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

GRANTED: November 17, 2003

GSBCA 15208

A & B LIMITED PARTNERSHIP,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Allen E. Ertel of Allen E. Ertel & Associates, Williamsport, PA, counsel for Appellant.

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

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

DANIELS, Board Judge.

After a lease expired, the lessor, A&B Limited Partnership (A&B), claimed entitlement to payment for the cost of repairing damage the Government had caused to the space it had leased, and also for the cost of replacing items the Government had removed. The Board earlier issued a decision denying a motion by the lessee, the General Services Administration (GSA), for summary relief as to the portion of the claim addressing the repair of damages and granting that motion as to the portion addressing the replacement of removed items. A&B Limited Partnership v. General Services Administration, GSBCA 15208, 01-2 BCA ¶ 31,444, reconsideration denied, 01-2 BCA ¶ 31,522. In this decision, we consider and grant the remaining part of the claim.

Findings of Fact

The lease with which we are concerned in this case is for office space in a building known as Penn Place in Wilkes-Barre, Pennsylvania. The lease is dated July 2, 1974, and was originally for a ten-year period (later stated to be September 15, 1975, through

September 14, 1985) with two renewal option periods of five years each. Appeal File, Exhibits 2 at 1, 4, 10; 15 at 1. The lease was renewed for the five-year periods ending on September 14 of 1990, 1995, and – after an amendment permitting a third renewal option period – 2000. Id., Exhibit 2 at 12, 38, 73-75.

The building was new when the Government leased it. Transcript at 494. The lease covered the entire 88,000-square-foot building except for a child care center which was located on the first floor. Id. at 154-55, 375.

The original lessor was Wideman Associates, which changed its name to Penn-Place Associates. The lease was transferred to W/B Associates in the early 1980s and ultimately to A&B on June 1, 1998. Exhibits 2 at 1, 10-11, 77; 15 at 1.

The lease originally included this provision:

> MAINTENANCE OF PREMISES. The Lessor shall maintain the demised premises, including the building and any and all equipment, fixtures, and appurtenances, furnished by the Lessor under this lease in good repair and tenantable condition, except in case of damage arising from the act or the negligence of the Government's agents or employees.

Appeal File, Exhibit 15 at 3 (¶ 2 of General Provisions); see also id. at 43-51.

On June 3, 1998, two days after the lease was transferred to A&B, the parties agreed that "[t]he Government shall assume routine maintenance and incidental repairs to the interior of the space that the Government occupies. . . . The Government shall assume routine cleaning of . . . and janitorial services for the space that the Government occupies." Exhibit 2 at 78.

Of more importance to this case, the "Maintenance of Premises" provision –

> was modified by paragraph 5 of [Supplemental] Lease Amendment 14 to state: "It is understood and agreed that the Government retains title to all removable property covered by this agreement. At the termination of this lease, the Government shall at its own expense restore the premises to their approximate original condition, fair wear and tear excepted; or the Government shall pay the Lessor the lesser of the cost of such restoration or the diminution [actually reads "dimimution" in original] in the market value of the leased premises resulting from the Government's failure to restore the premises."

Stipulation 4[1]; see Appeal File, Exhibit 2 at 16. Supplemental Lease Amendment (SLA) 14 is dated July 10, 1987, and is principally concerned with alterations to a Social Security Administration office on the second floor of the building. Appeal File, Exhibit 2 at 15-37.

The lease originally allowed the Government to "terminate this lease at any time during the renewal periods by giving at least 360 days' notice in writing to the Lessor." Appeal File, Exhibit 15 at 1. On December 19, 1994, the parties replaced this provision with one allowing the Government to "terminate this lease at any time after two (2) full years of occupancy during the renewal periods by giving at lease [sic] 180 days' notice in writing to the Lessor." Id., Exhibit 2 at 73, 75. On November 17, 1998, the contracting officer sent to A&B a letter which "shall serve as our 180 day written notice that the Government shall terminate [the] Lease . . . effective May 17, 1999." Id. at 79. On May 24, 1999, however, the parties by mutual agreement extended the lease term to July 16, 1999. Id. at 80; Stipulation 7.

