Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

APPELLANT'S MOTION FOR SUMMARY RELIEF DENIED;
RESPONDENT'S MOTION FOR SUMMARY RELIEF GRANTED
IN PART AND DENIED IN PART: August 15, 2006

GSBCA 16085

PETULA-MIDRISE IV, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Thomas A. Coulter of LeClair Ryan, P.C., Richmond, VA, counsel for Appellant.

Robert C. Smith, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **DeGRAFF**, and **GOODMAN**.

GOODMAN, Board Judge.

Appellant, Petula-Midrise IV, LLC (Petula or appellant), has appealed a contracting officer's decision denying its claim arising from the performance of a lease (the lease) entered into between appellant's predecessor-in-interest, Petula Associates, Ltd.,[1] and respondent, the General Services Administration (GSA or respondent). The parties have

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[1] In this decision, both appellant's predecessor-in-interest and appellant will be referred to as "appellant."

filed cross-motions for summary relief. As set forth herein, we deny appellant's motion and grant respondent's motion in part and deny respondent's motion in part.

Background

The Solicitation for Offers (SFO) and Lease Negotiations

On or about April 5, 2000, GSA issued an SFO, seeking approximately 70,000 rentable square feet of office space located in Northern Virginia. Supplemental Appeal File, Exhibit 22. Negotiations which eventually resulted in the lease were initiated between representatives of appellant and its commercial leasing representative, Trammel Crow Company (Trammel Crow), and GSA and its commercial leasing representative, Spaulding and Slye/Colliers International (Spaulding). Appellant's Motion for Summary Relief, Exhibit 1, Affidavit of Thomas A. Cresce (March 8, 2005) (Cresce Affidavit 1) ¶ 6. Mr. Thomas Cresce, a senior vice-president of Trammell Crow, served as leasing representative for appellant during the negotiations. Cresce Affidavit 1, ¶¶ 2-3.

Because the building was not yet under construction when negotiations began, the base building documents for construction of the building shell were complete at the time of negotiations, but the tenant improvement construction documents were in the preliminary stages of development and were to be finalized after lease execution. Cresce Affidavit 1, ¶ 5.

Mr. Cresce states that before he received the SFO, he initially discussed terms for the lease with Mr. Joseph Brennan of Spaulding in February 2000, in response to an inquiry from Mr. Brennan. Cresce Affidavit 1, ¶¶ 7, 9. He recalls that at that time he discussed with Mr. Brennan lease terms of a rental rate at $25 per square foot and a tenant improvement allowance of $25 per square foot. *Id.* ¶ 9.

When Mr. Cresce received the SFO in April 2000, he reviewed its terms. Section 1.10 of the SFO was entitled "Building Shell Definition." According to Mr. Cresce, the existing plans for the base building shell contemplated construction of a building with less than the building shell requirements of the SFO, in that the existing plans did not include a ceiling system, a complete heating system, lights, or carpet, and it was therefore "more in the nature of a cold dark shell."[2] He states that he believed that any effort to include all the

[2] The record of this case contains numerous references to individuals' interpretations and understandings of the terms "cold dark shell" and "warm lit shell," which are used in the real estate industry to designate the completeness of a building shell at a specific stage in construction. While these individuals refer to information in the SFO and the lease which some believe refer to a "cold dark shell" and others believe refer to a "warm lit shell," the

items listed in the SFO definition of the building shell in the construction of the building shell would require altering the existing plans for the base building and would have slowed the construction. Cresce Affidavit 1, ¶ 10.

Mr. Cresce estimated the difference in cost between the planned building shell and the shell required by the SFO as approximately $8-12 per square foot. He was instructed by appellant to offer an increase in the tenant improvement allowance of $12 per square foot, for a total tenant improvement allowance of $37 per square foot. Cresce Affidavit 1, ¶ 11. Mr. Cresce states that on April 19, 2000, he presented a proposal to Spaulding which offered less than the building shell requirements in the Government's SFO but an increased tenant allowance of $37 per square foot. *Id.* ¶ 12.

According to Mr. Cresce, from April through August 2000 one of the principal points of negotiation was how to modify the building shell definition in the SFO by including language in the lease that would reflect that the building shell would be provided only in accordance with the existing base building construction documents, i.e, that appellant would not be providing at its own expense all of the ceiling tile, HVAC, lighting, and sprinklers listed in section 1.10 in the SFO, but only those quantities of these items specifically shown in the base building construction documents. Mr. Cresce states that the parties understood that the remaining quantities of these items not shown in the existing base building construction documents would be provided in the tenant improvement process. Cresce Affadavit 1, ¶ 13.

