease and to federal law. If federal law does not resolve the issue presented by the parties, we may then consider "general property and contract law principles as they are embodied in state law pronouncements." Ginsberg v. Austin, 968 F.2d 1198, 1200 (Fed. Cir. 1992); accord Prudential Insurance Co. v. United States, 801 F.2d 1295, 1298 (Fed. Cir. 1986), cert. denied, 479 U.S. 1086 (1987); Forman v. United States, 767 F.2d 875, 880 (Fed. Cir. 1985); HG Properties A, L.P. v. General Services Administration, GSBCA 15219, 01-1 BCA ¶ 31,376. Federal law controls the

interpretation of a contract, including a lease, to which the Federal Government is a party. Forman, 767 F.2d at 879-80; Seaboard Lumber Co. v. United States, 15 Cl. Ct. 366, 369 (1988), aff'd, 903 F.2d 1560 (Fed. Cir. 1990), cert. denied, 499 U.S. 919 (1991); see generally Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943).

Appellant's First, Second and Fourth Arguments - Authority to Bind the Joint Venture

Appellant's first two arguments relate to the legal status of the joint venture under Texas law. The fourth argument, concerning the Wagner/Turner letter pertinent to financing of the project, is closely related to the first two. Accordingly, we address them together.

Before addressing appellant's arguments, which are predicated on Texas law, we note that there is some federal contract law that pertains when joint ventures contract with the Government. The Court of Appeals for the Federal Circuit has made the following observation:

> A joint venture is "generally an association of persons by way of contract to engage in and carry out a single business adventure for joint profit, combining their efforts, property, money, skill and knowledge without creating a partnership or a corporation." Lentz v. United States, 346 F.2d 570, 575, 171 Ct. Cl. 537 (1965). It has been aptly described as a partnership created for a limited purpose; a joint venture entails legal consequences similar to those of a partnership. Pine Products Corp. v. United States, 945 F.2d 1555, 1560 (Fed. Cir.1991); Gramercy Equities Corp. v. Dumont, 72 N.Y.2d 560, 534 N.Y.S.2d 908, 531 N.E.2d 629 (1988).
>
> The general rule is that each member of a joint venture has the authority to act for and bind the enterprise, absent agreement to the contrary:
>
> > In general, a joint adventure . . . has many of the elements of the traditional partnership in that either of the venturers may bind the enterprise by contracts which are within the scope of the business enterprise, and within that scope any one of the parties is authorized to act for the others.
>
> Lentz, 346 F.2d at 575.

Sadelmi Joint Venture v. Dalton, 5 F.3d 510, 513 (Fed. Cir. 1993); see also PCI/RCI v. United States, 36 Fed. Cl. 761 (1996); Aries Marine Corp., ASBCA 37826, 90-1 BCA ¶ 22,484 (noting that while the elements necessary to constitute a joint venture are typically a matter of state law, there are elements that are common to most jurisdictions).

Appellant's first and second arguments are interrelated and question the authority of Doyle Wagner and Clifford Woerner to act for the joint venture so as to bind it to perform

the obligations of the lease. In essence, appellant suggests that there was no default entitling respondent to claim excess costs of reprocurement because, in its view, there was never a binding lease under which Deep Joint Venture, or its constituent partners, was required to perform. These arguments are largely predicated on two points derived from the language of the joint venture agreement, which appointed Wagner Construction Company the managing partner of the joint venture, and the power of attorney executed by Doyle Wagner, Jr. Appellant contends that, by its clear terms, and as a matter of law, the power of attorney executed by Doyle Wagner, Jr. did not empower Clifford Woerner, who signed the lease on behalf of Deep Joint Venture, to act as the joint venture's attorney-in-fact. Appellant's argument focuses on the language of the power of attorney, which stated that:

> I, DOYLE WAGNER, JR., as Managing Partner of DEEP JOINT VENTURE . . . hereby do APPOINT, CLIFF WOERNER as my Attorney-In-Fact, to act in my place and stead, for the following special and singular purpose: To execute documents relating to the entering into a Lease Agreement with the General Services Administration by DEEP JOINT VENTURE, as may be required and appropriate . . . .

