Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED: November 22, 2004

GSBCA 16179, 16180

WRD VENTURE LLP,

Appellant in GSBCA 16179,

and

NWD VENTURE LLP,

Appellant in GSBCA 16180,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Stanley G. Feldman and Gerald Maltz of Haralson, Miller, Pitt, Feldman & McAnally, P.L.C., Tucson, AZ; and Marc Efron and Amy E. Laderberg of Crowell & Moring LLP, Washington, DC, counsel for Appellants.

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

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **PARKER**.

DANIELS, Board Judge.

Leases for associated buildings required that the United States Government repair the premises before ending its tenancy, restoring the buildings to their original condition less normal wear and tear. The Government failed to fulfill this obligation. It now accepts financial responsibility for its failure, but contests the lessors' calculation of the extent of that responsibility. We hold for the lessors.

Findings of Fact

1. For many years, WRD Venture LLP (WRD) and NWD Venture LLP (NWD) each leased to the General Services Administration (GSA), acting on behalf of the Government, a building in Albuquerque, New Mexico. The WRD building is two stories tall and contains approximately 53,000 net usable square feet of floor space. The NWD building is one story tall and contains approximately 56,000 net usable square feet of floor space. The two buildings share an address of 933 Bradbury, S.E. They are connected by a covered walkway and have common parking. Transcript at 95, 107, 208; WRD Appeal File, Exhibit 1 at 10 (unnumbered); NWD Appeal File, Exhibit 1 at 8 (unnumbered).[1]

2. The leases were for long terms. The NWD lease was dated January 4, 1979; the most recent WRD lease was dated September 25, 1984. Both leases ran through October 25, 1999. WRD Appeal File, Exhibit 1 at 10 (unnumbered); NWD Appeal File, Exhibit 1 at 7, 8 (unnumbered).

3. Paragraph 4 of the General Provisions of the WRD lease permitted the Government "to make alterations, attach fixtures, and erect additions, structures or signs in or upon the premises" during the term of the lease. Upon termination of the lease, the lessor had the option of allowing these items to remain on the premises or requesting the Government to remove them. The lease expressly stated, "Upon any removal, the premises shall be returned[,] at no expense to the lessor, to its original condition prior to any such alterations, attachments, erections or additions." WRD Appeal File, Exhibit 1 at 17 (unnumbered).

4. Paragraph 6(g) of the WRD lease provided, "The Government will be responsible for replacement of carpet and floor tiles, and will maintain, repair, and replace as necessary, all Government-owned and/or installed equipment and/or modification, including computer flooring and related wiring." WRD Appeal File, Exhibit 1 at 11 (unnumbered).

5. Paragraph 10 of the NWD lease, like paragraph 4 of the General Provisions of the WRD lease, permitted the Government "to make alterations, attach fixtures, and erect additions, structures or signs in or upon the premises" during the term of the lease. NWD Appeal File, Exhibit 1 at 10 (unnumbered). Paragraph 20 of the NWD lease provided, "The exercise of any rights by the Government under this Paragraph 10 shall not diminish the area or value of the building leased hereunder nor detrimentally affect its structural or mechanical integrity." Id. at 14 (unnumbered). GSA acknowledges that although the NWD lease is not as explicit as the WRD lease in requiring the Government to return the premises to its original condition upon termination of the lease, the NWD lease "obligated the Government

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[1]GSA submitted separate appeal files for the two cases, one for GSBCA 16179, WRD Venture LLP v. General Services Administration, and one for GSBCA 16180, NWD Venture LLP v. General Services Administration. Most of the exhibits in the two files are identical. Where we refer to an exhibit which appears in both files, we designate it as an exhibit in "Appeal File." Where we refer to an exhibit which appears only in the appeal file for GSBCA 16179, we designate it as an exhibit in "WRD Appeal File." Where we refer to an exhibit which appears only in the appeal file for GSBCA 16180, we designate it as an exhibit in "NWD Appeal File."

to repair damage to the premises beyond reasonable wear and tear." Respondent's Prehearing Brief at 1; Respondent's Posthearing Brief at 2.

6. The Social Security Administration (SSA) was the tenant Government agency in both buildings throughout the duration of these leases. Appeal File, Exhibit 26 at 1 (unnumbered). During its tenancy, SSA made numerous and significant additions and alterations to both buildings. It installed raised flooring throughout most of the WRD building and in the NWD building's computer room, reducing the floor-to-ceiling height in these spaces from nine feet to less than eight feet. It also installed a complex system of data, communications, and security wiring below that flooring. Transcript at 16-17, 21-25, 199-200.

7. As the leases neared their end, the Government decided to move SSA's offices from the WRD and NWD buildings to a new building which was to be constructed in downtown Albuquerque. WRD and NWD filed lawsuits in an effort to keep the new building from being constructed and the Government from moving to it. After lengthy negotiations, WRD and NWD agreed to drop these suits in exchange for GSA's agreement to continue the Government's tenancy in their buildings, under certain terms, for an additional five years. Transcript at 104-12; see also Findings 8-10.

8. Negotiations were conducted between Donald Pitt, the president of Cornerstone Capital Management (Cornerstone), which managed the properties for WRD and NWD, and Walter Marcinowsky, the GSA contracting officer responsible for the leases. Transcript at 95, 106. The negotiations involved what Mr. Pitt called a lot of "horse-trading." Id. at 106, 110; see Appeal File, Exhibits 2-13. Mr. Pitt felt that in dropping the lawsuits, WRD and NWD gave up something of value – the litigation "might have run for five years, and I would have had the tenant and then I might have had the tenant forever." Transcript at 111-12.