Mr. Cresce states that all negotiations took place between the leasing agents for the parties with counsel for appellant also participating. Cresce Affadavit 1, ¶ 6. He recalls that Joseph Delogu, a principal with Spaulding, suggested adding language to indicate that appellant would only be providing at its own expense those building shell items required by the base building construction documents. He states further:

> Mr. Delogu informed me and Stephen D. Delaney, counsel for Petula, that [he] had experience as a contracting officer with the GSA and had negotiated numerous government contracts and, as a result, was intimately familiar with the process. Based on that experience, Mr. Delogu informed us that any attempt to modify or strike out portions of the building shell definition would slow down the Government's approval of the lease. Therefore he suggested

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words "cold dark shell" and "warm lit shell" do not appear in the SFO or the lease.

> that we simply modify the building shell obligations by adding the "as per"[3] language to the beginning of the building shell definition.

Appellant's Response to Respondent's Motion for Summary Relief, Exhibit 2, Affidavit of Thomas A. Cresce (July 14, 2005) (Cresce Affidavit 2), ¶ 10.

Mr. Delogu tells a different story. He states that he supervised the "[Spaulding] team that assisted the Government" with the project and participated in the actual negotiation of the lease terms, and that his role was "to essentially monitor the progress of [the team.]" According to Mr. Delogu, the team consisted of himself, Joseph Brennan,[4] Richard Mann,[5] and possibly others. Deposition of Joseph Darke Delogu (June 4, 2004) at 28, 30. Mr. Delogu states that he has a general recollection that at the beginning of negotiations Trammel Crow, on behalf of appellant, did not offer to provide all the requirements in the building shell definition in section 1.10 of the SFO. *Id.* at 105, 109. However, he has no recollection of the negotiation of the building shell definition. He does not recall who negotiated that provision of the lease or any details of the negotiation, nor does he know with whom at GSA Spaulding would have communicated with regard to any discussions concerning this issue. *Id.* at 84, 98-99.

As to the issue of who drafted the modified language that was included in the building shell definition, Mr. Delogu recalled that appellant's attorney, Mr. Stephen Delaney, "physically made the adjustment" in the language of the building shell definition and "someone on the owner's team . . . came up with the language." Delogu Deposition at 118-19. His understanding of the reason for including the additional language was that it "would be helpful to have the construction documents for the building as an exhibit to demonstrate what level of construction was planned out there for the building. . . . We thought it was a

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[3] This refers to the modified language in the building shell definition that was ultimately included in the lease.

[4] Joseph Brennan stated that he has no recollection or personal knowledge of the negotiation of section 1.4 of the lease or the lease itself, nor does he have any recollection of reviewing the SFO before the lease was executed. Deposition of Joseph Brennan (May 27, 2004) at 13, 29, 37, 48. He also has no recollection of discussions of the rental amount for square footage and for tenant improvements, nor any knowledge as to why the language of section 1.10 of the SFO was modified to that which was included in section 1.4 of the lease, because he was not involved in "those conversations," and has "no personal knowledge of any changes made in [the language of the SFO]." *Id.* at 45, 58-59, 61.

[5] The record does not contain deposition or affidavit testimony from Mr. Mann.

good add, because there it is sitting next to our language, apparently an added criteria that would help our client by further clarifying what was going to be built." *Id.* at 122-23.

Contrary to the understanding of Mr. Cresce that the modification of the building shell definition limited appellant's obligations from those in the original SFO, Mr. Delogu stated that he believed at the time that the additional language gave the Government "more than the items listed in Section 1.4." Delogu Deposition at 122-23. However, he did not recall reviewing the construction documents during the negotiation. *Id.* at 124. He believes that either someone with Spaulding or Katoshia Ford, GSA's construction manager,[6] reviewed the construction documents, but he does not know who. *Id.* at 126.

While the leasing agents differ as to their understanding of the reason why the building shell definition was modified, no one disputes that the lease provision was modified. The provision reads as follows, with deleted language indicated by strikeout and added language indicated by italics:

~~1.10~~ *1.4* BUILDING SHELL DEFINITION

The following building improvements will be provided and installed by the Lessor *as per the construction documents attached to this lease* at the Lessor's expense.

Exterior

The building exterior will be completed.

Handicapped Accessibility

Complete handicapped accessibility is required to and throughout the Government demised premises *as shown on the base building and tenant improvement plans.*

Core Area

[6] Ms. Ford did not negotiate the lease. She began to provide services on the project in January 2001. Deposition of Katoshia Ford (May 12, 2004) at 49. At that time she reviewed the lease but not the construction documents attached to the lease. *Id.* at 26-27. She never reviewed the base building documents during her involvement with the project. *Id.* at 85-86.