Appellant contends that Cliff Woerner was not properly authorized to bind the joint venture to the lease. This is so because Wagner Corporation, not Doyle Wagner, was the managing partner of Deep Joint Venture. Thus, in effect, Doyle Wagner appointed Clifford Woerner to act as his [Doyle Wagner's] attorney-in-fact, and not as attorney-in-fact on behalf of the joint venture. Appellant points out that nowhere in the special power of attorney is there even a reference to Wagner Construction Company, the actual managing partner of the joint venture. Thus, appellant asserts, the power of attorney was ineffective to authorize Mr. Woerner to bind the joint venture. In support of this contention, appellant further urges that, under Texas law, the authorities conferred upon an agent under a written instrument such as a power of attorney must be strictly construed so as to exclude any authority not specifically set forth, except for such authority as is necessary to effectuate the purpose of the authority granted.[4] From this, appellant basically contends that the lease was never binding on the joint venture or on the joint venture members or, finally, on the principals of Tarco Investments and Wagner Construction.

Appellant's second, related, argument in favor of a grant of summary relief in its favor is that Doyle Wagner, Jr., in his individual capacity, had no authority to execute a power of attorney appointing Clifford Woerner to act on behalf of the joint venture. This, appellant argues, again is because Wagner Construction, not Doyle Wagner, was the managing partner of the joint venture. Appellant says that there is no evidence that the board of directors of Wagner Corporation authorized Doyle Wagner, Jr. to execute the special power of attorney. Appellant also contends that the power of attorney does not explicitly state that Doyle Wagner is acting as the president of Wagner Construction.

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[4] In support of this proposition, appellant cites F.M. Stigler, Inc. v. H.N.C. Realty, 595 S.W.2d 158 (Tex. Civ. App. 1980), rev'd on other grounds, Land Title Co. of Dallas v. F.M. Stigler, Inc., 609 S.W.2d 754 (Tex. Sup. Ct. 1980).

Appellant's fourth argument, related to the issue of whether the lease was valid, anticipates the Government's argument concerning the joint venture's ratification of the lease by addressing the August 30, 1993, letter jointly authored by Doyle Wagner, Jr. and Kay Turner, confirming that they would jointly and severally provide, on behalf of the joint venture, the funds necessary to construct the building in El Paso. In essence, appellant asserts that these assurances were provided individually by Mr. Wagner and Ms. Turner and not as representatives of their respective corporate joint venture partners and thus could not serve to validate Mr. Woerner's "unauthorized" action in signing the lease.

Appellant's proposed interpretation of the documents does not provide a basis for granting the appeal in appellant's favor on a motion for summary relief. First, we note that while federal case law recognizes the state law precept that a power of attorney should be strictly construed,[5] at the same time, such an instrument should also be given a construction which will give effect to the intent of the parties. See A.W. & Associates, Inc., 69 Comp. Gen. 737 (1990); J.W. Bateson Co., B-189848, 77-2 CPD ¶ 472 (Dec. 16, 1977). Appellant's interpretation of the relevant instruments ignores the statement in the joint venture agreement to the effect that Wagner Construction, acting "by and through its President," Doyle Wagner, Jr., would be the managing partner of the joint venture. In the power of attorney, Mr. Wagner refers to himself as the "managing partner" of Deep Joint Venture, which is susceptible to the interpretation that he was acting in his capacity as president of Wagner Corporation to perform that company's duties as general manager of the joint venture. As the joint venture agreement was written, Doyle Wagner was the individual with authority to act for the joint venture and to confer the power of attorney on Mr. Woerner. On this record, appellant has not shown that as a matter of law the instruments did not suffice to bind the joint venture to perform the lease. At best, this is an area in which the documents may be ambiguous and the facts are disputed such that further development of the record is necessary.

Even assuming that appellant's argument that the power of attorney was defective were to prevail, however, reading the language of the joint venture agreement and the power of attorney together, GSA may well have reasonably relied on the apparent authority of Mr. Woerner to bind the joint venture. See American Anchor & Chain Corp. v. United States, 331 F.2d 860 (Ct. Cl. 1964); Peter Bauwens Bauunternehmung GMBH & Co. KG, ASBCA 44679, 98-1 BCA ¶ 29,551, aff'd, 194 F.3d 1338 (Fed, Cir. 1999) (table); Western Box-O-Matic Corp., GSBCA 3562, 73-1 BCA ¶ 9968. Mr. Woerner was initially involved in negotiations on the lease before the formation of Deep Joint Venture and apparently was involved in the business negotiations that led to the decision that Deep Joint Venture, rather than Santa Fe VJV, would vie for the lease. As such he was familiar to the GSA contracting officials as an individual knowledgeable about this transaction and interested in working on the project. As GSA further points out, even beyond the August 30 letter authored by Mr. Wagner and Ms. Turner, the record is replete with correspondence from the joint venture principals manifesting an intention to perform the lease. At no time prior to the default action did either joint venture partner suggest that the lease was not valid because Clifford Woerner was not authorized under the power of attorney to sign it on behalf of the joint

