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

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CROSS MOTIONS FOR SUMMARY RELIEF DENIED:
March 30, 2001

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GSBCA 15219

HG PROPERTIES A, L.P.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Neil I. Levy and Emmett H. Miller, III of Kilpatrick Stockton LLP, Washington, DC, counsel for Appellant.

Jeremy Becker-Welts and Catherine C. Crow, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

**HYATT**, Board Judge.

Appellant, HG Properties A, L.P. (HG), the landlord under Government lease number GS-10B-04512, seeks $592,898.33 in damages from respondent, the General Services Administration (GSA). This lease was entered into in 1976 between GSA and HG's predecessors, for a twenty-year term beginning in October 1977, with two five-year renewal options. Under the lease, the Government was furnished approximately 40,000 square feet of office space in the Pocatello Federal Building and United States Courthouse located in Pocatello, Idaho. This is a three-story building which was constructed for the Government in 1976 and 1977. It has been occupied continuously, under the subject lease, by the Federal Government since its construction. Subsequent to the exercise of the first renewal option in 1997, the parties entered into a supplemental lease agreement dated May 7, 1999, in which they agreed to reduce the space occupied by the Government to approximately 18,000 square feet. The tenant that vacated the premises was the United States Courts; the remaining space is currently occupied by the United States Forest Service.

Thereafter, HG submitted a certified claim for "restoration damages" resulting from the Government's actions in making certain alterations to the grounds and building without

the lessor's knowledge and consent. The claim included HG's inspection findings for each floor and the exterior grounds, as well as drawings furnished by HG to show the changes and repairs that it deemed necessary as a result of alterations and damages occurring during the Government's occupancy. The contracting officer denied the claim and HG appealed this decision to the Board. Following the filing of HG's appeal, GSA moved for summary relief, contending that the material facts are not in dispute and respondent is entitled to judgment as a matter of law. Appellant opposes GSA's motion and has cross-moved for partial summary relief, contending the Board should find that as a matter of law GSA is liable for damage to the building and reserve for later proceedings appellant's proof of the fact and amount of damages.

## Background

GSA and HG's predecessors in interest executed the lease in November 1976. The scope of the lease incorporated the building and the lot on which the building is situated, including parking and landscaped grounds. Initial tenant improvements were made by the lessor in accordance with Government specifications. Appeal File, Exhibits 1, 5.[1]

The lease initially called for 31,175 net usable square feet of office and office-related space, 2695 square feet of storage space, and 2730 square feet of special use space. Office and related-use space was described in the lease with some specificity, including room sizes, and certain office space provided in conjunction with the courtroom. The courtroom was characterized as special use space, as were an interview room, detention cells, a mail room, a telephone room, an Occupational Safety and Health Administration (OSHA) laboratory, a Forest Service laboratory, and a food service area.

The lease contains a variety of provisions that are relevant to this dispute. The General Provisions provide the following:

> **MAINTENANCE OF PREMISES**
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> The Lessor shall maintain the demised premises, including the building and any and all equipment, fixtures, and appurtenances, furnished by the Lessor under this lease in good repair and tenantable condition, except in case of damage arising from the act or negligence of the Government's agents or employees. For the purpose of so maintaining said premises and property, the Government representative in charge, may enter and inspect the same and make any necessary repairs thereto.
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> **ALTERATIONS**

[1] Pursuant to Rule 104(a) the Government has submitted an appeal file consisting of exhibits 1-4. Appellant has submitted a supplemental appeal file, with mostly the same documents, numbered 5-8. Since the documents are numbered sequentially, we simply refer to a single appeal file.

> The Government shall have the right during the existence of this lease to make alterations, attach fixtures and erect additions, structures or signs in or upon the premises hereby leased, which fixtures, additions or structures so placed in, upon or attached to the said premises shall be and remain the property of the Government and may be removed or otherwise disposed of by the Government.