The Government vacated the building on July 16, 1999, and returned the keys to A&B on July 20 of that year. Stipulations 8, 9.

On July 20, according to A&B, it inspected the building and found that –

> quite frankly, it has been plundered. Sinks have been removed, doors have been removed, locks have been removed, doorknobs have been removed, and many of the new things which were added on the third floor, which were fixtures, have been taken. . . . There are holes in the walls, ceiling tiles removed, floor coverings have been destroyed and generally, the building has been trashed.

Appeal File, Exhibit 3 at 1. A&B provided the contracting officer with a seven-page detailed list of problems it had found. The list includes broken and missing ceiling tile and grid work; unidentified electrical, computer, and telephone cables hanging from ceilings; broken electrical receptacles, switches, and baseboard covers; malfunctioning light fixtures; walls with significant damage (including large holes) and unpainted areas; abnormal stains on carpets; missing carpet tiles; damage to a kitchenette; and broken and missing doorknobs, locks, and window blinds. Id. at 2-8; Appellant's Exhibit 4.

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[1]The Board's prehearing order directed the parties to agree on stipulations of "all material facts as to which each believes that no substantial controversy exists." Stipulations were to be proposed by April 15, 2003, and each party had until April 22 to "indicate its disagreement with any stipulation or part thereof" proposed by the other party. "Should no disagreement be indicated," the order provided, "the proposed stipulation shall be deemed as agreed." Board Order (Mar. 12, 2003). A&B proposed seventeen stipulations on April 15. GSA did not indicate its disagreement with any of them by April 22. At a telephonic conference on May 8, GSA counsel "stated affirmatively that respondent accepts the proposed stipulations." Board's Conference Memorandum (May 9, 2003). At the hearing in the case, on May 13, the Board noted that without objection, all the stipulations proposed by A&B were included in the record. Transcript at 6. No exception was taken to this statement.

Between July 21 and August 13, A&B's construction manager took pictures of areas of the building which had been damaged during the Government's tenancy, and the lessor also submitted those pictures to GSA. Stipulation 11; Appeal File, Exhibit 6. The pictures – as well as a videotape also taken by A&B's construction manager soon after the Government vacated its space in the building – show many instances of damage, of the kinds asserted by A&B, throughout the space the Government leased. Appeal File, Exhibit 6; Appellant's Exhibit 1; Transcript at 31-32, 60-61.

On August 20, A&B submitted to GSA a proposal by L. R. Costanzo Co., Inc., "to repair the building in the amount of $239,000." Stipulation 13. The proposal includes work on electrical, acoustical ceiling, carpet, painting, and general construction matters. Electrical work includes removal of exposed communication wiring and unused jacks, replacement of damaged or missing lighting lenses, relamping of fixtures, and replacement of keyed light switches in an area formerly used as jail cells. Acoustical ceiling work includes provision of a new ceiling in some areas and replacement of broken tiles and grid in others. Carpet work includes repair or replacement of carpet tiles where necessary, including in the former cell area. Painting work includes all walls on the second floor and walls on the third floor where necessary. General construction work includes replacement of missing fire extinguishers, locks, and doors; patching drywall where necessary; provision of a new vanity in one bathroom and a sink and wall cabinets in a kitchenette; removal of various items from the areas previously used as cells and a courtroom; and cleaning of carpets. Appeal File, Exhibit 8; Appellant's Exhibits 2-3. The parties have stipulated that the Costanzo proposal "is an accurate cost proposal to restore the building to its original condition, normal wear and tear excepted." Stipulation 14.

At hearing, A&B presented uncontroverted evidence that the cost of repairing areas which were damaged by the Government's removal of its own property – and which are not included within the Costanzo proposal – is $1,900. Transcript at 33, 58-60; see also Respondent's Brief at 21.

