Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION FOR PARTIAL SUMMARY RELIEF
DENIED: July 9, 2003

GSBCA 15137, 16004

WASHINGTON DEVELOPMENT GROUP-JWB, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Stephen L. Braga, Baker & Botts, L.L.P., Washington, DC; and Robert M. Fitzgerald and J. Brian Cashmere, Watt, Tieder, Hoffar & Fitzgerald, L.L.P., McLean, VA, counsel for Appellant.

Kevin J. Rice and Catherine C. Crow, Office of the General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

HYATT, Board Judge.

In these consolidated appeals, appellant, Washington Development Group-JWB, LLC (WDG), asserts a claim for monetary damages attributable to alleged Government-caused delay, and also seeks relief from claims for liquidated damages, rent-free occupancy of the premises, and set-off, asserted by respondent, the General Services Administration (GSA), arising under a lease for the renovation and subsequent rental of space in the John A. Wilson Building in Washington, D.C. At this time, we address appellant's motion for partial summary relief, seeking dismissal or denial of the Government's claims under the contract. In light of the existence of significant factual disputes with respect to these claims, we deny the motion in its entirety.

Background

The John A. Wilson Building is a historic edifice owned by the District of Columbia. Prior to renovations made under the subject contract, the Wilson Building was in significant disrepair. Because the District of Columbia Government lacked the funds to renovate the building, it approached GSA with a proposal under which GSA would lease a significant portion of the space in the building for a federal tenant. GSA was amenable to this arrangement and planned to move the Environmental Protection Agency (EPA) into the building. Under this arrangement, the District of Columbia Government would still occupy some space in the building, but would share the building with a Federal tenant. The presence of a Federal agency tenant in the building enabled the developer to obtain favorable financing rates for the needed repairs.

In August 1996, GSA and WDG (also the "lessor" or the "contractor"), acting as the agent for the District of Columbia Government, entered into a GSA lease for 165,000 square feet of office and related space in the Wilson Building. The lease called for renovation and construction work in two principal phases. The first phase was described as "base building" or "warm lit shell" (WLS) work, and the second phase was "tenant alteration" or "tenant fit out" (TFO) work. The seventeen-month construction and renovation phase work was slated for completion by February 9, 1998. A twenty-year lease term followed completion of the renovations. Appeal File, Exhibit 1.

The lease provided that in the event WDG failed to complete the renovation work within the time fixed in the lease contract, the contractor would pay "as fixed and agreed liquidated damages . . . the sum of 1,600.00" for each calendar day that the delivery of all space, ready for occupancy by the Government, was delayed beyond 529 calendar days from final execution of the lease. The liquidated damages clause in the lease stated that "[t]his remedy is not exclusive and is in addition to any other remedies which may be available under this lease or at law." Appeal File, Exhibit 1.

The lease also provided that:

> The rent commencement date shall be the day following the date of space acceptance as substantially complete made by the Government. However, if Government delay occurs, then the rent commencement shall be the same number of days earlier than the acceptance date as the number of days of delay. Any rental paid by the Government prior to actual occupancy shall be less the cost for services and utilities. In any event, the Government will not be required to accept space and commence rent prior to April 24, 1998 . . . . Each day of Lessor delay will increase the amount of free rent immediately after occupancy by the Government on a day-for-day basis.

Appeal File, Exhibit 1.

General Clause 9 of the lease sets forth Federal Acquisition Regulation (FAR) clause 552.270-39 (MUTUALITY OF OBLIGATION), providing that the Government may, upon issuance and delivery to lessor of a final decision asserting a claim against the lessor, set off such claim against any payment or payments then or thereafter due to the lessor under the lease. Appeal File, Exhibit 1.

In addition, General Clause 11 of the lease, the default in delivery clause, provides that the Government will not terminate the lease agreement but will rely on its rights and remedies under the lease:

> In the event of any circumstance which, notwithstanding the preceding sentence, would have permitted the Government to terminate this lease, or in the event the Government has the right to offset or reduce rent pursuant to this lease, no termination, offset or reduction will be taken by the Government unless the current mortgagee and the Lessor are provided written notice of such event or proposed rental reduction, together with the opportunity to cure or eliminate same within a reasonable period of time considering the nature and scope of the event giving rise to the right to terminate, offset or reduce rent. . . . Further, the failure of the Government to provide the above-described notice and cure rights shall not impose any liability on the Government or extinguish or otherwise affect the provisions of this Clause. . . . Instead, after obtaining the knowledge of its failure to comply with the notice and cure rights provided herein, the Government shall provide said notice and cure right, and shall rescind any action and otherwise restore the parties to the situation that existed when said notice and/or opportunity to cure should have been provided so as to ensure the full benefit of the provisions herein for the Lessor . . . concerning any termination rights.

Appeal File, Exhibit 1.

General Clause 15 of the lease sets forth FAR 552.270-17 (FAILURE IN PERFORMANCE), which provides:

> The covenant to pay rent and the covenant to provide any service, utility, maintenance, or repair required under this lease are interdependent. In the event of any failure by the Lessor to provide any service, utility, maintenance, repair or replacement required under this lease the Government may, by contract or otherwise, perform the requirement and deduct from any payment or payments under this lease, then or thereafter due, the resulting cost to the Government, including all administrative costs. . . . These remedies are not exclusive and are in addition to any other remedies which may be available under this lease or at law.

Appeal File, Exhibit 1.

The lease also contains various standard FAR clauses including FAR 552.270-18 (SUCCESSORS BOUND), which provides that the "lease shall bind, and inure to the benefit of, the parties and their respective heirs, executors, administrators, successors, and assigns," and FAR 52-233-1 (DISPUTES). Appeal File, Exhibit 1.

On May 22, 1997, GSA and WDG executed Supplemental Lease Amendment (SLA) Number 3, modifying, inter alia, the construction completion date, which was extended to July 9, 1998. Appeal File, Exhibit 24. Although WDG contends that in oral discussions held on June 3, 1999, GSA modified the TFO work schedule and extended the Project/TFO completion date further, no formal written document memorializes such discussions and GSA disputes WDG's position with respect to the alleged extension of the performance date.