All common areas, such as circulation corridors, lobbies, food service areas and rest rooms are complete and operational. Elevators are completed and operational. Toilet rooms are completed and operational. Mechanical and electrical rooms are completed, operational and ready for tenant improvement. Means of fire egress areas, including stairwells and outside exits, are completed and operational.

Mechanical and Plumbing Systems

All HVAC [heating, ventilating, and air conditioning] equipment is installed and operational. Main lines, branch lines, VAV [variable air volume] boxes, dampers, flex, diffusers and light boots are installed and operational. Control systems are installed and operational. Controls in tenant areas will be installed at the Lessor's expense during the tenant improvement process. Hot and cold water risers, domestic waste risers and vent risers are installed and ready for connections per tenant improvement plans. Complete electrical distribution capacity sufficient to operate Class-A ~~downtown~~ office space in each premises the Government will occupy.

Fire and Safety Systems

All systems are installed, distributed, and operational. This includes sprinkler, fire detection and alarm, emergency generator systems, *of any* fire control and other code requirements *as shown on the base building and tenant improvement plans.*

Partitions

Permanent perimeter and demising slab to slab partitions (including all columns in common and tenant areas) are installed and finished with paint and base.

Lessor's Responsibilities within Tenant Areas

Windows, window blinds, ceiling tile, interior lighting, and tenant-approved carpet are installed as part of the Lessor's building shell. Exterior/perimeter partitions and columns are finished with paint and base as part of the Lessor's building shell. All remaining interior improvements within the tenant area shall be paid-for by the tenant – including but not limited to: tenant partitioning, electric outlets, telephone outlets, interior doors, and specialty finishes.

Alterations to Meet SFO Requirements

Any alteration necessary for the building shell to meet the SFO requirements shall be included as part of the building shell rate.

Tenant Alterations

If an alteration requested as part of tenant improvements requires a change to existing building shell construction, the cost of that change shall be considered part of the tenant improvement cost and not part of the building shell rate.

Appeal File, Exhibit 21, Attachment 1.

The parties listed the documents included in the lease, including the following language in the lease:

"[t]he following are attached[7] and made a part hereof: . . . [Exhibit] G. Construction Documents - 1 page.

Appeal File, Exhibit 1 at 5.

Exhibit G of the lease contains the following language:

Construction Documents for US Drug Enforcement Administration's Lease Chantilly, VA

1) Specification Book; Midrise IV Avion Office Park, Chantilly, VA LA-0105709-00, dated June 2, 2000.[8]

[7] In its motion for summary relief, respondent states that "[t]he documents are not actually 'attached' to the lease." Respondent's Motion for Summary Relief at 5 n.1. However, in its legal argument, respondent states that these documents were incorporated into the lease -- "it made perfect sense to incorporate the building construction documents into the lease." *Id.* at 8. "The construction documents incorporated into the lease Exhibit G were clearly in existence when the lease was executed." *Id.* at 10.

[8] This Specification Book is included in the record as Supplemental Appeal File, Exhibit 25. It is approximately 900 pages in length.

2) Plans Set; Midrise IV Avion Lot 5 Chantilly, VA. Dated June 2, 2000.[9]

Appeal File, Exhibit 1 at 63. The specification book and the plans set referred to in Exhibit G of the lease were the base building construction documents that existed at the time the lease was executed. Appellant's construction manager states that they were available for review by respondent's representatives during the negotiation of the lease. Appellant's Motion for Summary Relief, Exhibit 2, Affidavit of Matthew D. Maio (March 9, 2005), ¶ 4 (Maio Affidavit 1).

The lease contained the following language with regard to the construction of tenant improvements:

> The Lessor shall provide to the Government a Tenant Improvement Allowance in the amount of $2,645,648.00. . . . In the event that the total cost of the Tenant Improvements to be made by the lessor under this lease exceeds the amount of the Allowance allocated by the Government for such purpose ("Improvement Overage"), the Government shall pay the Improvement Overage to Lessor . . . .

Appeal File, Exhibit 1 at 3.

Review by the Contracting Officer before Lease Execution

Lease negotiations were concluded in August 2000. Mr. Cresce received a revised version of the SFO, as a proposed lease from Spaulding, which contained the building shell definition as modified and the other language set forth above. According to Mr. Cresce, the purpose of the modification of the building shell language was to reflect the parties' understanding that appellant would provide certain building shell items at its own expense only as indicated in the base building construction documents that were part of the lease. Cresce Affidavit 1, ¶ 15. There were no further revisions to the building shell definition before the lease was executed in October 2000. *Id.* ¶ 16.