At some time in August, the GSA property manager for the building and another GSA employee spent an hour to an hour and one-half walking through the building to examine its condition. They made no measurements and took few notes. After this walk-through, these individuals met with the contracting officer to discuss the cost of repairing damaged areas. Transcript at 161-63, 167, 389, 394, 510-13. By letter dated September 27, 1999, the contracting officer sent to A&B a statement of all items which, GSA believed, had been damaged beyond normal wear and tear. The total cost to repair these items was said in the statement to be $16,032. Appeal File, Exhibit 10; Respondent's Exhibit 1.[2] The parties have

[2]The contracting officer and the property manager together made the estimates on which this figure is based. Neither of them had any firm idea, however, how many instances of damage occurred in the building or the time or unit cost involved in making necessary repairs. The contracting officer made no use of the list, photographs, or videotape supplied by A&B, or the Costanzo proposal, in developing the estimates. The property manager actually provided all the information, making rough estimates based on his past experience. Transcript at 212-40, 248-57, 277, 302-05, 397-98, 408-23, 456-70, 476-93, 496-500.
(continued...)

stipulated that this statement "is not accurate because the cost to repair the damage is not $16,032." Stipulation 15.[3] GSA told A&B on November 2, 1999, that it would pay this sum to the lessor. Appeal File, Exhibit 11. A&B received the payment on November 16. Respondent's Motion for Summary Relief, Exhibit H; see also Appellant's Brief at 3.

On October 29, 1999, A&B entered into an agreement to sell the building to Robert K. Mericle, doing business as Mericle Properties, for the sum of $1,800,000. Appellant's Exhibit 6. The property was actually sold to Mr. Mericle for that amount on November 24. Respondent's Motion for Summary Relief, Exhibit O. Mr. Mericle later – about a month later, according to a newspaper article placed in the record by GSA, and as much as six or seven months later, according to the chief operating officer of Mericle Commercial Real Estate Services – sold the property to the government of the county in which the building is located (Luzerne County, Pennsylvania). The sales price was $2,480,000, according to the newspaper article, and about $2,400,000 to $2,500,000, according to Mericle Commercial Real Estate Services' chief operating officer. Id., Exhibit M; Transcript at 328-29, 364.

The fair market value of the building, unrepaired, was about $1,800,000 during the second half of 1999. Stipulation 16. The fair market value of the building, repaired, was $2,500,000 at that time. Stipulation 17.[4]

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According to the contracting officer, leaving unidentified wires hanging from ceilings, tearing something off a wall and taking the paint with it, and removing electrical baseboard covers all constitute normal wear and tear. Id. at 231, 240, 258-60. The property manager acknowledged that he used no particular criteria, other than his own experience in reviewing six to eight other buildings, to determine what constituted normal wear and tear. Id. at 290. He agreed with the contracting officer that a tenant's leaving unidentified wires dangling from ceilings and tearing something off a wall and taking the paint with it constitute normal wear and tear, and also testified that putting holes (including large tears) in walls and concrete floors constitutes normal wear and tear. Id. at 295-97, 471-74, 491-92, 496, 501-03.

[3]Among other reasons for this conclusion is that, as the GSA contracting officer and building manager acknowledged, the costs associated with the individual items on the list – which costs were not provided to A&B until this litigation was under way – total $21,432. Transcript at 200-03, 403.

[4]Stipulations 16 and 17 include the values stated in this finding, but not the time period. At hearing, A&B's counsel said that he intended the stipulations, which A&B proposed, to be as of the time that the Government vacated the building. Transcript at 18-20, 114-15. Counsel for GSA, both at hearing and in his brief, noted the absence of a time period. Id. at 18-19, 115; Respondent's Brief at 28. The agency keys its acceptance of the amounts, however, to the prices and at the times at which the property was sold – first by A&B to Mr. Mericle in November 1999 and then by Mr. Mericle to Luzerne County. GSA believes, following its newspaper article exhibit, that the latter sale may have occurred in December 1999. Respondent's Brief at 28-30 & n.13. These sales occurred only a few months after the Government vacated the building. We construe GSA's justification for accepting the
(continued...)