[5] See, e.g., Texas Soil Recycling, Inc. v. Intercargo Insurance Co., 273 F.3d 644, 650 (5th Cir. 2001).

venture. After the lease was signed, the joint venture, through its partners, consistently advised the Government that it was undertaking to perform and made efforts both to obtain the needed financing and to sell the joint venture's assets to other companies that had better prospects of ultimately being able to perform. Thus, even if we could be persuaded that the initial signing of the lease by Clifford Woerner was legally defective, there is considerable evidence suggesting that the joint venture members, by their subsequent actions, ratified the lease. See American Anchor & Chain; Handel v. United States, 16 Cl. Ct. 70 (1988).[6] In sum, there are material disputed factual issues that preclude a grant of summary relief in favor of appellant on this issue.

Appellant's Third Argument - Violation of Regulation

Appellant also contends that it should, as a matter of law, be permitted to escape any liability under the lease because GSA failed to follow applicable provisions of the FAR in awarding the lease to Deep Joint Venture. In particular, appellant asserts that the contracting officer did not make a proper determination of Deep Joint Venture's financial capabilities in assessing whether the lease could properly be awarded to this offeror and that had the contracting officer performed a proper evaluation in accordance with applicable regulations, Deep Joint Venture would not have been awarded the lease.

Specifically, appellant relies upon the requirements set forth in subpart 9.1 of the FAR, which prescribes "policies standards and procedures for determining whether prospective contractors and subcontractors are responsible. FAR 9.104-1 provides that

> To be considered responsible, a prospective contractor must
>
> > (a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a));
> >
> > (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
> >
> > (c) Have a satisfactory performance record. . . . A prospective contractor shall not be determined

[6] It bears note that attempts to disclaim the validity of a joint venture relationship and transactions that conflict with the conduct of the parties to the alleged joint venture have been rejected as contrary to the actions of the parties. In Allan Construction Co. v. United States, 646 F.2d 487 (Ct. Cl. 1981), involving a disputed Texas joint venture, the Court observed that the actions and representations of the plaintiff in its dealings with the Government entitled the Government to treat plaintiff as a member of the joint venture. The Court also noted that a Texas state court had also considered the issue of whether the parties in this relationship had formed a joint venture and had concluded that the plaintiff had engaged in sufficient activities consistent with expression of an intent to form a joint venture so as to be estopped from denying its validity. 646 F.2d at 492-93.

> responsible or non-responsible solely on the basis of lack of relevant performance history. . . .
>
> . . . .
>
> (e) Have the necessary organization, experience, accounting and operational controls and technical skills or the ability to obtain them . . . .
>
> (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them . . . .

FAR 9.104-3 provides that "the contracting officer shall require acceptable evidence of the prospective contractor's ability to obtain required resources" for performance of the contract work. This includes adequate financial resources to perform.

The record as developed to date reflects that in evaluating Deep Joint Venture's lease proposal the contracting officer, through the efforts of financial analysts in GSA, looked at the financial capability of the newly-formed joint venture's partners and concluded that the proposed lessor would be financially capable of performing the lease. Appellant maintains that under these regulations the contracting officer should not have accepted Deep Joint Venture as a lessor because the FAR requires that there normally be a commitment or explicit arrangement in place at the time of contract award. According to appellant, it is clear that no formal commitments had been obtained such that the contracting officer could appropriately find the joint venture to be a responsible contractor.

It certainly is not clear on the record developed to date that the contracting officer in some way failed to comply with the prescribed regulations.[7] Moreover, even if we were to conclude that the contracting officer's finding that the joint venture was a responsible contractor for purposes of performing under this lease was erroneous, it would not absolve Deep Joint Venture of the obligation to perform on the lease. The responsibility provisions in the FAR are in place to protect the Government by ensuring to the extent possible that the contracting officer avoids making a contract award to an offeror that is incapable of performing, whether it be for financial or other reasons. The regulations are not intended to benefit contractors that encounter financial difficulties in performing after award. In short:

> Failure of a government contracting agency to abide by a provision of its own regulation is material only if the provision is for the benefit of the contractor and there is a causal nexus between the failure and the asserted financial injury to the contractor.

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[7] In essence, appellant assumes that the contracting officer must have failed to follow the regulations by virtue of the fact that it can now show it had no guaranteed source of financing to proceed with the project.