On November 24, 1998, GSA issued SLA No. 5, modifying the sequence and timing of required ceiling and carpet installation to coincide with the delayed TFO work. Appeal File, Exhibit 6.

On March 29, 1999, WDG submitted a claim to the contracting officer seeking compensation for alleged Government-caused delays. On July 28, 1999, GSA formally notified WDG that additional time would be needed to evaluate the facts and issue a contracting officer's final decision. GSA further stated that a decision would be issued on or before September 3, 1999. The claim was subsequently denied by the contracting officer in a decision dated September 3, 1999. The appeal which was docketed as GSBCA 15137 followed.

On or about November 23, 1999, GSA notified appellant that its proposed tenant, EPA, would not occupy the Wilson Building and that, instead, GSA planned to assign the lease, and GSA's interests therein, to the District of Columbia Government. Supplemental Appeal File, Vol. 2, Exhibit 7.

Thereafter, on January 24, 2000, the parties entered into SLA No. 6, acknowledging the Government's acceptance of the building as substantially complete and establishing a composite rent start date and lease commencement date of December 26, 1999. Supplemental Appeal File, Vol. 2, Exhibit 1. The parties agree that as of that date GSA did not intend to occupy the space.

In SLA No. 7, dated July 28, 2000, GSA unilaterally assigned the lease to the Council of the District of Columbia, effective December 26, 1999. Supplemental Appeal File, Vol. 2, Exhibit 2. The lease assignment provides, in pertinent part:

> 1. Assignment. GSA hereby assigns to the Council, and the Council hereby accepts from GSA, all of GSA's rights, title and interest in and to the Lease, including GSA's right to use and occupy all space in the Wilson Building covered by the lease, constituting approximately 165,000 rentable square feet. The Lease, including all Supplemental Lease Agreements made thereto, is attached to the Agreement as Exhibit A, and such Lease is made a material part hereof.
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> 3. Rent. The District shall be responsible for the rental payments required under the Lease.
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> 4. Compliance with Lease Terms. The District agrees to comply fully with all terms and conditions of the Lease. The District shall have the right and authority to exercise all tenant rights under the Lease, and shall be responsible for all tenant obligations under the Lease including, but not limited to, the rent.
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> 6. Disputes. (a) It is the intention of the parties to this Agreement that the District be wholly responsible for the resolution and defense of any and all claims, disputes, and controversies which may arise by virtue of its exercise of rights and fulfillment of obligations under the Lease.
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> (b) GSA agrees to cooperate fully and completely, in good faith, in taking action reasonably requested by the District to assist the District in enforcing the tenant's rights under the Lease. This includes, but is not limited to, executing documents necessary and appropriate to substantiate the District's right and entitlement to enforce the tenant's rights under the Lease. It further includes but is not limited to cooperating in the production of witnesses and documents relating to the enforcement of any right held by the tenant under the Lease and the District's defense of any claims, disputes, and controversies under the Lease.

> 7. Reservation of Existing Claim. The obligations of the District with respect to this Agreement and the Lease shall not extend to the certified claim submitted by the Lessor against GSA on June 3, 1999, and docketed at the General Services Board of Contract Appeals as GSBCA No. 15137. GSA shall continue to defend this claim and be responsible for any judgment and monetary damages arising therefrom. Each party specifically reserves its rights with respect to any contention by GSA that the District is responsible for any portion of the delay established against GSA in connection with the above-referenced claim. To the extent that GSA may so contend, GSA and the District agree to negotiate, in good faith, concerning resolution of that claim. . . .
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> 9. Repayment. (a) In consideration of expenses incurred by the Federal Government related to its prior intended occupancy of the Wilson Building, and in accord and satisfaction of all claims by the Federal Government against the District as to such expenses arising prior to the date of this Agreement, the District agrees to repay GSA, prior to September 30, 2000, by wire transfer of immediately available funds, the sum of $3 million. The District further agrees to repay GSA the additional sum of $2 million on or before October 1, 2001. In the event that the District fails to make timely payment of the sums referenced in this paragraph, the District shall be liable for interest on such unpaid sums, accruing from the date of their delinquency until paid in full, under the rate prescribed under the Contract Disputes Act.
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> (b) The District agrees to reimburse GSA the principal amount of any and all rental payments made by GSA to the Lessor prior to the execution of this Agreement.
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> (c) The repayment obligations set forth in this paragraph shall be in addition to those set forth elsewhere in this Agreement.
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> 10. Reservation of Rights. The parties recognize and specifically acknowledge that nothing in this Agreement is intended to or shall waive, alter, or otherwise diminish any claims that the District may have against the Lessor, the Washington Development Group, Inc., 1350 Pennsylvania Avenue Limited Partnership, Conrad Monts, or any partner, affiliate, predecessor, or successor of such parties.

The attachment to the SLA No. 7 Assignment confirms that the District Government was and has been the sole occupant of the Wilson Building. Supplemental Appeal File, Vol. 2, Exhibit 2.

In early August 2002, GSA's scheduling expert issued his expert report, providing a copy to appellant's attorney. On August 21, 2002, the contracting officer issued a revision to the September 3, 1999 final decision, relying on the findings of that report.[1] Based on the report, the contracting officer found that WDG was responsible for the greater portion of the delay incurred in the renovation of the Wilson Building project and assessed damages of $3,195,720. This figure was said to have been calculated in accordance with the lease agreement's remedies of liquidated damages and free rent on a day-for-day basis, based on a total of 132 days of delay for which GSA believes WDG is responsible. On November 18, 2002, WDG filed an appeal of this revision to the contracting officer's earlier decision. Supplemental Appeal File, Volume 2, Exhibit 4. That appeal was docketed as GSBCA 16004.