9. Ultimately, the parties agreed on supplemental lease agreements (SLAs) which extended each lease through October 25, 2004. Rents for the five-year period were specified in paragraph 3 of each SLA. These rents included, for the period beginning on October 26, 2001. and ending on October 25, 2002, $968,923.35 ($80,743.61 per month) for the WRD building and $950,845.83 ($79,237.15 per month) for the NWD building. WRD Appeal File, Exhibit 14 (SLA No. 5 to WRD lease); NWD Appeal File, Exhibit 14 (SLA No. 5 to NWD lease). Each of the SLAs included these paragraphs:

> 21 [19].[2] The Government may terminate this lease effective at any time after October 25, 2001, by giving at any time after October 25, 1999, not less than 24 months notice in writing to the Lessor specifying in the notice the date selected by the Government as the effective date of termination. . . .

[2]The first number shown here and in succeeding paragraphs appears in the SLA for the WRD lease. The second number, in brackets, appears in the SLA for the NWD lease. In all other regards, the quoted language is identical in the two SLAs.

> The termination of this lease must coincide with the termination of [the lease for the other building]. This lease cannot be terminated unless [the lease for the other building] is terminated at the same time.
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> . . . .
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> 23 [21]. If the Government elects to terminate this lease as provided in paragraph 21 [19] preceding and the Government is unable to vacate the premises on the date specified in its notice, the Government may holdover [sic] on a month to month basis for not more than (6) months at a monthly rent equal to 200%[3] of the monthly rent in effect as indicated in paragraph 3 for the time interval of the holdover.
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> . . . .
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> 25 [22]. If the Government gives a valid termination notice pursuant to Paragraph 21 [19] and when the Government has moved the Social Security Administration into a new building, located . . . in downtown Albuquerque, New Mexico, the Government shall immediately thereafter vacate and surrender possession of the Premises in the condition required by the Lease to the Lessor, who may immediately upon taking possession of the Premises, remodel and/or relet the Premises. Notwithstanding any such surrender, remodeling and/or reletting, the Government shall continue to pay rent, operating costs per month based at the same rate of the corresponding month for the prior calendar year, and operating cost adjustment and its share of real estate taxes through the date of the termination specified in the termination notice.

WRD Appeal File, Exhibit 14 at 2; NWD Appeal File, Exhibit 14 at 2.

10. Mr. Pitt testified that WRD and NWD had wanted a single SLA to cover both leases, believing that the buildings should be considered together because the newer (NWD) building had been built for the tenant of the older (WRD) building, and because the shared parking and configuration of entrances made them function as a single unit. At GSA's insistence, however, in light of the fact that separate leases had been in effect for the two buildings, for administrative reasons, a separate SLA was written for each lease. Nevertheless, the parties understood that "you couldn't have one [lease] end one month and the other end two months later[;] you'd have to have them both end two months later even if you wanted to get out of the first one early." Transcript at 107. Mr. Pitt also testified that with regard to the holdover rent described in paragraph 23 of the WRD SLA and paragraph 21 of the NWD SLA, it was understood in negotiations between him and Mr. Marcinowsky that if the Government gave a termination notice and remained in the buildings for more than

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[3]Mr. Marcinowsky had proposed that this number be 135 percent, but as part of the back-and-forth of negotiations, he agreed to 200 percent in exchange for Mr. Pitt's agreement to delete some provisions involving the lessors' lawsuits. Transcript at 106, 110.

six months beyond its specified termination date, the holdover rent would apply only to the first six months. Id. at 126-27.

11. By letter dated October 25, 1999, GSA terminated the leases as of October 26, 2001. Appeal File, Exhibit 15.

12. As the termination date approached, the parties exchanged much correspondence regarding the condition in which the Government would return the buildings to the lessors. During the summer of 2001, GSA proposed to WRD and NWD that most of the Government-owned equipment in the buildings be removed upon termination of the lease, but that some of the equipment be abandoned in place. Appeal File, Exhibits 16, 17. The lessors agreed to accept some of the equipment, but expressly required that most of the data and communications cabling be removed. The lessors stated, "Upon completion of your removal and abandonment plans, we require that the building[s] be left in broom clean, good condition, reasonable wear and tear excepted, with appropriate patching to remedy holes, disfigurement or marring." Id., Exhibit 18.

13. At the beginning of October, SSA told GSA contracting officer Marcinowsky that it did not have the time or resources to repair and restore the premises before leaving them. SSA asked him to negotiate a cash settlement with the lessors which would relieve the Government of responsibility for the repair and restoration. Transcript at 135. On October 9, Mr. Marcinowsky told the lessors that SSA preferred to abandon considerable equipment in place and "pay a fair and reasonable sum of money" in lieu of removing the items. Appeal File, Exhibit 19.

14. Mr. Pitt, the lessors' agent, was located in Tucson, Arizona. He reacted by asking someone closer to the facilities – Daniel P. Newman, a commercial real estate broker in Albuquerque – to determine the cost of assuming the Government's repair and restoration responsibility. Appeal File, Exhibit 20; see also id., Exhibit 21. Mr. Newman reported back that restoration would entail removal of much vinyl asbestos tile. The lessors did not want to assume responsibility for dealing with hazardous materials such as asbestos. Consequently, on October 26, WRD and NWD responded with a willingness to accept a cash settlement for only a few minor items and a direction that the Government otherwise fulfill its repair and restoration obligations. Id., Exhibit 23; Transcript at 98-99, 120.