On December 20, 1999, A&B appealed the contracting officer's November 2 determination that GSA owed A&B only $16,032 for repair of items in the building damaged, beyond normal wear and tear, during the Government's occupancy. In its notice of appeal, A&B claimed that the cost of repairing such items, as well as replacing fixtures removed by the Government, was $400,000. Appeal File, Exhibit 12. The Board docketed this appeal as GSBCA 15208.

The Board suspended proceedings in the case to permit A&B to elect whether to proceed under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (2000), or the lease's disputes clause. Board Orders (Mar. 20 & May 22, 2000). A&B elect to proceed under the Act and submitted to the contracting officer on June 19, 2000, a certified claim regarding costs of repair and replacement. The certified claim sought payment in the amount of $340,414.30 – $239,000 to cover the cost of repairing items damaged by the Government, beyond normal wear and tear, and $101,414.30 to cover the cost of replacing fixtures which had been removed. Respondent's Motion for Summary Relief, Exhibit N at 2. The contracting officer did not issue a decision on the claim, and the case has proceeded as an appeal from a deemed denial of it. Board Orders (Aug. 29 & Sept. 1, 2000). On June 5, 2001, the Board issued its interlocutory decision in the case, denying the claim for the cost of replacing fixtures. A&B Limited Partnership, 01-2 BCA ¶ 31,444. A&B then submitted a supplemental certified claim to the contracting officer on October 9, 2001. The supplemental claim is in the amount of $270,503 – $259,000 for repairing damages generally and $11,503 to repair damages specifically in areas from which the Government removed items. Letter from A&B to Board (Oct. 16, 2001), Attachment. At hearing A&B reduced the amount of its claim to $240,900 – $239,000 for repairing damages generally and $1,900 to repair damages in areas from which the Government removed items – less the $16,032 GSA has already paid it for repairs. Transcript at 60; Appellant's Brief at 3.

Discussion

A&B contends that it is entitled to be paid by GSA $240,900 – the cost of repairing damages caused by the Government, beyond normal wear and tear, during its tenancy in the building. To find for the appellant, we will have to conclude first, that the Government is obligated to pay for such repairs; second, that the amount proposed by A&B is an appropriate measure of the cost of repairing the damages caused by the Government, beyond normal wear and tear; and third, that this cost does not exceed the diminution in the building's fair market value that resulted from the Government's damage to the structure. Our task in reaching the necessary determinations is greatly facilitated by stipulations entered into by the parties.

1. Two alternative approaches both result in a conclusion that the Government is obligated to pay for the cost of repairing damages it caused, beyond normal wear and tear.

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stipulations as acceptance of the approximate time, as well as the specific amounts, proposed by A&B. There is no evidence in the record that commercial property values in the Wilkes-Barre area changed over the course of the period between July 1999, when the Government vacated the building, and November and December 1999, the dates to which GSA keys its acceptance of the stipulated values.

One approach derives from the parties' agreement that the Government would, at the termination of the lease, "at its own expense restore the premises to their approximate original condition, fair wear and tear excepted." This provision is contained in a paragraph of Supplemental Lease Agreement 14. In briefing GSA's motion for summary relief, the parties struggled endlessly to analyze whether the term "the premises" in this paragraph refers to the entire leased premises or merely to the premises which the lessor agreed to build out per other provisions of SLA 14. The Board concluded that it could not resolve the dispute without evidence as to the parties' interpretation of the paragraph in negotiating this SLA. A&B Limited Partnership, 01-2 BCA at 155,299. The one and only piece of relevant evidence presented by the parties is the stipulation that this paragraph is a modification of the original lease's "Maintenance of Premises" provision. The "Maintenance of Premises" provision clearly refers to the entire "demised premises." Therefore, we conclude that the key paragraph of SLA 14, in referring to "the premises," refers to the entire demised premises as well.

In the brief it submitted following our hearing on the merits, GSA reiterates arguments it made in its motion for summary relief, to the effect that the phrase "the premises" in SLA 14 could not possibly have been intended to refer to the entire leased area. The agency has not presented any evidence in support of its argument, however. We are left with the one piece of evidence advanced by A&B – the stipulation to which GSA agreed – and it points strongly in the direction suggested by the lessor. Our appellate authority has explained:

> In ordinary circumstances and absent special considerations, where a stipulation is entered into before a board and this court is called upon to review the board decision, great weight will be given to the stipulation. In instances where a stipulation is inadvertent, contrary to law, contrary to fact, or made without proper authority this court may disregard the stipulation.