Discussion

Appellant has moved for partial summary relief barring the claims asserted by GSA in the contracting officer's letter of August 21, 2002, amending the decision denying WDG's claim. In essence, WDG asks that we dismiss or deny the Government's affirmative claims for rent-free occupancy, set-off, and liquidated damages, arguing that the contract language, modifications to the lease, and principles of Government contract law bar any action by GSA for set-off, free rent, or liquidated damages.

Summary relief is properly granted 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); Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000); Olympus Corp. v. United States, 98 F.3d 1314,1316 (Fed. Cir. 1996); Mingus Constructors, Inc. v. United States, 812

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[1] In his August 21, 2002, decision the contracting officer states that he is issuing a revision to his final decision of September 3, 1999, in light of the expert's report, which he summarizes as follows and then adds his own conclusion:

> The report asserts that the project was delayed for a total of 541 days, the Government is responsible for 132 days, the Lessor, Washington Development Group (WDG), is responsible for 264 days, and the remaining 145 days are concurrent delay. According to this analysis the Lessor WDG is responsible for the greatest portion of delay, a net total of 132 days. Per the lease agreement, the remedy for lessor delay is both liquidated damages of $1600 per day and free rent on a day-for-day basis. The value of that delay is calculated on the attached document.
> . . .
>
> After a review of the report I agree that WDG is responsible for the greater portion of delay and therefore the Government demands payment in the amount of $3,195,720.00 for the delay caused by WDG to GSA.

F.2d 1387, 1390 (Fed. Cir. 1987). The moving party bears the burden of establishing the absence of any genuine issue of material fact. Id.; Armco, Inc. v. Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986); Jo-Ja Construction, Ltd. v. General Services Administration, GSBCA 14786, 00-2 BCA ¶ 30,964. In considering motions for summary relief, all reasonable inferences are drawn in favor of the non-moving party. Parcel 49C Limited Partnership v. General Services Administration, GSBCA 15222, 00-2 BCA ¶ 31,073; Executive Construction, Inc. v. General Services Administration, GSBCA 15224, 00-2 BCA ¶ 30,977.

In its motion, WDG offers a veritable cornucopia of grounds for dismissing or denying GSA's claims out of hand.[2] Appellant notes in its motion that the claims were raised a full three years after WDG submitted its claim for delay and damages associated with the project. WDG posits that GSA's belated assertion of these claims is a litigation tactic, made in the hope of discouraging WDG and softening its resolve to pursue its appeal. WDG further maintains that this alleged tactic must fail because the claims are, as a matter of law, barred by the provisions of the lease, modifications to and assignments of rights under the lease and applicable principles of contract law.

GSA, in responding to these general contentions as to the timing of the formal assertion of the claims, points out that while the contracting officer's written decision was issued three years after WDG first submitted its claim, in reality, the existence of GSA's claims was not unknown to appellant. GSA retained an expert to review and analyze WDG's delay-related claims and notes that it has consistently, in dealings and negotiations with appellant concerning this case, expressed an intent to pursue delay-related claims of its own once its expert had completed its study of the underlying facts and circumstances giving rise to the WDG delay claim.

GSA's claims, as set forth in the contracting officer's revised decision, consist of an assessment of liquidated damages and a demand for the value of free rent for the period of time when GSA allegedly would have been able to occupy the premises but for WDG's delay in delivering the premises. WDG argues first that these claims are barred by contractual provisions including the assignment of the lease to the District of Columbia Government, a modification to the lease constituting an accord and satisfaction discharging GSA's claims, the failure to give timely notice of claims pursuant to contract clause requirements, the proper interpretation of clauses providing delay remedies, and failure to fulfill conditions precedent to recovery of delay damages. Additionally, WDG raises a jurisdictional objection to the claims and, finally, WDG asserts that equitable considerations preclude allowing GSA to proceed with its claims.

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[2] WDG has characterized its motion as one for summary relief; GSA notes that although some elements of appellant's motion may well belong in this category, other elements are more properly categorized as challenges to standing and jurisdiction.

The Assignment of the Lease

WDG urges that SLA No. 7, in which GSA assigned to the District of Columbia Government "all of GSA's rights, title and interest in and to the Lease, including GSA's right to use and occupy all space in the Wilson Building covered by the lease, constituting approximately 165,000 rentable square feet," effective December 26, 1999, bars GSA from asserting these claims. In addition, WDG relies on SLA No. 7's proviso that the District "be wholly responsible for the resolution and defense of any and all claims, disputes, and controversies which may arise by virtue of its exercise of rights and fulfillment of obligations under the Lease" and on the language in paragraph 4 of the SLA to the effect that the District shall have "the right and authority to exercise all tenant rights under the Lease." WDG suggests that these provisions in the SLA demonstrate that GSA divested itself of any rights under the Lease. WDG adds that the fact that GSA carved out WDG's delay claim, but did not reserve any entitlement to pursue an affirmative action based on the events giving rise to WDG's claims, supports its position that the SLA bars further pursuit by GSA of the affirmative remedies asserted in the contracting officer's revised final decision.

GSA opposes these contentions, relying on the precedent established in Ginsberg v. Austin, 968 F.2d 1198 (Fed. Cir. 1992). The issue there was whether a landlord's existing claim for back rent payments was transferred under an assignment of "all rights, title, and interest" in the leased property to a successor lessor. The Court concluded that despite the assignment, which did not specifically reserve any rights to the landlord, the landlord retained standing to assert entitlement to back rent owed as to the Government's occupancy of the premises prior to the effective date of the assignment because he had not expressly transferred those rights with the assignment. In Ginsberg, the contractor had asserted his claim for back rent prior to the assignment's effective date. Subsequently, in Universal Development Corp. v. General Services Administration, GSBCA 12138 (11520)-REIN, 93-2 BCA ¶ 25,653 (1992), the Board held that the reasoning of Ginsberg should apply to cases where the claim for back rent existed at the time of transfer, but had not actually been asserted prior to the effective date of the assignment.