15. After Mr. Marcinowsky received the lessors' October 26 letter, he concluded that negotiations were at an impasse and told Mr. Pitt that if he was dissatisfied with the Government's resolution of the matter, he could file a claim. Transcript at 137. Mr. Pitt, on behalf of the lessors, warned, "Failure on the part of the Government to complete any of its obligations in either building on or before the last day of the existing holdover month will be considered as a continuing holdover and will continue to subject the Government to holdover rent until those obligations have been fulfilled." Appeal File, Exhibit 24.

16. The Government vacated both buildings on November 25, 2001. It paid rent for each building at the holdover rate specified in the relevant SLA for the month beginning on October 26 and ending on November 25. Respondent's Stipulation 6; Transcript at 124, 140, 199.

17. Mr. Pitt at this point asked Mr. Newman to find a new tenant which would lease the buildings in the condition in which the Government had left them. Mr. Pitt believed that renovating to suit a new tenant, rather than repairing and restoring the premises and then possibly having to modify them again for that tenant, would "save everybody money." Transcript at 99. Mr. Newman showed the buildings many times, but prospective tenants sensed that the buildings were in disrepair. In particular, the raised floor and shortened ceilings in the WRD building made the property show poorly. Mr. Newman was unable to attract a tenant. He eventually advised the owners to restore the buildings to make them marketable. Id. at 52-56.

18. Meanwhile, Mr. Pitt had sent Thomas J. Powers, an experienced project architect who was employed by Cornerstone, from Tucson to Albuquerque to examine the buildings. Mr. Powers prepared for his trip by reviewing the leases and drawings of the facilities. He then toured the facilities in the company of GSA cost estimators and prepared a scope of work necessary to restore each building to a suitable condition. He noted that removing the raised flooring would entail considerable work. The work would include asbestos abatement and containment, since the original vinyl asbestos tile had been damaged by the supports for the raised flooring; and moving and/or replacing light switches, electrical receptacles, fire alarm pulls and indicators, and doors and door frames, since those in existence would not be at the proper height once the raised flooring was removed. In addition, the mass of wiring below the floors would have to be removed and properly terminated, walls which had been damaged and/or through which holes had been cut to allow wiring to pass would have to be repaired or replaced, and the concrete floor would have to be patched and made ready for covering. As to the floor covering to be placed on the concrete, in place of the vinyl asbestos tile (which is no longer made), Mr. Powers included in the scope of work for each building the supply and installation of carpeting. Transcript at 15-26, 92-93; Appellants' Exhibits 5, 6.

19. Mr. Powers provided his scope of work for each building to the GSA representatives with whom he had toured the buildings. GSA never objected to anything in those documents. Transcript at 40. It never offered to pay for double or triple shifts, for example, in order to get the work done quickly. Id. at 41. Nor, Mr. Pitt testified, did anyone from the Government ever tell him that it wanted to control the cost or duration of the necessary work by doing the work itself. To the contrary, the Government "specifically said they weren't going to do the work." Id. at 101; see also id. at 112-13.

20. Mr. Powers needed a general contractor to perform the work. Not being knowledgeable about construction in the Albuquerque area, he asked people who were knowledgeable to recommend contractors to him. The architects of the buildings gave him two names; real estate broker Newman gave him two; and the man who had been the Government's facilities manager in the buildings gave him another. Transcript at 26-27. He sent to each firm a request for proposals which included the scope of work he had prepared for each building. All five firms responded. Mr. Powers reviewed their proposals and qualifications, interviewed each of them, and negotiated with four. He selected to perform the work Del Rio Enterprises, Inc., the firm suggested by the Government facilities manager. Mr. Powers testified that he was impressed that Del Rio's president, Kevin R. Garcia, was a "very hands-on operator" who was intimately familiar with the buildings because he had worked there during the past eight years and had done much of the SSA alteration and

addition work that had to be removed and restored. In addition, Mr. Powers noted that Del Rio's proposal was in the middle of the proposals' range in terms of both cost and duration of work. Id. at 27-32; see Appellants' Exhibits 7, 44-47.

21. Del Rio entered into separate fixed-price contracts with WRD and NWD for performance of the work. Appellants' Exhibits 9, 10. Messrs. Powers and Garcia both testified that because a contractor under a fixed-price contract is paid as soon he completes specified work, this form of contract creates an incentive for the contractor to finish the work quickly. Transcript at 33, 71. Del Rio completed the work for the contract prices – $347,632 for the WRD building and $30,601 for the NWD building. Id. at 84; Appellants' Exhibit 13 at 2. Del Rio took five months and three days to do all the work in the WRD building and two months and six days (running concurrently with the time for the WRD work) to do all the work in the NWD building. Transcript at 41. The total length of time devoted to construction was a week longer than Del Rio had proposed. Id. at 84. Messrs. Powers and Garcia both testified that the times actually taken for the work on the buildings were commercially reasonable. Id. at 41-42, 72. Mr. Garcia opined that the work could not conceivably have been done in less than four months. Id. at 64.

22. The requirement for asbestos abatement was a major contributing factor to the duration of construction. After a licensed asbestos abatement contractor (such as one of Del Rio's subcontractors) applies to the City of Albuquerque for a permit to perform certain work, thirty days must pass before the permit is granted. During that time, public notification of the project is given. Additionally, for reasons of health and safety, while asbestos abatement work is being performed, other work cannot be performed in the same space – and because of the configuration of the WRD building, for some of the time, other work could not be performed in the entire building. Transcript at 39-40, 64-66, 219-26. As Mr. Powers testified, asbestos abatement "fundamentally eliminates the ability for other trades to work." Id. at 227.