Appeal File, Exhibits 1, 5. The lease did not contain a clause expressly requiring the Government to restore altered space to its original condition upon vacating the premises. Id.

Schedule C of the lease contains additional pertinent provisions:

> For the purpose of this solicitation the Government's responsibility will be to operate the building and its equipment and systems on a day-to-day basis; keeping the building and its equipment in a functioning state and condition through periodic or occasional inspection, adjustment, lubrication and cleaning, and a programmed preventive maintenance system.
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> Preventive maintenance will be performed by the Government on all installed equipment and systems.
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> The Government shall repair or replace any mechanical, electrical, and/or plumbing equipment or fixtures which become inoperative subsequent to the first full year of occupancy and/or the expiration of any warranty or guarantee by the installer/manufacturer of such equipment or fixtures.

The lease further provides on the signature page:

> The Lessor shall furnish to the Government, as part of the rental consideration, the following: Exterior and structural maintenance in accordance with Schedule C of Solicitation for Offers No. 10PRA-76-47.
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> In the event of conflict between the award letters and the Solicitation for Offers No. 10PRA-76-47 and the General Provisions and Instructions (Standard Form 2-A, May 1970 edition), the documents or provisions of documents shall control in the order listed in this sentence.

Appeal File, Exhibits 1, 5.

The initial twenty-year lease term was from October 1977 to October 1997. The property changed ownership several times from 1978 until 1995, when HG Properties A, L.P. acquired it from Real Properties MLP Limited Partnership. HG acquired ownership of the property subject to the lease with GSA. Thereafter, appellant and GSA executed a lease

assumption agreement under which HG agreed to assume the obligations of the lease and the Government agreed to recognize HG as the lessor of the property. Appeal File, Exhibits 2, 6. By letter dated July 11, 1997, GSA exercised the first five-year option for renewal. Appeal File, Exhibit 6. On May 7, 1999, HG and GSA executed supplemental lease agreement number six, providing for a reduction of space occupied by the Government. Id.

The primary tenant occupying the premises during the lease term was the United States Courts. At the time of the initial rental period, the building space consisted, inter alia, of one courtroom and office space. During the lease term, according to the Senior Vice President of Property Management for HG's property manager, GSA made substantial alterations to the leased premises which diminished its market value and will have to be undone to make the property rentable to commercial tenants. Declaration of Mark C. Cully (Cully Declaration) (May 9, 2000).

The most significant alteration was the conversion of approximately 5150 square feet of office space on the second floor into a second courtroom. To accomplish this, HG alleges, GSA removed or altered permanent partitions, doors, hardware, floor coverings, ceiling tiles, lighting electrical components, and telecommunications wiring and cabling. GSA also installed permanent courtroom fixtures, including a judge's bench, witness stand, court reporter's desk, jury area and spectators' gallery, and a judge's chamber. The judge's chamber consisted of a private office, built-in bookcases, a rest room, a coffee break area, a law library and a secretary's office. Cully Declaration ¶ 7.

According to HG, in other portions of the first and second floors and basement, GSA subdivided office space into shapes that are too small and awkward for the typical commercial tenant. GSA also installed various communications and security equipment on the roof of the building. After the Oklahoma City bombing in 1995, GSA installed a separate "bomb barrier" at the parking lot entrance to the building for security purposes. This barrier consisted of a concrete cylinder filled with dirt and must be removed for commercial tenants. GSA also removed vegetation adjacent to the building to prevent the concealment of potentially threatening items next to the building. The removal of the vegetation resulted in subsequent water damage to the exterior of the building. Cully Declaration ¶¶ 8-14.

HG contends that the alterations made to the interior of the building and the grounds have caused damage to the building, diminished the market value of the property, and impaired appellant's ability to attract new commercial tenants. HG asserts that to correct these problems, the alterations will have to be completely undone.