De Matteo Construction Co. v. United States, 600 F.2d 1384, 1392 (Ct. Cl. 1979) (citation omitted); accord Cessna Aircraft Co. v. Dalton, 126 F.3d 1442, 1451-52 (Fed. Cir. 1997), cert. denied, 525 U.S. 818 (1998) ("[I]f the primary intended beneficiary of a statute or regulation is the government, then a private party cannot complain about the government's failure to comply with that statute or regulation, even if that party derives some incidental benefit from compliance with it."); American Electric Contracting Corp. v. United States, 579 F.2d 602, 613 (Ct. Cl. 1978). The reason for this rule is that the laws and regulations governing the making of Government contracts are generally for the protection of the Government against its own officers, and hence may not be enforced against the Government by a contractor seeking to avoid the obligation of a contract. Hartford Accident & Indemnity Co. v. United States, 127 F. Supp. 565, 566 (Ct. Cl. 1955) . The law is settled that where regulations were promulgated for the benefit of the Government, the contractor is not vested with litigable rights entitling it to complain that the regulations were not complied with. George Bernadot Co., ASBCA 42943, 94-3 BCA ¶ 27,242 at 135,743; Technical Services Corp., ASBCA 36505, et al., 93-1 BCA ¶ 25,310 at 126,095 (citing Hartford Accident & Indemnity Co. v. United States). Thus, even if we assume, for the sake of argument, that the contracting officer did not make a proper responsibility determination in awarding this lease to Deep Joint Venture, this does not provide a mechanism whereby the lessor can avoid the consequences of its failure to perform. Appellant's motion for summary relief on this basis must be denied.

As a corollary to this point, it is also settled that as a general rule, a contractor's financial ability to perform is considered to be within its control and financial difficulties do not provide a viable excuse for avoiding the consequences of a default in performing contractual obligations. Appellant was responsible for securing financing; neither insolvency nor undercapitalization generally will excuse a failure to perform. See, e.g., Sierra Tahoe Mfg., Inc. v. General Services Administration, GSBCA 12679, 94-2 BCA ¶ 26,771; Centennial Leasing v. General Services Administration, GSBCA 12037, 94-1 BCA ¶ 26,398; Yucca; Katzdorn Construction & Co., AGBCA 87-265-3, 87-2 BCA ¶ 19,929, at 100,838-39; International Equipment Services, Inc., ASBCA 21104, 83-2 BCA ¶ 16,675. Deep Joint Venture's inability to obtain the financing it needed to begin construction of the building it was required to provide under the lease does not excuse its failure to perform in a timely manner.

Appellant's Fifth Argument - Piercing the Corporate Veil

The parties' contentions concerning the personal liability of individuals acting on behalf of the joint venture partners are misfocused. Under the CDA, boards of contract appeals have jurisdiction over appeals concerning claims by and against a "contractor," defined as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4); see Admiralty Construction, Inc., by National American Insurance Co. v. Dalton, 156 F.3d 1217, 1220 (Fed. Cir. 1998); Fireman's Fund Insurance Co., ASBCA 50657, 00-1 BCA ¶ 30,802. The party in privity with the Government is the contractor, Deep Joint Venture. Brother's Cleaning Service, Inc. v. United States, 38 Fed. Cl. 106, 108 (1997) (although a joint venture can only act through its joint components, it "has an independent existence, and it is the only legal entity with whom the Government is in privity"). Thus, while the contracting officer's letter demanding payment of excess reprocurement costs is addressed to Deep Joint Venture, Tarco Investments, Wagner Construction, Ms. Turner, and Mr.

Wagner, this does not necessarily mean that the issue of whether Ms. Turner or Mr. Wagner may be held personally liable for the amount claimed by the Government is subsumed in this appeal. These individuals are properly included as recipients of lease-related correspondence in their capacities as representatives of the individual members of the venture -- Tarco Investments and Wagner Construction. The contractor, and the party with principal responsibility for contract performance and liabilities arising from the lease, is Deep Joint Venture.

Appellant vigorously argues that, under Texas law, the Board cannot pierce the corporate veil to hold Ms. Turner personally liable for the damages sought by GSA. Respondent just as vigorously asserts that, under federal law, "the corporate form may be disregarded in the interest of justice where it is used to defeat an overriding public policy." Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co., 417 U.S. 703, 713 (1974). Regardless of what law applies, this issue is not appropriate for resolution on summary relief.[8] The arguments raised by the parties with respect to the potential personal liability of Kay Turner to the Government for excess costs of reprocurement are not, at this point, central to this appeal and, at best, are entirely premature. Ms. Turner, as a principal of Tarco Investments, was not in direct privity of contract with GSA. Presumably, any issue of Ms. Turner's liability on a personal level does not arise until, at the earliest, it has been determined that the lessor, or contractor, Deep Joint Venture, is liable for excess costs of reprocurement. We cannot grant appellant's motion on this issue, either.