WDG suggests that Ginsberg should not apply to GSA's claims here for several reasons. First, appellant argues that Ginsberg should be construed to stand only for the narrow proposition that an assignment of "all rights, title, and interest" does not assign previously accrued but unpaid rents absent an express statement to that effect. It should not necessarily be broadened to apply to causes of action other than those for back rent. Since, WDG reasons, GSA's claims are not for back rent, GSA should not be held to have standing to pursue these claims following the assignment of "all rights" to the District of Columbia Government.

We are not persuaded that Ginsberg should be construed as narrowly as appellant proposes. Ginsberg essentially held that an assignment of all rights under a lease ordinarily operates prospectively -- that is, it applies with respect to rights accruing after the effective date of assignment. The decision is simply not phrased as restrictively as appellant suggests. For example, the Court quoted, with approval, the following language from a California decision addressing assignment rules in general:

> Unless an assignment specifically or impliedly designates them, accrued causes of action arising out of an assigned contract . . . do not pass under the assignment as incidental to the contract if they can be asserted by the assignor independently of his continued ownership of the contract and are not essential to a continued enforcement of the contract.

968 F.2d at 1201 (quoting National Reserve Company of America v. Metropolitan Trust Company of California, 17 Cal. 2d 827, 112 P.2d 598, 602 (1941)). This language implies that all accrued causes of action arising out of a lease are not automatically assigned as incidental to the lease if they can be asserted independently of continued ownership of the lease. This analysis is particularly apposite here, since the claims arise from the delays experienced in the tenant fit-out process occurring prior to delivery of the premises for occupancy, rather than with respect to the occupancy of the space itself. The TFO process was managed by GSA, and appellant's claims are asserted against GSA. GSA's counterclaims arise from the same build-out stage of the contract.

Under the reasoning of Ginsberg and Universal Development, the Government cannot be said to have divested itself of the right to pursue its accrued claims merely by virtue of the general language used to transfer its leasehold interest to the District of Columbia. In the absence of specific language manifesting such an intent, we decline summarily to bar GSA's assertion of these claims on this basis.

Next, however, WDG contends that even under a broad interpretation of the Ginsberg rationale, the Government's claims were in fact assigned because they did not "accrue" until after the assignment was effected. According to WDG, GSA's claims cannot be considered to have accrued until the contracting officer wrote the final decision asserting them on August 21, 2002. As legal support for this proposition, WDG cites us to a statement in Brighton Village Associates v. United States, 52 F.3d 1056, 1060 (Fed. Cir. 1995), to the effect that "[a] claim 'arising under' a mandatory dispute resolution provision of a contract, however, does not accrue 'until the duly-invoked decision of the administrative or arbitral board or tribunal'" is rendered. Based on this notion, WDG argues, GSA's claims could not be considered to have accrued until after the contracting officer issued his revised decision, formally asserting GSA's claims. This event occurred long after the assignment of GSA's rights under the lease to the District of Columbia Government was effective.

Again, WDG's analysis is not persuasive. The Court in Brighton was discussing when a claim should be deemed to have accrued for purposes of proceeding in court and the application of the statute of limitations. The quoted language was not intended to address the issue of when a claim might be ripe for purposes of determining what contractual rights pass with an assignment. We agree with GSA that WDG's proffered interpretation misapplies the notion articulated in Brighton in the context of the facts and circumstances of this case. In general a cause of action or claim will be considered to have accrued when the events giving rise to the claim, or entitling the party to relief, have transpired.[3] Within the

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[3] See, e.g., Franconia Associates v. United States, 536 U.S. 129 (2002); Lins v. United States, 688 F.2d 784, 787 (Ct.Cl.1982), cert. denied, 459 U.S. 1147 (1983). In Crown Coat

context of the Contract Disputes Act (CDA), however, the concepts of a "claim" and a "cause of action" are not synonymous. Although neither the contractor nor the Government can pursue a "cause of action" until a contracting officer's decision has been rendered on a claim, the issuance of a contracting officer's decision is not a prerequisite for a claim to exist.[4] The notion that a claim has accrued when the events giving rise to it have occurred is adopted in the Federal Acquisition Regulation, which defines "accrual of a claim" to mean:

> the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

48 CFR 33.201 (1999). Under the CDA, for a claim to be litigated, it must have been submitted to the contracting officer for consideration, in the case of the contractor, and the subject of a contracting officer's decision, in the case of the Government. 41 U.S.C. § 605(a) (2000). Thus, under the CDA, once a claim has arisen, the issuance, or opportunity for issuance, of a contracting officer's decision is the catalyst creating a cause of action.

In sum, for purposes of determining whether it was transferred under the lease assignment, the Government claim for delay-related damages accrued when all of the events giving rise to it had occurred. Here, the events giving rise to GSA's claim for delay damages are identical to those prompting WDG's claim. WDG's claim for delay costs, and GSA's counterclaims are two sides of the same coin. The parties simply disagree about who bears the responsibility for causing the delays experienced in the TFO process. Although GSA's cause of action did not ripen until the contracting officer's revised decision was issued in August 2002, the claim itself pre-existed the assignment of GSA's rights under the lease, and was not expressly included in the assignment. Under the rationales of Ginsberg and Universal Development, GSA has standing to pursue these claims.

Accord and Satisfaction

Front Co. v. United States, 386 U.S. 503 (1967), the Supreme Court cautioned that there are:

> hazards inherent in attempting to define for all purposes when a "cause of action" first "accrues." Such words are to be "interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought."

Id. at 517 (citations omitted).

[4] See, e.g., In re Cool Fuel, Inc., 210 F.3d 999, 1006 (9th Cir. 2000); In re Remington Rand Corp., 836 F.2d 825, 831-32 (3d Cir.1988), both recognizing that while a claim may not have matured into a legal cause of action under the CDA, it could still be ripe for assertion in a bankruptcy proceeding.