HG also contends that the Government failed to maintain the leased premises in a functioning state. HG contends that Schedule C placed the exclusive responsibility to maintain and operate the leased premises on GSA, with the sole exception of the structural maintenance of the building. According to HG, GSA did not fully carry out its maintenance duties. For example, HG states that while the carpet was replaced in 1984, thereafter much of the carpet in the building was allowed to exceed its useful life without being replaced and, when the space was vacated, much of the carpet was stained, discolored, and lacked uniform color and condition. In addition, interior doors were shortened excessively and exterior maintenance of the parking lot and sidewalks was neglected, requiring replacement of concrete pads used for walkways and repair and repaving of the parking lot. HG points out

that a full-time GSA maintenance employee was on the premises. Cully Declaration ¶¶ 15-17.

With the exception of a few items, the contracting officer denied the claim, primarily because the lease does not contain a restoration clause. In responding to the claim she noted that the Government had altered the property to accommodate the expansion of the courts and the changing needs of the other federal tenants in the building, but, in her opinion, the alterations did not change the original intended use of the leased space. The contracting officer also pointed out that the Government in fact spent many thousands of dollars to operate and maintain the building, providing dollar amounts expended for the last decade as an example. After reviewing all the claimed items in the inspection report attached to the claim, she determined, however, that the Government would remove the concrete barrier and would reinstall shelving removed in error. The contracting officer declined to provide compensation for the lessor-owned card-entry key system which had been removed by the Government and replaced several times with updated systems because the system installed in 1976 is obsolete and has no current value. Appeal File, Exhibit 4. She also has stated that in reviewing the premises she observed no material change in its condition, other than ordinary wear and tear. Declaration of Susan L. Foster (April 13, 2000) ¶ 6. In addition, although there was a full-time employee on the premises, this employee was a mechanic who provided maintenance only for equipment and systems within the building. He did not provide maintenance for the entire leased premises. Declaration of Susan L. Foster (May 25, 2000) ¶ 5.

At the time the lease was entered into, GSA had in effect a handbook entitled Acquisition of Leasehold Interests in Real Property. Chapter 10 of this handbook addresses claims for restoration or damages to property that has been leased by the Government. The handbook recognizes that the Government may be liable for damages either by reason of an express clause in the lease or by operation of law.

The handbook defines restoration as

> the physical replacement or repair of the premises at the termination of the Government's occupancy to the same condition existing at the commencement of such occupancy, except for reasonable and ordinary wear and tear, and damage by the elements, etc.

Waste is defined as "any material change in the premises other than ordinary wear and tear which permanently injures the lessor's and/or the owner's interest." Reasonable and ordinary wear and tear is defined as "disrepair, deterioration or depreciation of the premises resulting from ordinary use and occupancy for the purpose for which the property is leased." HG referred to the handbook in its claim. GSA Handbook, Acquisition of Leasehold Interests in Real Property, ch. 10 (1966).

Appellant has furnished a declaration from a real estate expert formerly employed by GSA in various aspects of real estate transactions including real estate negotiations. This individual states that, although most GSA leases do not contain restoration clauses and do permit the Government to make alterations to the premises:

> [T]here is a pattern and practice in both U.S. Government and commercial leases for the tenant, including government tenants, to pay the cost of removing tenant alterations that diminish the value of the property, and the cost of restoring the property to its original condition. This pattern and practice is consistent with the government or commercial tenant's obligation to restore arising from the implied covenant not to commit waste of the leased premises, which is implicit in every lease. This practice was evidenced by several U.S. Government lease transactions that I have been involved with in which the Government paid restoration damages relating to Government-made alterations, even though the lease allowed tenant alterations and did not contain an express restoration clause.

Declaration of Thomas W. Rochford (May 9, 2000) ¶¶ 7-8.