Appellant's Sixth Argument

Appellant also says it is entitled to summary relief on the issue of any damages GSA says are owed because GSA failed to mitigate damages and made it difficult for Deep Joint Venture to arrive at an acceptable arrangement whereby it might actually have been able to commence construction and perform under the lease. Namely, appellant points to GSA's actions in declining to discuss three prospective proposals, from KPH, Basic Capital, and, in the final days of the contract, the Raymond Mallooly Trust, for completing the project. Appellant argues that GSA's actions in this regard both contributed to delays in getting under way prior to the termination decision and also contributed to increased costs in the reprocurement process. This latter point, concerning GSA's failure to mitigate the costs of excess reprocurement, is not yet ripe for consideration. As to the other argument, the record is not sufficiently developed to demonstrate that appellant is entitled, as a matter of law, to summary relief on the basis of GSA's actions in administering the lease prior to termination.

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[8] We note that while under some circumstances the corporate form may be disregarded, in this case the Government would bear the burden of demonstrating that some injustice or inequity would result from preservation of the protections normally accorded by the corporate form. In balancing the equities, considerable weight is attached to the respect given the corporate form by the corporation's officers and shareholders. United States v. Van Diviner, 822 F.2d 960, 964-65 (10th Cir. 1987).

Appellant's Seventh Argument

Appellant couches its final argument in terms of GSA itself having breached the lease through its actions, which appellant terms an anticipatory repudiation of the lease. Although appellant does not expressly say so, this argument effectively amounts to a claim that GSA's actions, in significantly increasing the space requirements in February 1994, without extending the time for construction,[9] and in asserting entitlement to liquidated damages prior to the 120th day after receipt of the building permits, affected the lessor's ability to obtain financing to proceed with construction once the permits were issued.

Appellant also notes that the record does not establish that the permits were available to Deep Joint Venture prior to August 24, when the contracting officer visited El Paso's Public Inspections Office and says that she learned that the permit requests had been approved on August 9, but then misfiled. Appellant contends that in fact no permits were approved until August 25, 1994. Although the contracting officer insisted that the 120 day delivery date be based upon the approval date for the permits, appellant believes that the proper date for making this calculation is August 25, when appellant learned the permits had been issued. This, according to appellant, entitled it to have the 120 days calculated beginning no earlier than August 25. Although it appears from the limited record available that GSA has a valid argument that appellant was unreasonably dilatory in obtaining the permits, and, when it did, in proceeding with construction of the building, there is sufficient dispute over the facts to allow appellant to proceed with its arguments.

Most significantly, appellant argues that the Liquidated Damages clause of the contract did not permit the contracting officer to assess liquidated damages until the 120 days for construction were past and the building still not delivered. Appellant thus alleges that the contracting officer's premature insistence that the lessor owed GSA liquidated damages as asserted in her August 11, 1994, communication, and in her dealings with Basic Capital and the Raymond Mallooly Trust, hindered appellant's ability to obtain reasonable financing terms and, subsequently, to obtain another contractor to perform under the lease.

This argument is creative, but not particularly compelling. As we have pointed out, it is generally the contractor's obligation to obtain adequate financing to proceed with the work. The Government is generally not obligated to renegotiate the terms of the contract to enable the contractor to obtain financing or a buyer for its assets, including the contract. Certainly, these facts, and appellant's gloss on them, do not give rise to a basis to grant summary relief to appellant. The question is whether appellant can prove that the contracting officer improperly claimed entitlement to liquidated damages, thereby contributing to the delays experienced in its attempts to obtain financing and a contractor to construct the building so as to give appellant a basis to overcome the default. Although making this showing would be a difficult burden to meet, we conclude that appellant has raised sufficient doubt, and sufficient disagreement as to the facts, to permit it to try to show the default was

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[9] Although a supplemental lease amendment was agreed to, the signatory on behalf of Deep Joint Venture was Cliff Woerner, the individual whom appellant asserts did not have authority to act on behalf of the joint venture.

excusable. Accordingly, appellant's cross-motion for summary relief is denied, but respondent's motion must also be denied, although -- as noted -- respondent has met its burden to establish a prima facie case that the default termination action was justified.

Decision

Each party's motion for summary relief is **DENIED.**

CATHERINE B. HYATT
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

MARTHA H. DeGRAFF
Board Judge