Catherine E. Sheehan, GSA's contracting officer who executed the lease on behalf of respondent, states that Spaulding conducted all the negotiations for the lease and her first involvement was when she "received the complete document to sign." Deposition of Catherine Sheehan (May 12, 2004) at 17. No one at Spaulding informed her that the language of the building shell definition in the lease had been changed from that in the

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[9] These drawings are included in the record as Supplemental Appeal File, Exhibit 24. There are approximately 100 drawings.

original SFO. *Id.* at 53-54. Even so, she realized that the inclusion of the phrase "as per the construction documents attached to the lease" was not typical language that she usually saw in a building shell definition. She did not specifically ask Mr. Delogu where this language came from, nor did she discuss this language with Mr. Delogu. *Id.* at 55, 61.

However, because the building shell definition in the proposed lease did not contain the words "warm lit shell," she called Joseph Delogu on October 6, 2000. She states that he clarified "that the building shell and all the items annotated below included what we refer to as a warm lit shell and that these were provided for by the owner [appellant] at his expense. That was the only outstanding issue that I felt I needed [to be] clarified." Sheehan Deposition at 27. She needed this clarification because, in her experience, typically the phrase "warm lit shell" is included in the SFO, and here it was not. *Id.* at 28-29.

She concluded before signing the lease that because the items listed in the shell definition were those which she understood to be included in a "warm lit shell," and because the construction of the building was ongoing, the reference to items in construction documents meant that those items would be supplied in addition to those already listed. Sheehan Deposition at 58. This conclusion was not based on information from Mr. Delogu, because she and he did not discuss the meaning of that language. *Id.* at 61. However, her interpretation of this language at the time of lease execution was the same as Mr. Delogu's interpretation.

Before signing the lease, the contracting officer was not aware that the base building plans and specifications had been completed. Sheehan Deposition at 45. She has never reviewed the base building plans or the tenant improvement plans for the building. *Id.* at 45-46.

Lease Execution

In October 2000, appellant and GSA entered into a "build-to-suit" lease (the lease) for office space in Chantilly, Virginia, which required construction of a three-story building with 71,504 square feet of rentable space. Appeal File, Exhibit 1. The lease was executed on behalf of appellant by Mark Scholz, vice president, and John Bunz, counsel. There is no affidavit or deposition testimony from Mr. Scholz or Mr. Bunz in the record of this appeal. Catherine Sheehan, the respondent's contracting officer, executed the lease on behalf of respondent. *Id.* at 5. During her deposition, she stated that she did not have the base building construction documents "in [her] possession" at the time she executed the lease. Even so, it was her understanding that these documents "were attached" to the lease at the time of lease execution. Sheehan Deposition at 180, 189.

The Dispute

By letter dated December 12, 2000, Mr. Cresce wrote to the contracting officer, requesting her to confirm that "[t]he Building shell is to be completed pursuant to the construction documents attached as Exhibit G of the lease." Sheehan Deposition, Exhibit 8. The contracting officer signed this letter on or about April 25, 2001, as "SEEN AND APPROVED." Before signing the letter, she did not review the construction documents attached as Exhibit G, but assumed these documents were consistent with her interpretation of the lease. *Id.* at 67-69.

The tenant improvement drawings, included as Exhibit 27 in the Supplemental Appeal File, are the tenant improvement drawings approved by the tenant, the Drug Enforcement Administration (DEA) and, therefore, signify DEA's final approval of those drawings on June 27, 2001. Stipulation 1. All work on the tenant improvement drawings was to be funded by the tenant improvement allowance afforded to the Government under the lease. Appeal File, Exhibit 1 at 3.

By letter dated July 10, 2001, the contracting officer transmitted the tenant improvement drawings to appellant,[10] stating:

> All work on the drawings that is building shell should be clearly identified. Pursuant to Section 1.5, paragraph (b), item of the SFO of the lease, you are hereby directed to ensure that no building shell items are included in the competitive proposal submitted to the Government.

Appeal File, Exhibit 7.

Appellant's construction manager asserts that the tenant improvement drawings contain specific items in the categories listed in the building shell definition of the lease, including, ceiling grid and tile, carpeting, and general lighting fixtures. It is appellant's position that the specific items in these categories that appear in the tenant improvement drawings are within the tenant space and not in the building shell, are not in the construction drawings attached to the lease, and therefore are not to be provided at the expense of the appellant but are to be paid for in the tenant improvement process. Maio Affidavit 1, ¶ 7.

By letter dated July 30, 2001, appellant's construction manager submitted documentation to GSA which included a document entitled "GSA Tenant Improvements Initial Project Cost Analysis" (cost analysis) and requested that GSA issue a notice to proceed for work valued at $4,483,468.08. Also included was an invoice in the amount of

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[10] The parties have stipulated that these are the drawings transmitted by this letter. Stipulation 2.