In response, GSA has offered a counter-declaration from the Chief of Business Practices for Real Estate Services in the Northwest Arctic Region, who has worked for GSA for twenty-one years and as a GSA realty specialist for some fourteen years. She states that it has not been the pattern and practice in GSA leases for the Government to restore leased property to its original condition where there is no restoration clause and the lease permits the Government to alter the premises. Declaration of Katherine Reddick (May 25, 2000) ¶ 2.

## Discussion

Both respondent and appellant have moved for summary relief in this appeal. Respondent contends that appellant's claim is for restoration of the premises and that this action is precluded as a matter of law by reason of the lack of a restoration clause in the lease. Appellant disagrees, but cross-moves for partial summary relief, maintaining that it is entitled to judgment with respect to entitlement -- that the Government's alterations to the property and failure to fully meet its maintenance obligations damaged the premises and that the Government is liable for these damages as a matter of law.

Applicable Law

Summary relief is properly granted only where 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-movant. Parcel 49C Ltd. 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.")

Moreover, the fact that both parties, adopting inherently contradictory positions, 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 Ltd. Partnership, 00-2 BCA at 153,405-06; Deval Corp., ASBCA 47132, et al., 95-1 BCA ¶ 27,537, at 137,233.

Finally, in determining the rights and liabilities of the parties to this dispute 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).

The Court in Prudential recognized that while "a lease may concern and convey a property interest it is also very much a contract." Id. In interpreting the lease in this appeal, our fundamental objective is to ascertain the intent of the parties and to effectuate the spirit and purpose of the lease. See Northrop Grumman Corp. v. Goldin, 136 F.3d 1479 (Fed. Cir. 1998); Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991); Arizona v. United States, 575 F.2d 855, 863 (Ct. Cl. 1978). The language of the contract must also be given the meaning that would be derived therefrom by a reasonably intelligent person acquainted with the contemporary circumstances. Blake Construction Co. v. United States, 987 F.2d 743, 746 (Fed. Cir.), cert. denied, 510 U.S. 963 (1993).

GSA's Motion

It is undisputed that the lease did not contain a clause requiring restoration. The certified claim submitted to the contracting officer seeks "restoration damages." The claim does not explicitly seek recovery based on a breach of the implied covenant not to commit waste or on a breach of the duty to maintain, although appellant argues that such a claim was presented by virtue of its reference in its claim to GSA's handbook. GSA's motion is straightforward. The lease clause permitting the tenant to make alterations, coupled with the absence of an express obligation to restore, conclusively establishes that no legal liability for restoration costs exists. GSA thus asserts that it is entitled to judgment as a matter of law. In the alternative, to the extent that HG now contends its appeal is based on waste, GSA asserts that a claim for commission of waste was not presented to the contracting officer and should be dismissed for lack of jurisdiction.

The absence of a clause in the lease obligating the Government to restore the premises to its original condition does not conclusively dispose of this matter. Although the Government is not affirmatively required to restore the premises to the condition in which it was originally let, the lease is silent as to the tenant's responsibility to compensate the lessor for the cost of returning altered office space to its original configuration. As HG points out, appellant's claim does not actually seek restoration, but rather to recover "restoration damages," or the cost of renovating the building back to the office dimensions and type of space initially provided.[2] HG argues that regardless of the absence of a specific requirement for restoration, the action may still be maintained as a claim to recover damages for the commission of waste or for the tenant's failure to maintain the premises properly.