Kaminer Construction Corp. v. United States, 488 F.2d 980, 988 (Ct. Cl. 1973); see also Mech-Con Corp. v. West, 61 F.3d 883, 887 (Fed. Cir. 1995); Employers Mutual Casualty Co., GSBCA 11003, 92-1 BCA ¶ 24,594, at 122,709 (1991), aff'd on reconsideration, 93-1 BCA ¶ 25,482 (1992). We have been given no indication that the stipulation with which we are concerned is inadvertent, contrary to law, contrary to fact, or made without proper authority. We therefore give the stipulation great weight.

The other approach which results in a conclusion that the Government is obligated to pay for the cost of repairing damages it caused, beyond normal wear and tear, derives from a common law principle enunciated by courts in this country at least since United States v. Bostwick, 94 U.S. 53, 65-66 (1876): 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. HG Properties A, L.P. v. General Services Administration, GSBCA 15219, 01-1 BCA ¶ 31,376, at 154,924; KMS Development Co. v. General Services Administration, GSBCA 12584, 96-2 BCA ¶ 28,404, at 141,840 (citing Eaddy v. United States, 139 F. Supp. 49, 51 (Ct. Cl. 1956)).

Even if we were incorrect in our determination that the lease, as amended by the SLA 14 paragraph at issue, required the Government to "restore the premises to their approximate

original condition, fair wear and tear excepted," this second approach would lead us to the same conclusion. In other situations – for example, where a building has been previously occupied and is renovated specially for the Government's use (as in Adelaide Blomfield Management Co. v. General Services Administration, GSBCA 13125, 97-1 BCA ¶ 28,914) – the duty to restore and the duty to repair damages might well be different from each other, for the duty to restore might include additional work in returning interior configurations to their previous state. Here, however, the building was new when the Government's tenancy began, and the lessor claims no costs for returning specially-modified areas to their previous configuration, so restoring the building to its original condition (less normal wear and tear) and making repairs so as to remedy damages (beyond normal wear and tear) cover identical work.

2. The evidence is that the amount proposed by A&B is an appropriate measure of the cost of repairing the damages caused by the Government, beyond normal wear and tear. Virtually all of the repairs for which A&B seeks payment are encompassed in a proposal submitted by L. R. Costanzo Co., Inc. The parties have stipulated that the amount of Costanzo's proposal, $239,000, is the cost "to repair the building" (Stipulation 13) and that this "is an accurate cost proposal to restore the building to its original condition, normal wear and tear excepted" (Stipulation 14). It is uncontested that the cost of repairs to areas not included in the Costanzo proposal is $1,900. The total of these two dollar figures is the sum A&B now seeks through this appeal, $240,900.

GSA advances several arguments in opposition to the conclusion that the cost of repairing damages caused by the Government, beyond normal wear and tear, is $240,900. We reject these arguments, giving attention to the four principal points made by the agency.

First, GSA maintains that the Costanzo proposal covers a full restoration of the building, not merely repairs of damages caused by the tenant. Although the stipulations are not as artfully drafted as they might have been, we are not troubled by the use of the term "restore" in one stipulation and "repair" in another. As explained earlier, whatever work Costanzo might have done would have been the same, whether denominated "restoration" or "repair." The proposal's scope of work shows no items which might be encompassed by the return of any area to a configuration other than the one in which the Government left it.