$2,073,886.08 for construction work which appellant asserted was the initial improvement overage and therefore GSA's responsibility under the terms of the lease. Appeal File, Exhibit 9; Notice of Appeal, Exhibit 11.

Appellant's construction manager for the tenant improvement construction states that the work set forth in the cost analysis did not contain any construction work attributable to the base building documents. The work was solely attributable to tenant improvements to the interior of the building. Affidavit of Matthew D. Maio (July 15, 2005) (Maio Affidavit 2), ¶ 6.

In June, 2001, during construction of the project, Mr. Timothy Friemel, the construction manager for Spaulding, concluded after reviewing the base building construction documents that the ceiling tile, HVAC, and lighting included in appellant's cost analysis are not included in these documents. Appeal File, Exhibit 4; Deposition of Timothy Friemel (May 25, 2004) at 54.

On September 5, 2001, GSA's contracting officer issued a notice to proceed for the tenant improvement construction which deducted $694,980 from the total amount requested by appellant. That letter stated:

> [The] proposal erroneously included pricing for building shell items, which, under Section 1.4 of the Solicitation for Offers[11] as part of the lease, are clearly the Lessor's responsibility, and not the Government's. Examples of these improper inclusions are charges for ceiling tile & grid, tenant approved carpet, sprinkler system, fire alarm devices and programming, light fixtures and lamps, and the mechanical system part of the warm lit shell. We estimate the value of these items in your proposal to be $694,980.00, which are hereby being deducted from the amount of your cost proposal.

Appeal File, Exhibit 12.

The Government calculated its deduction by multiplying the estimated value of the items for which it claims appellant was responsible by the total square footage of the lease, for a subtotal of $643,500, and then applied an 8% mark-up for the contractor's and appellant's fee, resulting in a total of $694,980. Appeal File, Exhibit 4; Respondent's Response to Interrogatory No. 11 (Deposition Exhibit 15). The amount of $694,980

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[11] As noted previously, the building shell definition was actually section 1.10 of the SFO, but its designation was changed to section 1.4 in the lease.

withheld was apportioned for ceiling tile ($193,050), HVAC ($154,440), sprinkler ($193,050), and lighting ($154,440). Ford Affidavit, ¶ 4.

Respondent's construction manager for tenant improvements, Katoshia Ford,[12] states that the four items for which the Government denied payment are shown on the base building documents.[13] While she asserts that the base building documents contain information about these items, she does not assert that the construction of these items for which appellant sought compensation in its cost analysis were included in the base building construction. Ford Affidavit.

The notice to proceed for less than the full amount requested, based on the Government's deductions from Petula's cost proposal, was issued pursuant to the Changes clause, FAR 552.270-14, incorporated into the lease as paragraph 33 of the General Clauses. Appeal File, Exhibit 12 at 25.

By letter dated December 24, 2002, appellant submitted a certified claim in the amount of $694,890,[14] asserting that the Government had improperly deducted that amount from its notice to proceed previously issued, and requested a contracting officer's final decision. Appeal File, Exhibit 19.

On February 21, 2003, the contracting officer issued a final decision denying appellant's claim. That decision stated:

> [Y]our client is stressing the added verbiage "as per the construction documents attached to the lease," while apparently ignoring the phrase "at the Lessor's expense." At the time the lease was executed, the construction

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[12] Ms. Ford succeeded Mr. Friemel as construction manager. Ford Deposition at 62.

[13] Apparently this statement is based on her review of the base building documents after this litigation commenced, as she stated in her deposition on May 12, 2004, that she had never seen the base building documents. Ford Deposition at 85-86. She also testified that she was unaware that the parties had modified the building shell definition during their negotiations and never became aware of that during her involvement in the project. During her involvement in the project, she had no understanding of which construction documents were referred to in the building shell definition. *Id.* at 121-22.

[14] The amount of Petula's claim, $694,980, is undisputed. Sheehan Deposition at 121–22.

> drawings were not in existence,[15] and thus it is a strained interpretation of this section to contend that the Lessor's obligations were diminished by attached future drawings.

Appeal File, Exhibit 20.

By letter to the Board dated March 14, 2003, appellant filed a notice of appeal of the contracting officer's final decision. Appeal File, Exhibit 21.