23. While construction was ongoing, Mr. Powers served as the owners' representative. Prior to that, as already explained, he had reviewed the leases and building drawings, inspected the facilities, prepared the scope of work for each building, sought and found potential contractors, allowed those firms two weeks to prepare their proposals, reviewed the proposals and negotiated them with the offerors, and put in place the lessors' contracts with Del Rio. He had also gotten permits for the work. His pre-construction efforts took seven weeks. Transcript at 33, 42-43. Cornerstone's charges for Mr. Powers' services were, for WRD, $19,502 – $13,282 for his time and $6,220 for his expenses – and for NWD, $7,384 – $6,918 for his time and $466 for his expenses. Id. at 43-44; Appellants' Exhibits 14, 52. Mr. Powers testified that these charges were commercially reasonable. Further, he testified, compared to the charges which would have been incurred if the lessors had hired three separate individuals – an architect, an owners' representative, and a construction manager – to perform the duties he assumed, "I believe . . . I'm a bargain." Transcript at 44-45.

24. The total amount claimed for the work performed by Del Rio and Mr. Powers was $405,119 – $367,134 for WRD and $37,985 for NWD. GSA says that it "has always been willing to pay reasonable repair costs and agrees that the sum of $405,119.00 is reasonable." Respondent's Posthearing Brief at 1.

25. GSA does not believe that the time Mr. Powers spent to prepare for the repair and restoration work or the time Del Rio spent on that effort was reasonable in duration. The agency bases its position on the testimony of Donald Cobb, a GSA program manager. Respondent's Posthearing Brief at 8; see also Transcript at 144. Mr. Cobb now awards contracts for the building of border stations and manages funding for those projects, but prior to 1999, both in private industry and with GSA, he was involved in estimating construction costs and durations. Transcript at 156-58, 172-73.

26. Mr. Cobb made three trips to the WRD and NWD buildings to estimate the cost and schedule for renovating the space. Transcript at 159. He recognized that because he is not now engaged in making construction estimates and because he was unfamiliar with construction in Albuquerque, he needed help from an Albuquerque contractor in making estimates. He selected someone named Larry Garcia to assist in this effort. Id. at 175-80. Larry Garcia is said to operate a firm called G&S Construction. Id. at 160-63. Whether such a firm exists, however, and whether Larry Garcia possesses any qualifications to make construction estimates, is not known to us. The contractor who performed the renovation work, Kevin Garcia (the president of Del Rio), testified that he has been a general contractor in Albuquerque for the past nineteen years and before that grew up in the construction business in that city, where his father was a contractor. Kevin Garcia has never heard of Larry Garcia. Id. at 59-61. Mr. Cobb testified that Larry Garcia is alive and living in Albuquerque, id. at 179, but GSA did not call Larry Garcia as a witness at our hearing (which was held in Albuquerque). Larry Garcia never gave Mr. Cobb a signed bid or proposal to do the work. Id. at 182. Mr. Cobb believes that pre-construction work (such as that performed by Mr. Powers) should have taken a month. He believes that the construction work itself (such as that performed by Del Rio) should have taken four weeks or, at most, five weeks. Id. at 163, 166, 191.

27. Mr. Cobb's estimate of the time necessary for pre-construction work was by his own admission no more than a "guess." Transcript at 166, 191. Some of the elements of his estimate of the time necessary for construction work are plainly without basis. Three give a flavor of the credibility of his formulation. First, he assumed that the contractor would perform its work by operating two shifts each day – something he thought possible because an abundance of skilled labor exists in Albuquerque. Id. at 193-94. The only witness with personal knowledge of the Albuquerque labor market, however, Kevin Garcia, testified that skilled laborers in the area are "few and far between" and that in his many years of experience there, he has never heard of a job that was performed on double shifts. Id. at 66-67. Further, experienced project manager Thomas Powers testified that double shifts are rare in construction generally and that he had never negotiated a contract which mandated them. Id. at 41. Second, Mr. Cobb thought – based on information he learned from Larry Garcia, who got it "from the asbestos guy" (an unidentified person) – one can get a permit for asbestos abatement work within three to four days in Albuquerque, and then proceed with the work after a two-week notification period. Id. at 164-65, 188-89. Kevin Garcia, who actually subcontracts such work, testified, however, that getting a permit for Albuquerque asbestos abatement work takes two weeks, and one cannot proceed with the work until a four-week notification period has passed. Id. at 74-75. Third, Mr. Cobb assumed that the restoration contractor would leave the concrete floor bare, even though he acknowledged that the leases required the Government to replace damaged floor tiles and that buildings "of this caliber" should have carpet on the floors. Id. at 169-70, 184, 186. Mr. Cobb believed that

if, to replace the damaged vinyl asbestos tile, the lessors had installed vinyl composition tile instead of carpet, they could have saved three weeks in the construction schedule. Id. at 170. The only knowledgeable witness who spoke to this matter, however, Mr. Powers, testified that concrete could not be a finished floor in these buildings because it was so extensively patched. Mr. Powers also testified that preparing a concrete floor to accept carpet is simpler and less costly than preparing such a floor to accept tile, and that because carpet comes in rolls twenty feet wide whereas tile comes in small squares, carpet can be laid faster than tile. Id. at 92-93, 227-28. Mr. Cobb ultimately agreed on cross-examination that notwithstanding his estimates, "the only way to know for sure how long it takes to do something is to do it." Id. at 183.

28. During the summer of 2002, WRD and NWD submitted certified claims in sums certain to the contracting officer. In the claims, the lessors contended that the Government had breached its contractual responsibility to restore the buildings to their original condition prior to the Government's making of alterations, attachments, erections, or additions. The damages sought were costs of repair and restoration; management costs associated with repair and restoration; holdover rent during the time that repair and restoration work would occur; real estate taxes for the repair/restoration period; and, for WRD, the Government's unpaid share of real estate taxes for all of 2001. NWD's claim included holdover rent and taxes for the time needed to repair and restore the WRD building, as well as the NWD building, on the ground that SLA No. 5 to the NWD lease provided that the termination of the NWD lease must coincide with the termination of the WRD lease. WRD's claim was submitted by letter dated July 31, 2002, and NWD's by letter dated September 12, 2002. WRD Appeal File, Exhibit 27; NWD Appeal File, Exhibit 27.