Second, GSA contends that the proposal covers items which are properly considered normal wear and tear. This is a difficult proposition to advance successfully, in the face of the stipulations, for there is no fixed rule of law or fact which enables a tribunal to distinguish between what is normal wear and tear and what is not. Even after a careful, detailed analysis, differentiating one from the other is often a matter of degree and judgment. Jonnet Development Corp., GSBCA 6943, 86-3 BCA ¶ 19,311, at 97,658-59 (citing Davenport v. United States, 26 Ct. Cl. 338, 344 (1891)); W. L. Holbrook, AGBCA 2000-174-1, et al., 03-1 BCA ¶ 32,103, at 158,715 (2002). Due to the absence of detail in the testimony of GSA's contracting officer and property manager regarding the condition of the building, such analysis is impossible here. GSA's difficulty in persuading us of the correctness of its position is compounded by our appellate authority's holding that where a lessor's repair work covers both damage resulting from normal wear and tear and damage resulting from the tenant's improper use, the tenant is responsible for the entire cost of repair. WDC West Carthage Associates v. United States, 324 F.3d 1359, 1363-64 (Fed. Cir. 2003)

(addressing replacement of carpet damaged by Government tenant); Vinoy Park Hotel Co. v. United States, 125 Ct. Cl. 336, 338-39 (1953) (addressing need to paint walls damaged by Government tenant). We note that an exclusion contained in the Costanzo proposal and the testimony of A&B's construction manager make clear that numerous areas of the building which had normal wear and tear were not part of the scope of Costanzo's work. Appeal File, Exhibit 8 at 2; Appellant's Exhibit 2; Transcript at 78-80. In light of the hurdles established in the law and the evidence to the contrary of GSA's position, we have no reason to believe that the stipulation as to the proposal's not involving repair of damages caused by normal wear and tear should be found to be inadvertent, contrary to law, contrary to fact, or made without proper authority.

Third, GSA maintains that by paying A&B $16,032 in November 1999, it has fully compensated the appellant for any excessive wear and tear to the premises. This is a rather curious position in that the agency has stipulated that $16,032 is not an accurate cost figure. It is based on the testimony of the GSA contracting officer and property manager, neither of whom had any real basis for selecting this number. The contracting officer did not inspect the building after the Government's tenancy ended. While the property manager did make an inspection, it was cursory; he made no detailed notes, and he was unable to testify to any specific instances of damage used in his calculations. Both of these agency employees had extravagant ideas of what constitutes normal wear and tear. The slim reed of their testimony is no basis for disregarding the stipulations as to the cost of repairing damages caused by the Government beyond normal wear and tear.

Fourth, GSA says that A&B's claim should be rejected because it is for anticipatory profits, which are not permitted under a termination for the convenience of the Government, and because A&B has paid nothing for the repairs. As the lessor points out, it does not seek anticipatory profits – merely reimbursement for costs it would have incurred if it had had necessary work performed – and the lease ended not with a termination for convenience, but at the end of an extension which was mutually agreed upon. The fact that the lessor never had the work performed does not affect the Government's liability for the consequences of its actions. Jonnet Development Corp., 86-3 BCA at 97,659 (citing Pocono Pines Assembly Hotels Co. v. United States, 69 Ct. Cl. 91, 108 (1930)).

3. To recover the claimed amount, A&B must also demonstrate that the cost of repairs of damages caused by the Government does not exceed the diminution in the building's fair market value that resulted from that damage. The purpose of this rule is to avoid windfall recoveries. Missouri Baptist Hospital v. United States, 555 F.2d 290, 294-95 (Ct. Cl. 1977). "[R]epair costs are subjected to a ceiling. That ceiling is the diminution in fair market value attributable to defendant's breach." Id. at 295; see also San Nicolas v. United States, 617 F.2d 246, 249 (Ct. Cl. 1980); Dodge Street Building Corp. v. United States, 341 F.2d 641, 645 (Ct. Cl. 1965); Banisadr Building Joint Venture v. United States, 38 Fed. Cl. 392, 395 (1997); Adelaide Blomfield Management Co., 97-1 BCA at 144,145.

Through stipulations, A&B is able to meet its burden in this regard without difficulty. The fair market value of the building, at about the time the Government's tenancy ended, was roughly $1,800,000 in the structure's unrepaired condition. The building's fair market value at about that time, in repaired condition, was $2,500,000. The difference between these two figures, $700,000, is considerably greater than the cost of making repairs necessitated by the

Government's damage to the premises, $240,900. The cost of making the repairs therefore does not exceed the diminution of the fair market value due to the damage. In awarding the cost of repairs to the appellant, we would not be creating a windfall recovery.