WDG also contends that SLA No. 6 effected an accord and satisfaction barring the assertion of the Government 's claims for delay damages. Specifically, WDG argues that this modification to the lease discharged all rental obligations that GSA might have claimed based on delays to the schedule and precludes GSA from asserting its claim now.

As noted above, SLA No. 6 fixed the date of acceptance of the renovations to the premises as substantially complete and established a composite rent start date and lease commencement date of December 26, 1999. In pertinent part, SLA No. 6 further stated that:

> On December 8, 1999, the Government notified WDG that it would not occupy any portion of its leased premises on the Lease Commencement Date. Accordingly, pursuant to paragraph 2.10 of the lease, "Adjustment for Vacant Premises," the Government's rental payment shall be reduced on the thirtieth day following the date of the notice of December 9, 1999, by that portion of the costs per rentable square foot of operating expenses not required to maintain the space. Therefore the Lessor and the Government agree that the annual rental rate shall be reduced by $3.37 per rentable square foot, resulting in an annual rental of $5,852,550.00 per annum or a rate of $487,712.50 per month, or a rate of $35.47 per net rentable square foot.

The next paragraph of SLA No. 6 addresses when upcoming rental payments will be made. Following that, the SLA provides that "[a]ll other terms and conditions of the lease shall remain in force and effect."

Appellant urges that this contract modification, by redefining GSA's future rental obligations, constitutes an accord and satisfaction, or a waiver, of GSA's claim for damages in the form of free rent to compensate it for delay. Again, appellant believes that absent an express reservation of GSA's claims, the claim must be considered to be discharged by operation of law.

The Board has recently spoken to the legal standard applicable to showing that a modification of a contract operates as an accord and satisfaction sufficient to discharge a claim:

> Generally, when a bilateral contract modification does not contain any reservation of claims, the modification constitutes an accord and satisfaction as to the subject matter of the modification and the contractor cannot later narrow the scope of the modification. . . . An accord and satisfaction has the effect of discharging an existing right. The accord occurs when one party to a contract agrees to give or to perform something other than what the second party claims the contract requires, and the second party agrees to accept the alternate thing or performance in satisfaction of the claim. The satisfaction occurs when the parties perform their agreement. . . . The essential elements of

> an accord and satisfaction are competent parties, proper subject matter, consideration, and a meeting of the minds.

Trataros Construction, Inc. v. General Services Administration, GSBCA 15344, slip op. at 11-12 (Apr. 22, 2003) (citations omitted); accord 2160 Partners v. General Services Administration, GSBCA 15973, slip op. at 14 (May 12, 2003).

GSA opposes appellant's interpretation of this modification, asserting that several essential elements needed for an accord and satisfaction are missing in the instant case, so as to defeat a grant of summary relief. There is no evidence that an accord was reached with respect to the discharge of GSA's putative claims, nor has WDG shown that any consideration was given for GSA to give up its claims for delay damages.

On balance, we agree with respondent that this is not an issue that lends itself to resolution on summary relief. Whatever may be the ultimate merits of WDG's argument as to the effect of SLA No. 6, it would be premature to resolve this matter on a motion for summary relief. On its face, the modification simply adjusts the time for payment of rent to commence and the amounts to be paid prospectively to account for the revised lease commencement date and the fact that the premises would be vacant as of that date. To determine that a claim is barred by accord and satisfaction or waiver, a clear manifestation of such intent is needed. Nothing in the modification itself suggests a broad intent to settle all claims the Government might have arising out of delays connected to the tenant fit-out process, particularly given the fact that neither GSA's nor WDG's claims are in any direct way addressed in this modification and GSA disputes this characterization of its intent.[5] We cannot, based on the terms of this modification's wording, discern the requisite meeting of the minds required for a modification to operate as an accord and satisfaction of a claim.

Failure to Give Notice

WDG further maintains that for GSA to recover any rental reduction or offset associated with delays, it must first have given notice and a reasonable opportunity to cure, which the Government failed to do. WDG premises this argument on the language in the default in delivery clause of the lease, which states that:

> no termination, offset or reduction will be taken by the Government unless the current mortgagee and the Lessor are provided written notice of such event or proposed rental reduction, together with the opportunity to cure or eliminate

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[5] Further, GSA notes that at least one material element of accord and satisfaction requires the resolution of disputed evidence. GSA states that it is prepared to provide proof of its contemporaneous actions showing that its understanding of the modification was inconsistent with appellant's interpretation. Among other things, the parties to the appeal negotiated a partial settlement agreement specifically recognizing that a government claim for delay damages might ensue. Thus, this argument is not appropriate for disposition on summary relief.

> same within a reasonable period of time considering the nature and scope of the event giving rise to the right to terminate, offset or reduce rent. . . . Further, the failure of the Government to provide the above-described notice and cure rights shall not impose any liability on the Government or extinguish or otherwise affect the provisions of this Clause. . . . Instead, after obtaining the knowledge of its failure to comply with the notice and cure rights provided herein, the Government shall provide said notice and cure right, and shall rescind any action and otherwise restore the parties to the situation that existed when said notice and/or opportunity to cure should have been provided so as to ensure the full benefit of the provisions herein for the Lessor . . . concerning any termination rights.

Appellant maintains that it never received notice, in accordance with this clause, that the Government intended to take an offset or reduction in rent, and certainly did not receive notice of this intention when the delays were occurring. WDG argues that the plain language of the clause imposed on GSA an obligation to give the requisite notice in sufficient time to afford appellant the opportunity to cure the performance deficiency giving rise to GSA's claim. As a consequence, WDG maintains, the Government should not now be permitted to take an offset or rent reduction.