29. Following the submission of the claims, the lessors and GSA negotiated in an attempt to settle them. The negotiations failed, and on April 8, 2003, the contracting officer concluded that "[t]he damages you have alleged would far exceed those necessary to make WRD [or NWD] whole for the claimed breach and instead would place WRD [or NWD] in a better position than had none of the claimed things occurred." WRD Appeal File, Exhibit 31 at 5 (unnumbered); NWD Appeal File, Exhibit 31 at 5 (unnumbered). In reaching this conclusion, he relied heavily on the estimates (made by Mr. Cobb) that the pre-construction and construction work could have been performed much more quickly than the lessors maintained. Id. (each at 4-5). The contracting officer concluded that the claims were "not justified" and denied them. Id. (each at 4).

30. The lessors have modified their claims on several occasions since submitting them. As stated most recently – in the lessors' posthearing brief (at 10-11) – the claims are as follows:

	WRD	NWD
Cost of repair and restoration	$ 367,134	$ 37,985
Holdover rent for five months after November 25, 2001	807,430	792,370
Rent for an additional month and three weeks	141,300	138,664
Taxes during six-month, three-week		

period	5,648	14,775
Government's share of taxes for 2001 prior to November[4] 25	4,984	
Total	$1,326,496	$ 983,794

The total amounts are exclusive of interest which the lessors believe is due.

31. The following facts are relevant to the amounts claimed for taxes. The parties have stipulated that the Government's obligation for real estate taxes is at the monthly rates of $836 for WRD and $2,189 for NWD, for whatever period of time (if any) the Board finds rent is due. Transcript at 114. As to WRD only, the Government was obligated under the lease to pay $9,052.13 in taxes (above a specified base year amount) for the period from January 1 to November 25, 2001. The Government has paid only $4,067.27 of this amount, leaving $4,984.86 not yet paid. Id. at 114-16; Appellants' Exhibit 55.

32. According to an appraisal of the buildings performed by an independent appraiser under contract with GSA, on November 25, 2001, the market value of the buildings in "as is" condition was $3,075,500, and with the tenant "improvements" removed would have been $3,550,000. Appeal File, Exhibit 38 at 3-4 (unnumbered), 45 (numbered)[5]; Transcript at 201. Thus, according to this appraisal, the presence of the "improvements" diminished the market value by $475,000. WRD and NWD accept this estimate of diminished value as correct. Transcript at 204.

Discussion

"Every lease contains a provision, implied if not expressed, that a tenant will not commit waste by damaging the property, and therefore will, when it vacates leased space, return the space to the landlord in the same condition in which it received that space, reasonable wear and tear excepted." A & B Limited Partnership v. General Services Administration, GSBCA 15208, 04-1 BCA ¶ 32,439, at 160,504-05 (2003) (citing United States v. Bostwick, 94 U.S. 53, 65-66 (1876)). In the leases involved in these cases, the provision was expressed. The WRD lease made the Government responsible generally for returning the premises, upon lease termination, in "its original condition prior to any such alterations, attachments, erections or additions" as the Government had made and removed. Finding 3. This lease also made the Government responsible specifically for replacement and necessary repair of floor coverings and "all Government-owned and/or installed equipment and/or modification." Finding 4. The NWD lease similarly made the Government responsible for ensuring that whatever alterations, attachment of fixtures, or erection of additions or other items it made to the premises would not "diminish the . . . value of the

[4]The brief states October, but the clear import of the argument and supporting testimony is that November is the appropriate month here.

[5]Exhibit 38 contains a cover letter and an appraisal report. The pages of the cover letter and the beginning of the appraisal report are unnumbered. The next forty-seven pages of the report are numbered.

building." Finding 5. As GSA acknowledges, both these leases "obligated the Government to repair damage to the premises beyond reasonable wear and tear." Id. These obligations were reiterated in supplemental lease agreements in which the Government agreed that when the leases terminated, "the Government shall immediately thereafter vacate and surrender possession of the Premises in the condition required by the Lease." Finding 9.

Pursuant to paragraph 21 of the WRD lease and paragraph 19 of the NWD lease, GSA gave notice that the leases would be terminated on October 26, 2001. Findings 9, 11. The Government did not vacate the buildings until November 25, 2001, however. Finding 16. It had warned that it would not fulfill its repair and restoration responsibilities before leaving, and indeed, it did not ever fulfill them. Findings 13, 18.

Upon learning that the Government would not live up to its obligations under the leases, the lessors notified GSA that they would claim damages resulting from this failure. Finding 15. After the Government breached the leases, the lessors, true to their word, made such claims. Finding 28. The contracting officer denied the claims. Finding 29. By appealing the contracting officer's decisions, the lessors have placed on the Board the responsibility for determining the proper amount of damages. They seek recovery of the cost of repair and restoration, rent for the period of time in which repair and restoration occurred, and taxes during that period (and, for the WRD building, taxes for an earlier period). Finding 30. GSA now agrees that recovery of all of the repair and restoration costs and some of the claimed rent and taxes should be paid.