GSA resists this conclusion by maintaining that because A&B sold the property to Robert Mericle for $1,800,000 and Mr. Mericle shortly thereafter sold it to Luzerne County, Pennsylvania, for about $2,500,000, A&B must have sold the property at a discount for business reasons unrelated to the condition of the building's interior. GSA is once again asking us to ignore stipulations – this time, as to fair market value – by urging that the fair market value of the building, unrepaired, was $2,500,000, as well as $1,800,000, during the second half of 1999. See Respondent's Brief at 30 n.13.

The record suggests two possible reasons for the difference in sales prices. One is contained in the testimony of the chief operating officer of Mericle Commercial Real Estate Services: In the time during which he owned the building, Mr. Mericle spent hundreds of thousands of dollars making significant improvements to the building's roof, structure, and electrical system (though he made few if any interior repairs). Transcript at 328-29, 362-64. The other possible reason for the difference in sales prices is contained in a newspaper article placed in the record by GSA: According to assertions reported in the article, although Mr. Mericle made few if any changes to the building during his brief ownership of it, the county commissioners who agreed to buy the building paid a premium to reward him, a contributor to their election campaigns, for his support. Respondent's Motion for Summary Relief, Exhibit M.[5]

Whether either of these explanations is accurate is uncertain. A&B presented two witnesses who cast doubt on the credibility of the chief operating officer of Mericle Commercial Real Estate Services. Transcript at 429-55. No evidence was presented in support of the newspaper article's reported assertions. This in itself makes it difficult for us to accept either theory as a basis for finding the stipulations as to fair market inadvertent, contrary to law, contrary to fact, or made without proper authority.

Further, to the extent that either of the explanations might be considered accurate, neither relates to any measure of fair market value which is relevant to the case. The fair market value of a piece of property is the price that an unrelated seller is willing to accept and an unrelated buyer is willing to pay on the open market and in a bona fide arm's-length transaction. Riverside Research Institute v. United States, 860 F.2d 420, 423 (Fed. Cir. 1988); Georgia-Pacific Corp. v. United States, 640 F.2d 328, 335 (Ct. Cl. 1980); Houser v. United States, 12 Cl. Ct. 454, 472 (1987); Black's Law Dictionary 1549 (7th ed. 1999). If the testimony that Mr. Mericle spent hundreds of thousands of dollars making improvements is correct, the second sale was of a building considerably upgraded from the one A&B sold. The sales price may have been at a fair market value, but that value was not for the building as the Government vacated it or the building with interior repairs having been performed. If the newspaper article is correct, the second sale was not a bona fide arm's length

[5]As to the second possible reason, a partner in A&B testified that before selling the building to Mr. Mericle, the partnership offered it in its unrepaired state to Luzerne County for $1,850,000, but the county expressed no interest in buying it. Transcript at 142-43.

transaction between an unrelated buyer and an unrelated seller. The price paid was for the building and something else. This price therefore cannot be considered a measure of any fair market value of the property itself in any condition.

We are left with only the stipulations as to the fair market value of the building during the second half of 1999, both in its unrepaired state as the Government left it, and in the condition in which it would have been had the necessary repairs been performed. We give these stipulations great weight.

Decision

The appeal is **GRANTED**. GSA shall pay to A&B $240,900, less the $16,032 it has already paid, for repairs to the Penn Place building. GSA shall additionally pay to A&B interest on the net amount of $224,868, at rates established by the Secretary of the Treasury for Contract Disputes Act claims. 41 U.S.C. § 611. Interest is due on $222,968 from the date on which the contracting officer received the claim dated June 19, 2000, until the date of payment. Interest is due on $1,900 from the date on which the contracting officer received the claim dated October 9, 2001, until the date of payment.

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STEPHEN M. DANIELS
Board Judge

We concur:

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ANTHONY S. BORWICK
Board Judge

_____
EDWIN B. NEILL
Board Judge