For its part, GSA responds that the language cited by WDG must be considered in its full context to derive its true intent. General Clause 11 of the lease, subparagraph (a), provides the usual default termination remedy should the lessor default on its obligation to deliver the premises, with the tenant build-out substantially complete, by the specified date. Further, GSA argues, subparagraph (d), the provision relied upon by appellant--particularly the notice provision therein--is intended primarily to protect the financial institutions by providing that the Government will not terminate the lease or exercise other remedies that might jeopardize repayment of the outstanding loans without notice to the mortgagee. GSA thus contends that this clause no longer applies because the mortgagee has now been paid off.[6] Moreover, GSA urges that it provided sufficient notice to appellant by issuance of the contracting officer's decision and that it was not in a position to notify appellant more particularly of the extent of its delay damages claim until the expert analysis was available to it. Finally, GSA disputes the contention that appellant was prejudiced by a failure to give notice of the Government's potential delay claims during the build-out process. Thus, GSA submits that the notice requirement in this clause should not be construed to bar its claims.

With respect to notice requirements in general, we note that:

> Generally, the courts and boards of contract appeals do not bar a claim for failure to comply with contractually required notice provisions. Rather, even when [a party] has been prejudiced by the lack of timely notice, precedent favors the imposition of a

[6] Respondent's Appendix to its Opposition to Appellant's Motion for Partial Summary Relief, Exhibit 8.

> higher burden of persuasion upon the [other party] rather than outright denial of the claim.

R. P. Richards Construction, Inc., DOTCAB 4032, et al., 01-2 BCA ¶ 31,594, at 156,146 (citing Mingus Construction Co. v. United States, 812 F.2d 1387, 1392 (Fed. Cir. 1987)). Although Richards and Mingus address notice issues where the contractor failed to meet a contractually-imposed notice requirement accruing to the benefit of the Government, this reasoning has also been applied in situations where the Government has failed to meet a requirement for providing notice of nonperformance. See, e.g., Government Contractors, Inc., GSBCA 6776, 84-1 BCA ¶ 16,934.

The proper interpretation of the lease's notice requirements, a determination of if and when notice was required to have been given, and the fact and degree of prejudice which may have been incurred by WDG, are some of the many disputed factual and legal issues that need to be resolved on a more fully developed record. Thus, this issue, too, is not conducive to resolution on a motion for summary relief.

Failure to Occupy the Premises

In addition to the failure to give notice, WDG raises two other express preconditions to recovery that are not met here. WDG asserts first, that it did not cause the delay and second, that GSA never occupied the premises. The first point clearly does not give rise to summary relief. The issue of responsibility for the delays experienced in the tenant fit-out phase of the lease clearly involves disputed facts and is not susceptible to summary disposition.

Appellant's second point, that even if WDG caused the delay, GSA never occupied the premises, and thus should not be entitled to a monetary remedy approximating the value of rental-free occupancy, requires more analysis. GSA contends that once it took legal possession of the premises and started paying rent, even without occupying the space, the remedy of free rent was operative under the lease. GSA thus calculated the value of free occupancy of the premises back to April 1999, which is when GSA contends that the premises were required to be delivered. WDG responds that the plain language of paragraph 2.12(f) of the lease provides for this remedy only "after occupancy" of the premises by GSA. It is undisputed that GSA's tenant never physically occupied the premises and that the District of Columbia Government was the sole tenant. WDG maintains that physical occupancy of the premises was a "condition precedent" to entitlement to invoke the free-rent provision of the lease. That is, GSA could have demanded free rent once its tenant was actually moved into the space, but until that occurred, no obligation to furnish this remedy could be imposed on the lessor.

GSA explains that its claim for free rent is based on the conclusion of its expert that, but for contractor-caused delay, GSA's tenant should have been able to occupy the premises as of April 16, 1999. Instead, GSA was not in a position to occupy the leased space until December 26, 1999, when it accepted the premises as substantially complete, took "legal possession" of the space, and began to pay rent. Once that occurred, GSA argues, it was entitled to the benefit of its free-rent remedy for the WDG-caused delay. In response to WDG's argument that no GSA tenant ever actually occupied the premises, GSA maintains

that actual occupancy of the premises is not a condition precedent [7] to the free-rent remedy and that the legal right of possession of the premises, or "beneficial occupancy," satisfies the occupancy requirement which in the lease is linked to the commencement of the obligation to make rental payments. GSA further points out that since WDG no longer has the capability to provide rent-free occupancy to GSA, it must seek a substitute remedy in the form of a monetary equivalent.

The issue of whether the lease is susceptible to the differing interpretations advocated by the parties involves mixed questions of fact and law, and ultimately is controlled by the intent of the parties to the lease. It is not clear on the face of the lease what the parties envisioned by "actual occupancy" and whether "legal possession" or "beneficial occupancy" would suffice to bring into play an entitlement to free rent upon proof of contractor-caused delay. This issue must thus be deferred for decision on a more fully-developed factual record.

Double Penalty

Appellant also contends that GSA's assertion of entitlement to both liquidated damages and free rent improperly seeks recovery of a double penalty which is prohibited by law.

GSA points out that its claims are consistent with the language of the lease, which permits it to assess liquidated damages of $1600 per day for each calendar day of contractor-caused delay and expressly states that the liquidated damages remedy is not exclusive, but rather in addition to other remedies contemplated under the lease. Moreover, GSA contends that there is nothing inherently draconian in the demand for payment of both types of damages because they are designed to remedy different types of harm sustained by the Government as a consequence of delay. Moreover, similar objections have previously been rejected by the Board in ROI Investments v. General Services Administration, GSBCA 14402, 99-1 BCA ¶ 30,353, reconsideration denied, 99-2 BCA ¶ 30,508, aff'd, 243 F.3d 563 (Fed. Cir. 2000) and First Interstate Bank of Denver N.A., GSBCA 9484, 89-1 BCA ¶ 21,453 (1988). In ROI the Board addressed a contractor's objection to GSA's action in withholding rental payments under a lease and assessing liquidated damages at the same time. The Board rejected the contractor's contention that this constituted an unlawful double penalty, noting that the two remedies served differing purposes -- "the withholding of rent was to ensure that the Government paid only for space it occupied, whereas the liquidated damages were intended to compensate the Government for administrative costs." 99-1 BCA at 150,114. The analysis in First Interstate is much to the same effect.