We first dispose of the claimed damages as to which the parties agree. The cost of repairing and restoring the WRD building was $367,134, and GSA is responsible for reimbursing WRD for this cost. Finding 24; Respondent's Posthearing Brief at 1, 15. The cost of repairing and restoring the NWD building was $37,985, and GSA is responsible for reimbursing NWD for this cost.[6] Id. GSA must also pay to WRD $4,984 in taxes for the period from January 1 to November 25, 2001, which were the Government's responsibility but have not yet been paid. Finding 31; Respondent's Posthearing Brief at 15.

The parties disagree as to three matters to which we now turn:

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[6]As we noted in A & B, to recover the claimed amounts, the lessors must demonstrate not only that the costs of repairing and/or restoring the damage caused by the Government were reasonably incurred, but also that these costs do not exceed the diminution in the building's fair market value that resulted from that damage. 04-1 BCA at 160,508 (citing Missouri Baptist Hospital v. United States, 555 F.2d 290, 294-95 (Ct. Cl. 1977), and other decisions). WRD and NWD have met this burden by accepting as correct the estimate of an appraiser hired by GSA as to the amount by which the damage caused the market value of the buildings to be diminished. The cost of the repairs and/or restoration, $405,119 ($367,134 for the WRD building plus $37,985 for the NWD building) does not exceed the appraiser's estimate of the diminution in the buildings' fair market value that resulted from that damage, $475,000. See Finding 32.

(1) What was the reasonable length of time during which repair and restoration should have occurred? The answer to this question is critical to the measure of recovery of both rent and taxes.

(2) At what rate should recovery of rent be calculated?

(3) Should the period in which rent and taxes are due be the same for both buildings?

(1) With few exceptions, courts have held that a lessor suing for breach of a lease covenant to repair or restore the premises is entitled to recover, in addition to the costs of the construction itself, the rental value of the premises during the period reasonably required to make the necessary repairs. Friedman on Leases § 10.602a at 734 (4th ed. 1997); William H. Danne, Jr., "Measure and Elements of Damages for Lessee's Breach of Covenant as to Repairs," 45 A.L.R. 5th 251, § 25(a) (1997). Of key importance to this tribunal, which is subject to the understandings of law expressed by the Court of Appeals for the Federal Circuit, a predecessor to that court has spoken to the matter. Ruling in a case involving the Government's rental of a house located only three blocks from where GSA's headquarters building now stands, the Court of Claims held:

> As to the rent claimed for the time the house was undergoing repairs, the premises were withheld from the petitioners and held by the United States as a consequence of their breach of their engagement to return them in tenantable condition, and the loss incident to that must be borne by the United States, and not by the petitioners.

Hoover's Case, 3 Ct. Cl. 308 (1867). More recent state court decisions to like effect include SDR Associates v. ARG Enterprises, Inc., 821 P.2d 268, 271 (Ariz. App. 1991); Fisher Properties v. Arden-Mayfair, Inc., 726 P.2d 8, 20 (Wash. 1986); and Worthington v. Kaiser Foundation Health Plan, Inc., 8 Cal. App. 3d 435, 442 (1970). One of our sister boards of contract appeals has followed this rule as well. Richard & Terry Ponce, DOTCAB 2039, 90-1 BCA ¶ 22,517. Another board has specifically held that the landlord is entitled to compensation in the form of rent when, after a lease has expired, a tenant Government agency constructively occupies the premises by leaving considerable property behind and thereby making the space unrentable. T. W. Cole, PSBCA 3076, 92-3 BCA ¶ 25,091; see also Cafritz Co. v. General Services Administration, GSBCA 13525-REM, 98-2 BCA ¶ 29,936, at 148,122 (distinguishing Cole from a situation in which the presence of a few items did not hinder the lessor's possession and use of the premises).

WRD and NWD had the necessary repair and restoration work performed by architect Thomas J. Powers (pre-construction activities and project management) and Del Rio Enterprises, Inc. (construction activities). Findings 18-23. Mr. Powers' pre-construction activities, which pertained to both buildings, took seven weeks. Finding 23. Del Rio's construction work took five months and three days in the WRD building and two months and six days in the NWD building. Finding 21. (The work in the two buildings was performed concurrently. Id.)

GSA believes that these durations were excessive. Its position is based on the testimony of Donald Cobb, a GSA program manager. Finding 25. Mr. Cobb believes that the pre-construction work should have been performed in a month and the construction work done in another month (or at most, five weeks). Finding 26. We find his testimony unpersuasive. Although Mr. Cobb was at one time a construction cost estimator, he realized that because he had not been engaged in this work at the time relevant to this dispute and because he was unfamiliar with construction in the area where the buildings were located, he would have to rely on a local contractor for help in making estimates. Findings 25-26. That local contractor was said to be Larry Garcia. Whether Mr. Garcia was qualified to advise Mr. Cobb, and whether Mr. Garcia's conclusions have any rational basis, remain unknown, since Mr. Garcia was never called as a witness.[7] See Finding 26. Mr. Cobb's comments are consequently founded in large measure on hearsay.

Mr. Cobb's theory that Mr. Powers' pre-construction work could have been done in a month, rather than the seven weeks it actually took, is, by his own admission, a guess. Finding 27. Counsel's suggestion that the one month estimate is valid because Mr. Powers spent 179.38 hours on this work, and that amount of time is about four and one-half work-weeks, is also unpersuasive. As Mr. Powers' time sheets reasonably show, he had responsibilities other than the WRD/NWD project and did not devote full time in any week to this project. Appellants' Exhibit 14. During some periods – for example, between sending requests for proposals to contractors and receiving offers in response – he spent little or no time on the project, but time passed due to a reasonably-paced sequence of events leading to construction. GSA has offered no suggestions that Mr. Powers worked inefficiently on any particular aspect of his work. We conclude that he reasonably spent seven weeks preparing for construction, and that during this period, both buildings remained encumbered by the Government's having breached the leases and left the structures in a state of disrepair.