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[2]In support of its argument that summary relief should be granted because an express commitment to restore is necessary to establish a restoration obligation, GSA cites three Board precedents: Adelaide Blomfield Management Co. v. General Services Administration, GSBCA 13125, 97-1 BCA ¶ 28,914; Merlyn J. Jenkins v. General Services Administration, GSBCA 13610, 97-1 BCA ¶ 28,678 (1996); and Arnold D. Becker, GSBCA 5542, 80-2 BCA ¶ 14,654. None of these cases actually holds that the lack of an express restoration clause prevents recovery of costs attributable to the need to restore a building that has been altered, and possibly damaged, by the tenant. In Blomfield the lessor made substantial modifications to its building space to accommodate the Government prior to occupancy of the premises. The Board held that a restoration requirement added to a supplemental lease agreement specifying minor alterations, and executed after the original lease was signed, could not be construed to obligate GSA to pay for restoration of all the changes made prior to initial occupancy. In Jenkins the lessor demanded compensation for damage to a door installed by the Government with the landlord's consent as a result of removal of the Government's security system. There the Board noted no restoration clause had been pointed to but also stated that the landlord had caused the damage himself by failing to meet his obligation to maintain the door. 97-1 BCA at 143,263. Finally, Becker involved similar lease clauses allowing alterations with no requirement to restore, but the lessor had sole responsibility for repair and maintenance. It does not appear that the landlord sought restoration, but rather sought, inter alia, to recover damages to the premises caused by installation or removal of changes to the premises. The Board awarded costs for those items.

We agree with appellant in this instance. Even conceding respondent's position that the claim as certified does not expressly allege that appellant seeks damages for breach of the implied covenant not to commit voluntary waste, this is not fatal to the continuation of appellant's appeal under that legal theory. The requirement to present a claim in writing to the contracting officer is set forth in the Contract Disputes Act of 1978, 41 U.S.C § 605 (1994 & Supp. IV 1998). This requirement has been construed simply to mean that the contractor must provide the contracting officer with a clear statement that sets forth adequate notice of the basis and amount of the claim. See Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586, 592 (Fed. Cir. 1987). The assertion of a new or alternative legal theory of recovery, premised upon the same operative facts presented in support of the original claim, does not constitute a new claim that must be presented to the contracting officer. Stroh Corp. v. General Services Administration, GSBCA 11029, 96-1 BCA ¶ 28,265, at 141,129-30; Blaze Construction Co., IBCA 2863, 91-3 BCA ¶ 24,071, at 120,502-03; see Placeway Construction Corp. v. United States, 920 F.2d 903, 907-08 (Fed. Cir. 1990).

Here, whether the damages claimed are based on an express obligation to restore or an implied obligation not to commit waste and to maintain the building, the applicable operative facts, describing the alterations made to the original space leased to GSA and other damage to the property, have already been presented to, and considered by, the contracting officer. The same facts would govern appellant's recovery under the alternative legal theories. Indeed, the contracting officer addressed GSA's operation and maintenance of the building in her decision. Accordingly, GSA's alternative motions – to dismiss for lack of jurisdiction or to deny the appeal summarily – are denied.

HG's Motion

In response to GSA's motion, HG has cross-moved, alleging that it is entitled to partial summary relief declaring that GSA is liable for appellant's damages as a matter of law, subject to proof by appellant of the fact and amount of damages. Specifically, appellant contends that it is entitled to a declaration of law that under the terms of the lease GSA is obligated to maintain the leased premises, except for the exterior of the building, and that to the extent that GSA has violated its maintenance obligation, it is liable to pay damages to appellant in the amount required to restore the premises to the same condition as if GSA had fully performed its maintenance obligations. Additionally, HG believes it is entitled to a declaration that, under the implied covenant not to commit waste, GSA is liable for any voluntary or permissive waste it may have caused to the premises which could include alterations that may have diminished the value of the premises.

Although we are of the view that an appellant may in proper circumstances pursue an action for damages arising from the commission of voluntary waste, the record as presently developed does not support a grant of summary relief as to liability or entitlement. There are disputed material facts with respect to both of appellant's theories of recovery – breach of the obligation to maintain the premises properly and breach of the implied obligation not to commit waste – such that it would be premature to grant a motion for summary relief.