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[7] As noted by GSA, a condition precedent is generally defined to be "an event, not certain to occur, which must occur unless its nonoccurrence is excused, before performance under a contract becomes due." In addition, "[c]onditions precedent are disfavored and will not be read into a contract unless required by plain, unambiguous language." RT Computer Graphics, Inc. v. United States, 44 Fed. Cl. 747, 756 (1999) (quoting Restatement (second) of Contracts § 224 (1981) and Effects Associates, Inc. v. Cohen, 908 F.2d 555, 559 n.7 (9th Cir. 1990), cert. denied sub nom. Danforth v. Cohen, 498 U.S. 1103 (1991)).

Once again, WDG's contention that the remedies sought must be dismissed summarily falls short of the mark. The two types of damages are not mutually exclusive, or necessarily designed to enrich GSA with damages that more than compensate it for the financial harm that may have been incurred as a consequence of contractor-caused delay. Whether, and to what extent, GSA might be entitled to either or both of these remedies can only be ascertained on the basis of a fully-developed factual record.

Contracting Officer's Authority to Reconsider Decision

From a jurisdictional perspective, WDG challenges the authority of GSA to assert its claims in the manner that it did. That is, WDG questions the authority of the contracting officer to revise the initial decision, denying appellant's delay claim, to incorporate GSA's claims for delay damages. While recognizing the well-settled proposition that a contracting officer may revise a final decision at any time prior to resolution of the dispute by adjudication, see, e.g., Air, Inc., GSBCA 7687, et al. (Nov. 5, 1985),[8] WDG maintains that nonetheless the contracting officer does not have authority to add new Government claims by this means.

WDG refers us to the Board's decision in Thomas J. Murray, GSBCA 6869, 84-1 BCA ¶ 17,081, for the proposition that the contracting officer was not free to assert new claims in reconsidering WDG's claim. WDG suggests that, as in Murray, the contracting officer did not actually reconsider any of WDG's claims, but simply took the opportunity to inject new claims into the existing appeal process. This, WDG states, was not permitted in Murray.

As respondent correctly points out, Murray does not support WDG's contention. This decision does in fact superficially resemble the case at hand in the sense that the contracting officer had issued a second contracting officer's decision after litigation had commenced, affirming the initial decision denying appellant's claims and adding several new Government claims at the same time. There the resemblance ends. The Board did not rule that the contracting officer's revised decision was unauthorized, but rather declined to dismiss the pending appeal in response to a motion filed by the Government. The Board simply docketed the appeal of the second decision and consolidated it with the first -- precisely what has occurred here.

WDG's assertion that the assignment of the lease operated to divest the contracting officer of authority to issue the revised opinion similarly fails. Again, the operative facts of both the appellant's and the respondent's claims arise out of the tenant fit-out phase of the lease -- a process that was not assigned to the District Government. Thus, the contracting officer retained the authority to issue decisions on claims relevant to this process under the rationales of Ginsberg and Universal Development, discussed above.

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[8] Although the contracting officer has no authority to issue a revised decision solely for the purpose of ousting the board of jurisdiction, see Fairfield Scientific Corp., ASBCA 21151, 78-1 BCA ¶ 13,082, at 63,906, there is no general prohibition against the contracting officer voluntarily reconsidering a decision pending before a board to correct errors and the like. Air, Inc., aff'd as modified by 611 F.2d 854 (Ct. Cl. 1979).

Lack of Independence of Contracting Officer's Decision

Additionally, WDG contends that the contracting officer's revised decision is invalid because it represents a "wholesale adoption of a litigation expert's report" rather than the independent exercise of judgment by the contracting officer in accordance with the FAR and applicable case law principles. See, e.g., Pacific Architects & Engineers, Inc. v. United States, 491 F.2d 734 (Ct. Cl. 1974); American Transparents Plastics Corp., GSBCA 7006, 91-1 BCA ¶ 23,349 (1990); Air-O-Plastik Corp., GSBCA 4802, 81-2 BCA ¶ 15,338. WDG's contention is premised upon the fact that the contracting officer accepted the expert's allocation of responsibility for delay between the Government and the contractor and asserted GSA's claim accordingly.

It is well established that the contractor is entitled to a decision that has been independently rendered by the contracting officer. A decision issued by a contracting officer acting solely pursuant to the dictates of other, higher-level, personnel in the Government is not valid. At the same time, the regulations and case law anticipate that the contracting officer, particularly in complex matters, will seek and consider advice of counsel and experts as an integral part of the process of formulating a final decision. The contracting officer is not required to be isolated from the advice and guidance of others. As another board has recently observed:

> A C[ontracting] O[fficer] may, for the purpose of forming his or her independent judgment, obtain information and advice from advisors and staff offices, particularly in the fields of accounting, engineering and law, areas in which he or she may have little or no expertise. Indeed, it would reflect poor judgment on the part of a CO if he or she did not do so.

BAE Systems Information & Electronic Systems Integration, Inc., ASBCA 44832, 01-2 BCA ¶ 31,495 (citations omitted).

Although the contracting officer here adopted the findings of the expert retained by GSA to analyze WDG's delay claim, this on its face does not suffice to demonstrate, in the context of a motion for summary relief, that the contracting officer failed to exercise independent judgment in making his decision. The letter reflects that the contracting officer reviewed and agreed with the report.

As the board observed in BAE Systems, the fact that a contracting officer is persuaded by the advice and guidance of experts does not by itself give rise to the conclusion that the contracting officer failed to exercise independent judgment. Moreover, it has previously been held, in similar circumstances, that a contracting officer's agreement with someone else's presumably informed recommendations is not, without more, justification to conclude the decision is invalid:

> The first [issue] is the contractor's contention that there should be further proceedings 'to determine whether the contracting officer actually devoted his personal and independent consideration to the decisions bearing his signature.' All that

> plaintiff has shown is that these decisions were prepared by a subordinate of the contracting officer and were adopted by the latter without change. We do not think that this is enough of a showing to call for further inquiry into the question whether the contracting officer 'put his own mind to the problems and render(ed) his own decisions.' New York Shipbuilding Corp. v. United States, 385 F.2d 427, 180 Ct.Cl. 446 (1967). In the absence of further significant proof (or proffer of proof) we must assume that the contracting officer did his duty.