Discussion

Summary relief is appropriate when there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *US Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001); *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 1996). A fact is material if it will affect our decision, and an issue is genuine if enough evidence exists so the fact could reasonably be decided in favor of the non-movant at a hearing. *John A. Glasure v. General Services Administration*, GSBCA 16046, 03-2 BCA ¶ 32,284, at 159,746 (citing *Celotex Corp.*; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

As discussed below, there are genuine issues of material fact in dispute with regard to appellant's motion in its totality and respondent's motion in part. We therefore deny appellant's motion; grant respondent's motion in part, as we find appellant is not entitled to payment for the sprinklers; and deny the remainder of respondent's motion.

GSA's original SFO contained a clause which defined the building shell and the lessor's obligations to provide certain items at its own expense. During the negotiation of the lease, which was conducted by leasing representatives of appellant and respondent, Mr. Cresce of Trammell and Mr. Brennan and Mr. Delogu of Spaulding, and counsel for appellant, Stephen Delaney, this building shell definition was modified and the proposed allowance for tenant improvements was increased.[16] It is undisputed that the parties included

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[15] The contracting officer was actually referring to the tenant improvement drawings. Respondent's Response to Interrogatory 23; Deposition Exhibit 15.

[16] Appellant asserts that the increase in the tenant allowance was the result of the modification of its obligations under the building shell agreement, while respondent asserts that the two subjects are not linked.

the building shell definition clause as modified and the increase in the tenant allowance in the final version of the lease to be executed.

The lease was subsequently executed by three individuals -- the GSA contracting officer, Ms. Sheehan, who has stated that she was not involved in the lease negotiation; and appellant's vice president, Mr. Scholz, and appellant's counsel, Mr. Bunz, from whom we have no information in the record other than the signatures on the lease.

This dispute arose during lease performance from the parties' differing interpretation of appellant's obligations pursuant to the building shell definition. When the plans for the tenant improvements were finalized by the tenant agency, the DEA, appellant submitted a proposal to GSA with pricing to construct the tenant improvements. GSA denied payment to appellant in the amount of $694,980 for quantities of four items as to which GSA maintains that, according to its interpretation of the building shell definition, appellant was obligated to provide at its own expense - ceiling tile, HVAC, lighting, and sprinklers. In its cross-motion, GSA offers several reasons for denying payment. GSA maintains that all four items were shown in the construction documents attached to the lease, so appellant is obligated under its own interpretation of the modified language to provide all the items at its own expense. Alternatively, GSA argues that even if the disputed items are not shown in the construction documents, the plain meaning of the lease clearly required the appellant to provide them at its own expense.

Appellant asserts that respondent is required to pay for the quantities of these items, as they are not included in the base building plans and specifications attached to the lease and are not in the category of items that it agreed to provide at its own expense, regardless of whether shown on the base building or tenant improvement plans.

Contract interpretation is said to begin with the plain language of the contract, and that language must be read in accordance with its express terms and plain meaning. *See BKG Main Street Operating Associates v. General Services Administration*, GSBCA 16238, 04-2 BCA ¶ 32,658, at 161,654; *James A. Prete v. General Services Administration*, GSBCA 15884, et al., 03-1 BCA ¶ 32,163, at 159,208; *Saul Subsidiary II Ltd. Partnership v. General Services Administration*, GSBCA 13544, 98-2 BCA ¶ 29,871, at 147,860. A contract must also be read in a manner that gives meaning to all its provisions and makes sense, and an interpretation that gives meaning to all its parts is preferred over one that leaves a portion of the contract useless. *MCI Worldcom Communications, Inc. v. Social Security Administration*, GSBCA 16169-SSA, 04-2 BCA ¶ 32,689 at 161,758; *BENMOL Corp. v. Department of Treasury*, GSBCA 16374-TD, 04-2 BCA ¶ 32,669, at 161,698, *reconsideration denied*, 05-1 BCA ¶ 32,967*, aff'd sub nom. BENMOL Corp. v. Paulson*, No. 05-1532 (Fed. Cir. July 11, 2006). It is not the subjective intent of any one party that is controlling. *Firestone Tire and Rubber Co. v. United States*, 444 F. 2d 547, (Ct. Cl. 1971).

The appellant relies on its leasing agent who negotiated the lease for its interpretation of the modified building shell definition. Mr. Cresce states that the parties' representatives and appellant's counsel negotiated and included the phrase "as per the construction documents attached to the lease" with regard to certain categories of items in the base building definition to *limit* appellant's obligation to provide at its own expense only items as shown in the base building plans and specifications. He states that he told Mr. Delogu that this was the intent of the modified building shell definition, and Mr. Delogu was the one who suggested the modification language. The base building plans and specifications were then referenced in the lease[17] to designate those items to be provided at appellant's expense. Additionally, by other language added to the building shell definition, appellant states that it obligated itself to provide certain categories of items at its own expense regardless of whether they were in the base building shell or the tenant improvements, and those categories were designated to be provided by appellant "as shown on the base building and tenant improvement plans." Appellant further maintains that it raised the tenant allowance per square foot cost to compensate the Government for construction of these same items when included in the tenant improvement plans to be finalized after lease execution.