GSA's Maintenance and Repair Obligations

Both parties recognize that the lease divides the maintenance obligations. Although the clause in the General Provisions of the lease allocated full maintenance responsibilities to the lessor, the more specific provisions in Section C provide that the Government is responsible for "operat[ing] the building and its equipment and systems on a day-to-day basis; keeping the building and its equipment in a functioning state and condition through periodic or occasional inspection, adjustment, lubrication and cleaning, and a programmed preventive maintenance system." HG asserts that this language shifted full daily maintenance and repair responsibilities to the Government, leaving only exterior structural maintenance for the landlord. HG further argues that the presence of a full-time GSA maintenance employee demonstrates that both parties construed the language in this manner in practice. The Government views this provision more narrowly than does HG – it states that the language only requires operation and maintenance of equipment and systems in the building and that the mechanic assigned to the premises provided maintenance only for equipment and systems within the building. Given the opposing interpretations advocated by the parties, and the disputed issue concerning the role of the GSA employee who provides maintenance services in the building, it would not be appropriate to dispose of this question on summary relief.

The Implied Covenant Not to Commit Waste

The implied covenant not to commit waste by altering leased premises derives from the common law view that in the absence of a specific provision in the lease, a tenant may not make material alterations or changes in a building for its convenience, and that such changes constitute waste, even though the value of the property might actually be enhanced. Milton R. Friedman, Friedman on Leases § 22.104 (4th ed. 1997). In looking to federal law addressing this subject, the implied covenant not to commit waste has been said to require return of the premises to the lessor in the same condition as received, reasonable wear and tear excepted. Both elements of this implied covenant are construed with reference to the intended use of the property by the lessee. Brooklyn Waterfront Terminal Corp. v. United States, 90 F. Supp. 943, 948-50 (Ct. Cl. 1950), cert. denied, 340 U.S. 931 (1951). In general, there is an implied covenant not to alter, change, or disfigure property any more than is necessary for the purpose for which the property was leased. United States v. Bostwick, 94 U.S. 53, 68-69 (1876); see also Italian National Rifle Shooting Society of the United States v. United States, 66 Ct. Cl. 418 (1928). The application of the implied covenant usually occurs, however, where there is no clause permitting alterations. That is, the law of waste applies where the lease does not address what a tenant's rights may be to effect changes or alterations in the premises. It may be superseded when a lease stipulates the extent of a tenant's right to alter or improve the leased premises. See Friedman on Leases § 22.101, at 1338.

The Board has recognized that where a lease permits GSA to make alterations to the premises and does not contain a clause requiring GSA to restore the premises to the condition that existed when the lease term began, there nonetheless exists an implied obligation on GSA's part not to damage the property. KMS Development Co. v. General Services Administration, GSBCA 12584, 96-2 BCA ¶ 28,404, reconsideration denied, 97-1 BCA ¶ 28,968 (citing Eaddy v. United States, 139 F. Supp. 49 (Ct. Cl. 1956)); see Arnold D. Becker, GSBCA 5542, 80-2 BCA ¶ 14,654. In KMS, the claim for damages was not for the

costs of restoring the premises, but for costs of repairing damage to the premises occasioned as a result of alterations.

What is not clear is whether alterations that are within the contemplated use of the property, and are permitted under the lease, give rise to an obligation to compensate the landlord for the cost of restoring the building to the configuration it was in at the time the lease was executed.[3] GSA was permitted to make alterations under the lease; the clause does not condition that right upon obtaining the consent of the landlord, nor does it contain an express requirement to restore the premises to the condition existing at the time of initial occupancy. Under an action for waste, one issue to be considered is whether those alterations were consonant with the contemplated use of the premises or whether they impermissibly altered the permanent character of the leased space in ways that were not intended. This issue is not squarely addressed by either party. The original lessor provided the building in question to GSA for operation as a federal courthouse and office building, with various special use facilities such as laboratories. Although GSA altered the space to add a courtroom, and thus eliminated some space previously used as offices, there remains a question of whether this actually damaged the property given the uses that were contemplated at the inception of the lease. Under the circumstances, this question can only be answered by determining the intent and expectations of the parties when entering into this lease. The record has not been fully developed with respect to this issue, although both parties have offered extrinsic evidence intended to support their proposed interpretations. This evidence concerns the pattern and practice with respect to restoration of alterations in commercial and government leasing.