J. A. Terteling & Sons, Inc. v. United States, 390 F.2d 926, 927 (Ct.Cl. 1968).

WDG has not shown that the contracting officer's revised decision lacked the requisite independence or was otherwise invalid so as to justify dismissing the Government's claims from the consolidated proceedings.

Equitable Considerations

WDG further contends that GSA's claims are barred by equitable considerations because of the undue delay in asserting them against appellant, which WDG maintains operated to its prejudice. In essence, WDG argues that GSA waived its right to assert the counterclaims.

In support of this contention, WDG directs our attention to the decision in Roberts v. United States, 357 F.2d 938 (Ct. Cl. 1966), involving a Government counterclaim for savings realized by a contractor from changes to the scope of work required under a contract for highway construction. The court held that the counterclaim, which was not asserted or disclosed to the contractor until the matter was in litigation at the court, had been waived due to the failure of the Government to take timely action to assert entitlement to deductive changes. The court explained that the Government's failure to raise the claims or to take a deductive change in a timely manner had prejudiced the contractor:

> By the Government's acquiescence and silence, plaintiff was led to believe that no claim would be asserted for the savings. Under these circumstances we hold that the failure of the contracting officer to make an equitable adjustment, within a reasonable time after it was apparent that savings had been realized and in time for the contractor to appeal any dispute on the matter to the head of the department, constituted a waiver by the Government of any entitlement to the claimed savings.

Id. at 946. The court also noted that in making a deductive change, the contracting officer has a duty to issue a change order "while the facts supporting the claim are readily available and before the contractor's position is prejudiced by final settlement with his subcontractors." Id. WDG urges that similarly, because GSA failed to assert its counterclaims at the time the events giving rise to them occurred, or within a reasonable time thereafter, it should be deemed to have waived the claims.

GSA responds that the cases cited by WDG are distinguishable and do not serve to bar its claims. First, GSA points out that appellant has been aware through its counsel's dealings with GSA concerning appellant's claims based on changes ordered in the fit-out phase of the lease that GSA believed it had delay-associated counterclaims that would be formally decided once GSA's expert had evaluated the relevant documents and materials pertinent to the claims. The settlement document addressing the change order claims specifically refers to the possibility that GSA would later assert these counterclaims. Accordingly, GSA urges, WDG had effective notice early on that counterclaims might be asserted by GSA and also had available to it the same documentary information being used by the expert to evaluate the claims. Therefore, GSA maintains that WDG has not been prejudiced by the contracting officer's actions in waiting for the completed report to issue a revised final decision asserting the Government's claims with as much specificity as possible.

Moreover, GSA argues that the delay was not unreasonable in length given that GSA's expert needed schedule updates prepared by appellant's contractor, Clark Construction Company, to complete his analysis. GSA's expert report was promptly finished after the documents prepared by Clark were produced and Clark's and WDG's employees were deposed.

Finally, assuming that the assessment of liquidated damages would be precluded by the establishment of a new completion date, compare LaGrow Corp., ASBCA 42386, 91-2 BCA ¶ 23,945 with Scientific Security Systems of Tacoma, Inc., GSBCA 4476, 79-2 BCA ¶ 14,079, the parties differ over whether a new completion date was established. The evidence in the written documentation is inconsistent and does not conclusively demonstrate that a new date was ever established or that GSA relinquished any claim for liquidated or other delay damages.[9]

Given the factual issues raised here, we cannot find on motion for summary relief that WDG lacked notice of GSA's potential claims and accordingly was prejudiced so as to justify the conclusion that GSA should be deemed to have waived its counterclaims. It remains to be seen whether and when WDG was aware that GSA contemplated asserting its own claims for contractor-caused delay damages, and whether the failure to receive adequate notice of these claims actually caused prejudice by foreclosing remedial action.

Finally, WDG contends that GSA waived entitlement to liquidated damages by agreeing to extend the date for performance and establishing a new contract completion date. This contention as well is an area giving rise to vigorously disputed factual issues -- no formal extension of the date for performance occurred; these contentions are based on various meetings and alleged actions giving rise to WDG's belief that GSA was willing to

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[9] Respondent notes that it is particularly ironic that appellant claims GSA waived its claim to liquidated damages when appellant in collateral litigation in the Superior Court of the District of Columbia relied on an affidavit executed by the contracting officer, swearing that litigation between the District of Columbia and WDG would delay the build-out of the space and subject WDG to liquidated damages under the lease. The affidavit was provided to aid WDG in its effort to obtain a preliminary injunction in its dispute with the District of Columbia Circuit. Affidavit of Robert Roop (June 26, 1999).

extend the date for performance. Given disputed factual issues concerning this issue, disposition on summary relief is inappropriate.

Failure to Plead Affirmative Counterclaim

Finally, WDG contends that GSA's failure to interpose its damages claims as a counterclaim in the answer filed in the initial appeal precludes their assertion now. The simple answer to this contention is that the claims are properly before the Board in the appeal of the revised contracting officer's decision which was timely appealed by WDG and consolidated at the joint request of the parties. Since GSA's counterclaims necessarily had to be the subject of a contracting officer's opinion to be appealed by the contractor, it would have been premature to assert them as counterclaims prior to the issuance of such a decision. See Van Ness Associates, Ltd. v. General Services Administration, GSBCA 11862, 93-1 BCA ¶ 25,410, at 126,603 (1992).

Decision

In accordance with the foregoing discussion, WDG's motion for partial summary relief is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

MARTHA H. DeGRAFF
Board Judge