As to the construction phase of the work, we have already noted in Finding 27 three specific instances in which we found Mr. Cobb's testimony to be less than credible. Based on testimony from Mr. Powers and Del Rio president Kevin Garcia, we conclude that the work could not reasonably have been performed by double-shifting craftsmen. Based on testimony from Mr. Garcia, we conclude that asbestos abatement, a critical aspect of the construction work (see Finding 22), could not reasonably have been performed as fast as Mr.

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[7]WRD and NWD ask the Board to make adverse inferences from GSA's failure to call Larry Garcia as a witness, despite the fact that at the time of the hearing, Mr. Garcia was alive and living in the city where the hearing was held. In doing so, they rely on this statement from John W. Strong, et al., McCormick on Evidence § 264 (5th ed. 1999): "When it would be natural under the circumstances for a party to call a particular witness . . . and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference" (referencing Graves v. United States, 150 U.S. 118, 121 (1893)). GSA urges us not to make the requested adverse inferences, on the ground that Mr. Garcia's testimony would be cumulative of Mr. Cobb's. GSA relies on this statement from the same section of the treatise cited by the lessors: "[I]f the testimony of the witness would be merely cumulative, the inference is unavailable." Because we reject the contentions which are based on Mr. Cobb's testimony, even without making adverse inferences from GSA's failure to call Mr. Garcia, we need not decide whether to make those adverse inferences.

Cobb (based on double-hearsay) thought possible. Based on testimony from Mr. Powers, we conclude that covering the concrete floors with carpet rather than vinyl composition tile did not add any time to the construction schedule. The only other specific suggestion in GSA's brief in support of the agency's belief that "Del Rio performed the WRD and NWD contracts at a snail's pace" (Respondent's Posthearing Brief at 10) is that demolition took longer than the contractor planned. It is true that Del Rio's schedule for work in the WRD building shows that nine weeks was planned for demolition, but demolition work actually took about three and one-half weeks. Appellants' Exhibit 13; Transcript at 75-78, 83. But this fact does not lead inexorably to GSA's conclusion that the work in the WRD building should have taken five and one-half weeks less than it actually did. It may merely indicate that the schedule was not well designed. Perhaps some aspects of the work took more time than projected and other aspects took less. We do know that taken as a whole, the work in that building took a week longer than planned. Finding 21.

GSA's Mr. Cobb ultimately testified that "the only way to know for sure how long it takes to do something is to do it." Finding 27. This testimony is consistent with the lessors' formulation, which we have previously expressed in other situations, that "the proof of the pudding is in the eating." Federal Systems Group, Inc., GSBCA 10286-P, 90-1 BCA ¶ 22,547, at 113,143 (1989); Richard W. Israel (Deceased), GSBCA 8501, 89-3 BCA ¶ 22,226, at 111,763; see also Breese Burners, Inc. v. United States, 140 Ct. Cl. 9, 17 (1957); Myers v. Polk Miller Products Corp., 201 F.2d 373, 378 (C.C.P.A. 1953). We found Del Rio president Kevin Garcia, who performed the construction work, and architect Powers, who served as the owner's representative for it, to be highly credible witnesses. They both testified that Del Rio did its job on each building in a commercially reasonable time. Finding 21. The burden is on GSA to show that the contractor did not exercise reasonable diligence in performing its work. Bank One, Texas, N.A. v. Taylor, 970 F.2d 16, 29 (5th Cir. 1992), cert. denied, 508 U.S. 906 (1993); Jones v. Consolidated Rail Corp., 800 F.2d 590, 593 (6th Cir. 1986); Federal Insurance Co. v. Sabine Towing & Transportation Co., 783 F.2d 347, 350 (2d Cir. 1986); United Technologies Corp., Pratt & Whitney Group, ASBCA 46880, et al., 97-1 BCA ¶ 28,818, at 143,794. The agency has not met this burden; it has given us no sound reason to doubt the witnesses' testimony. Nor did it ever take any steps to mitigate its liability by performing its repair and restoration obligations, or by directing the lessors to have their contractor approach the job in any particular way. Finding 19. We hold that the amount of time Del Rio spent in repairing and restoring each building was reasonable and that during each of these periods, the building in question remained encumbered by the Government's having breached the lease by leaving it in a state of disrepair.

(2) The second question we must answer in these cases is, At what rate should recovery of rent be calculated for the pre-construction and construction periods? According to WRD and NWD, the answer is the rental rate prescribed by the leases. According to GSA, it is the fair rental value determined by a professional appraiser hired by the Government. The difference is significant, for GSA believes that the appraised rental value is $56,145 per month for the two buildings, whereas the lease rate is, as described below, much higher.

The basis for the Government's position is obscure. Once upon a time, it was considered deceitful – nay, even sinful – to sell something for more than its just price. See St. Thomas Aquinas, Summa Theologica, II-II, question 77, art. 1. The general rule today, however, is that when a lease term ends and the tenant fails to surrender possession of the

premises, the landlord may treat him as a holdover tenant, in which case the rental terms are as expressed in the just-ended lease. Cafritz Co. v. General Services Administration, GSBCA 13525, 97-1 BCA ¶ 28,680, at 143,271 (1996), remanded for further proceedings on other matters sub nom. Cafritz Co. v. Barrum, 129 F.3d 134 (Fed. Cir. 1997) (table); Burdette A. Rupert v. General Services Administration, GSBCA 10523, 93-1 BCA ¶ 25,243, at 125,728 (1992); see also Friedman on Leases § 18.4 at 1236 ("With some exceptions, the holdover tenancy is on the same terms as those in the preceding lease, except those clearly inapplicable to the holdover term."). In this case, there can be no doubt that the rental terms of the leases must govern, for the supplemental lease agreements say precisely how the rent should be calculated if the Government stays in the buildings beyond the termination date: "If . . . the Government is unable to vacate the premises on the date specified in its [termination] notice, the Government may holdover [sic] on a month to month basis for not more than (6) months at a monthly rent equal to 200% of the monthly rent in effect as indicated in paragraph 3 for the time interval of the holdover." Finding 9. This provision was the product of extensive negotiations and was agreed to by the GSA contracting officer in exchange for the lessors' agreement to other actions desired by GSA. Id. n.3. For any additional months of Government occupancy, the rate would be that specified in paragraph 3 of each SLA. Findings 9, 10. To impose another rental rate now would be to impermissibly rewrite the parties' contract.