Respondent's interpretation of the modified building shell definition is presented by its leasing agent and contracting officer. The leasing agent, Mr. Delogu, has a different recollection than Mr. Cresce. He has no detailed recollection of the negotiation, but recalls that the modification of the building shell definition was advantageous to the Government. Rather than limit appellant's obligation to provide certain items, he believed the modification of the building shell definition *increased* the appellant's obligation to provide the items listed in the building shell definition.

We find the plain meaning of the modified building shell definition far from clear. On its face, the phrase "as per the construction documents attached to the lease," while referring to those documents attached as Exhibit G to the lease, gives no indication to the reader whether the contents of these documents limits or expands the appellant's obligation under the original language, and would require an intimate knowledge of voluminous, technical documents (more than 900 pages of specifications and 100 drawings) for one to make that determination. The parties themselves have offered differing interpretations as to the intent of the language and what is included in the construction documents. The leasing agents for both parties who negotiated the lease and the contracting officer who executed the contract on behalf of respondent describe their understandings of the intent of the modification in terms of their subjective intent - their understandings of the concepts of "cold dark shell" and "warm lit shell," phrases that do not appear in the SFO. We cannot read provisions into the

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[17] In its motion, the respondent questions whether the documents were actually "attached" but admits that they were "incorporated into the lease." These documents were a 900 page specifications book and a roll of approximately 100 drawings.

contract which are not there. *Henry H. Norman v. General Services Administration*, GSBCA 15070, et al., 02-2 BCA ¶ 32,042, at 158,342.

The fact that the language was modified in negotiations by individuals who would not be the persons to ultimately execute the lease leaves one to question why the language was not clearer, and how the intent of the modification was transmitted to the those with authority to bind the parties. However, the fact that we do not find the language clear does not mean it is ambiguous. An ambiguity exists if the parties held differing, reasonable interpretations of the language when the agreement was executed. *See, e.g.*, *JJA Consultants v. Department of the Treasury*, GSBCA 16796-TD (July 6, 2006), slip op. at 8.

Despite the extensive discovery and briefing by the parties, the record is insufficient to determine whether the parties actually held differing interpretations at the time of execution, as issues of material fact remain in dispute.

With regard to respondent, we know that the contracting officer, Ms. Sheehan, did discuss with respondent's leasing agent his interpretation of the building shell definition, as she contacted Mr. Delogu for clarification of the meaning of the language when she reviewed the final version of the lease. Mr. Delogu, who had not reviewed the construction documents attached to the lease, confirmed Ms. Sheehan's understanding that the building shell must be a "warm lit shell."[18] She did not believe it was necessary to review the construction documents referenced in the lease to gain any understanding of this language.[19] She

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[18] The Government has raised the alternative interpretation that the "as per" language in the building shell definition means that appellant is required to furnish at its own expense any items "indicated" on the construction documents attached to the lease, and since the base building construction documents contain these same types of items in the building shell, appellant is required to furnish those items when they ultimately appear in the tenant improvement plans. While appellant characterizes this interpretation as a new interpretation that was not one held by respondent at the time of lease execution, we view this interpretation as a recasting of the interpretation of Mr. Delogu and Ms. Sheehan, i.e., that the construction documents attached to the lease were clarifications of the items to be furnished. Even though both stated that they had not reviewed the documents, this does not negate their view that the documents increased (Delogu) or confirmed (Sheehan) the obligations contained in the unmodified language.

[19] The contracting officer has testified that the documents were not in her possession when she executed the lease, but admitted they were attached to the lease. This inconsistency raises another issue of material fact in dispute that will need to be resolved before an adjudication on the merits can be made.

apparently was never aware of the significance of the construction drawings, as she consistently confused references to them as references to the tenant improvement drawings.

With regard to appellant, we do not know if its leasing agent's alleged understanding of the modified building shell definition was ever transmitted to its signatories. While appellant has offered the interpretation of its leasing agent, who negotiated the lease, the record is silent as to the interpretation, if any, of the appellant's vice president and counsel who executed the lease. The record contains nothing to indicate whether they had any interpretation at all, and if they did, whether their interpretations agreed with each other or that of Mr. Delogu and the contracting officer, who executed the agreement on behalf of respondent. These are issue of material fact that remain in dispute.