In particular, both parties have offered evidence concerning GSA's practice in restoring premises that have been altered under a clause providing GSA with authority to make alterations to adapt to changing tenant needs. Appellant's affidavit states that it is the common practice for GSA to pay for restoration where it has altered leased space; GSA says that it does not commonly undertake to restore space it has altered during the term of a lease. As discussed below, neither affidavit is sufficiently detailed to meet the requirements of the law to establish a custom or trade usage.

It is certainly appropriate to refer to custom within a particular industry to ascertain the intended meaning of disputed contract terms. The Court of Appeals for the Federal Circuit has recognized that:

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[3] At least one case, construing a clause somewhat similar to the one presented here, would suggest that there is not necessarily such an obligation. The United States Court of Appeals for the Fifth Circuit has ruled that a lease clause which stated that "[i]t is agreed that Lessee shall make such changes or alterations to the interior of the building and to the walls thereof, as it may see proper and deem necessary" authorized all of the changes made to the building and overturned the lower court's ruling requiring the tenant to compensate the lessor for alterations made during the tenant's occupancy. Bifano Building Corp. v. W. T. Grant Co., 325 F.2d 147, 148 (5th Cir. 1963).

> Before an interpreting court can conclusively declare a contract ambiguous or unambiguous, it must consult the context in which the parties exchanged promises.
> . . . .
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> . . . [E]vidence of trade practice and custom plays an important role in contract interpretation. Before arriving at a legal reading of a contract provision, a court must consider the context and intentions of the parties. That context may or may not disclose ambiguities. In any event, evidence of trade practice and custom is part of the initial assessment of contract meaning. It illuminates the contemporaneous circumstances of the time of contracting, giving life to the intentions of the parties. It helps pinpoint the bargain the parties struck and the reasonableness of their subsequent interpretations of that bargain.

Metric Constructors, Inc. v. National Aeronautics and Space Administration,169 F.3d 747, 752 (Fed. Cir. 1999); see also Jowett, Inc. v. United States, 234 F.3d 1365, 1367 (Fed. Cir. 2000); Bristol-Myers Squibb Co. v. United States, 48 Fed. Cl. 350 (2000); Roxco, Ltd., ENGBCA 6435, 00-1 BCA ¶ 30,687 (1999).

Here, the evidence of custom, in the form of affidavits from individuals employed in the fields of government and commercial leasing, is inconclusive and in conflict. In particular, neither affidavit contains sufficient detail to determine whether the leases referred to and alterations made are similar in nature and scope to the one in this appeal. Neither affidavit clearly establishes what, if any, custom existed at the time the lease was entered into. Although the handbook suggests that GSA is aware of the potential for legal liability for damage to leased premises, it does not clearly demonstrate that GSA consistently pays for the cost of removing alterations and restoring premises when it has a contractual right to make alterations. Evidence of the industry custom, when fully developed, may well be material to a determination of whether the alterations in question should be regarded as waste or as a permissible alteration of the building under the terms of the lease, which, in the absence of undue damage or unreasonable wear and tear, would not obligate the tenant to compensate the landlord.[4] The evidence now before us is not sufficient to carry the day. We cannot find that there is no genuine issue of material fact to be resolved such as to justify granting summary relief for appellant.

[4] Similarly, with respect to appellant's argument that GSA failed to fulfill its maintenance obligations under the lease, the evidence is in dispute. The contracting officer states that she inspected the premises and observed no damage beyond ordinary wear and tear; appellant's property manager contends that such damage exists.

Decision

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

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CATHERINE B. HYATT
Board Judge

We concur:

_____
STEPHEN M. DANIELS
Board Judge

_____
MARTHA H. DeGRAFF
Board Judge