The period of time during which rent was to accrue at the holdover rate of 200% of the monthly rate specified in paragraph 3 of each SLA was, as just stated, six months after the termination date. Before the period of time at issue in these cases, the Government stayed in the buildings for one month after the termination date, and it paid rent for that month at the prescribed holdover rate. Finding 16. After that month, five months remained in the period during which rent was to accrue at the holdover rate – $161,487.22 for the WRD building and $158,474.30 for the NWD building. To the extent that the repair/restoration period consumed some or all of those five months, GSA is obligated to pay rent at those rates for that duration. To the extent that the repair/restoration period consumed any additional time, GSA is obligated to pay rent at the monthly rate specified in paragraph 3 of each SLA – $80,743.61 for the WRD building and $79,237.15 for the NWD building – for that duration.

The parties have stipulated that GSA owes each lessor for taxes on its building, as well as rent, for whatever length of time the Board determines rent is due. The stipulated tax rates are $836 per month for the WRD building and $2,189 per month for the NWD building. Finding 31.

(3) We have already determined the duration of the repair/restoration period – seven weeks for pre-construction activities pertaining to both buildings, plus a construction period of five months and three days on the WRD building and a concurrent two months and six days on the NWD building. Thus, the entire period consumed five months, seven weeks, and three days for the WRD building and two months, seven weeks, and six days for the NWD building. The duration of the work on the WRD building clearly is the length of time for which rent and taxes must be paid by GSA on that building. We must now decide whether that duration should be deemed the length of time for which rent and taxes must be paid by GSA on the NWD building as well.

We believe that it should. It is true that when the NWD building was fully repaired and restored to its original condition, that building could conceivably have been rented separately. Nevertheless, all other considerations indicate that separate rental would not have been an outcome that either party could reasonably have anticipated.

The buildings were treated as a single unit for the more than two decades that the Government was quartered there. The buildings share an address, are connected by a covered walkway, and have common parking. Finding 1. The shared parking and configuration of entrances make the buildings function as a single unit. Finding 10. Throughout the Government's tenancy, one agency – the Social Security Administration – occupied the entirety of the space. Finding 6. Negotiations for lease extensions were conducted in tandem, with a single manager representing both lessors. Finding 8. Although the negotiations culminated in two SLAs, one for each building, this was done for administrative rather than substantive reasons: separate leases had previously been written for the two buildings, and the SLAs had to follow the form of the leases. Finding 10. Each SLA expressly provided that the termination of the lease in question "must coincide with the termination of [the other lease]." For emphasis, each SLA then stated, "This lease cannot be terminated unless [the lease for the other building] is terminated at the same time." Finding 9 (¶¶ 21 of WRD lease, 19 of NWD lease). The purpose of this provision was to return the buildings to the lessors at the same time so that a single new tenant could be secured. Id. (¶¶ 25 of WRD lease, 22 of NWD lease).

The appraisal report commissioned by GSA confirmed the parties' purpose in writing the key paragraphs into the SLAs. In the report, the appraiser stated as a matter of fact, "The subject property is an existing single tenant . . . office building [which] includes two structures, the East Building and the West Annex, connected by an enclosed corridor." Appeal File, Exhibit 38 at 1 (numbered). The appraiser's calculations are based on the assumption that the property is a single building. Id. at 17-18 (numbered). He assumed that if the property were to be divided for "multi-tenancy," a single tenant would do the dividing. Id. at 22 (numbered).

WRD and NWD have calculated the amounts owing for rent and taxes for the repair/restoration period on the assumption that five months, seven weeks, and three days is equivalent to six and three-quarters months. If this assumption is in error, it is too conservative, for seven weeks and three days, or fifty-two days, are a bit more than one and three-quarters months. Based on this assumption, the lessors' calculations of rent and taxes due are virtually correct – again, we find them to be on the conservative side, a few dollars lower than our own calculations show. See Finding 30. The lessors are entitled to recover all that they claim for rent and taxes, $954,378 for WRD and $945,809 for NWD.

Decision

GSBCA 16179 is **GRANTED**. GSA shall pay to WRD the sum of $1,326,496. GSA shall also pay to WRD interest on this amount, at rates established by the Secretary of the Treasury, from the date on which the contracting officer received WRD's claim dated July 31, 2002, until the date of payment. 41 U.S.C. § 611 (2000); see Finding 28.

GSBCA 16180 is **GRANTED**. GSA shall pay to NWD the sum of $983,794. GSA shall also pay to NWD interest on this amount, at rates established by the Secretary of the Treasury, from the date on which the contracting officer received NWD's claim dated September 12, 2002, until the date of payment. 41 U.S.C. § 611; see Finding 28.

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STEPHEN M. DANIELS
Board Judge

We concur:

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ANTHONY S. BORWICK
Board Judge

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ROBERT W. PARKER
Board Judge