Thus, the record is not sufficient to determine appellant's interpretation of the building shell definition as held by the individuals who executed the lease on appellant's behalf as of the date of lease execution. If appellant's interpretation agrees with respondent's, then appellant's interpretation asserted in its motion is factually erroneous. If it is ultimately determined that the parties' interpretations disagree, we must then determine if the differing interpretations are both reasonable. If both interpretations are reasonable, this which would result in an ambiguity to be construed against the drafter.[20] *Griffin Services, Inc. v. General Services Administration*, GSBCA 14507, 00-2 BCA ¶ 30,988, at 152,939.

If ultimately we must construe an ambiguity against the drafter, an issue of material fact also remains in dispute as to the identity of the drafter. Respondent states that an attorney representing appellant, Mr. Delaney, inserted the modified language into the lease, but the record is not clear as to who actually drafted the language. The record contains no testimony from appellant's attorney as to whether he actually drafted the language or whether he knows who did.

If we ultimately determine that the building shell definition as modified is ambiguous, another issue of material fact in dispute which may need to be resolved is whether the items for which appellant sought compensation are contained in the construction documents

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[20] If there is an ambiguity, another issue to be resolved is whether the ambiguity was patent or latent. *Griffin Services, Inc.*, 00-2 BCA at 152,939. If patent, the party not creating the ambiguity would have a duty to inquire. Apparently the contracting officer's reading of the building shell definition immediately raised a question that she believed was deserving of inquiry. If we ultimately determine that there was a patent ambiguity giving rise to a duty of inquiry by the respondent, the issue remains as to whether the contracting officer fulfilled the duty of inquiry by calling her own leasing representative. If, however, there was no patent ambiguity, then the contracting officer had no duty to inquire about the lease language.

referenced in the lease or the tenant improvement plans. The parties have submitted extensive information to support their positions that the items for which payment was denied are either included or not included in the construction documents. In June 2001, during construction of the project, Mr. Timothy Friemel, the construction manager for Spaulding, concluded after reviewing the base building construction documents that the ceiling tile, HVAC, and lighting included in appellant's cost analysis are not included in these documents. Mr. Friemel affirmed this assessment during his deposition. Respondent has attempted to rebut this factual assertion by submission of an affidavit of Katoshia Ford, Mr. Friemel's successor on the project. Ms. Ford reviewed the base building construction documents after this litigation commenced. Appellant asserts that respondent's attempt to rebut Mr. Friemel's assessment by Ms. Ford's affidavit is improper, in that a party cannot create an issue of fact, and thereby avoid summary relief, merely by submitting an affidavit or declaration contradicting his prior testimony, without explaining the contradiction or attempting to resolve the disparity. *Sinskey v. Phamada Ophthalmics, Inc.*, 982 F.2d 494, 498 (Fed. Cir. 1992), *cert. denied*, 508 U.S. 912 (1993); *Shea-Ball (JV)*, ENG BCA 5608, 99-1 BCA ¶ 30,277, at 149,721 (1998). We need not resolve this issue at this time, as the foregoing issues of material fact remain in dispute.

Accordingly, with regard to three of the four items for which GSA withheld payment -- the ceiling tile, HVAC, and lighting -- the foregoing issues of material fact that remain in dispute will have to be resolved before we can determine whether appellant was entitled to payment or respondent was entitled to withhold payment. The parties' cross-motions for summary relief are therefore denied as to entitlement on these items.

With regard to the fourth item for which GSA withheld payment -- the sprinklers -- GSA maintains that appellant, by its own interpretation, has conceded that it must supply the sprinklers at its own expense, as all sprinklers are to be provided "as shown on the base building and tenant improvement plans." Memorandum in Support of Respondent's Motion for Summary Relief at 4. We agree with respondent on this issue, and find that respondent properly denied payment for sprinklers. Thus, whether the sprinklers appear on the base building and/or the tenant improvement plans, appellant must provide them at its own expense. We grant respondent's motion for summary relief denying payment for the sprinklers.

The government calculated the amount withheld for the sprinklers based upon its own estimate of $193,500. Based upon information submitted by appellant after the contracting officer's final decision, respondent acknowledges that this estimate may not be correct.[21]

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[21] Respondent's Reply Memorandum in Support of Motion for Summary Relief at 6 n.2.

Accordingly, the record is not sufficient for the Board to determine the quantum of the deduction.

Decision

Appellant's motion for summary relief is **DENIED**. Respondent's motion for summary relief is **GRANTED IN PART**, as appellant is not entitled to payment for the sprinklers, and **DENIED IN PART**. The quantum of the deduction for the sprinklers is to be determined in further proceedings.

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ALLAN H. GOODMAN
Board Judge

We concur:

_____
CATHERINE B. HYATT
Board Judge

_____
MARTHA H. DeGRAFF
Board Judge