BEACON CYBERPORT,	)	**AGBCA No. 2002-102-1**
	)	
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	)	
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RULING ON PARTIES= MOTIONS FOR SUMMARY JUDGMENT AND GOVERNMENT=S MOTION TO DISMISS

November 22, 2002

Before POLLACK, VERGILIO (presiding), and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK. Opinion by Administrative Judge VERGILIO, concurring in part and dissenting in part.

On October 3, 2001, the Board received a notice of appeal from Beacon Cyberport (Appellant, Beacon or Lessor) identified as the successor in interest to Miami Free Trade Zone Corporation (Miami) of Miami, Florida. Miami had entered into Lease No. 57-6395-0-017, with the Respondent, the U.S. Department of Agriculture, Animal and Plant Health Inspection Service (APHIS, Government or USDA). Beacon appealed from a default on the lease.

The matter is before us on cross motions for summary judgment and on a Government motion to dismiss the appeal for lack of jurisdiction. The basis for claiming lack of jurisdiction was the alleged failure of Appellant to appeal from the termination within 90 days. The Government summary judgment motion argued three issues. First, the Government contended that the default

was justified because the Appellant unequivocally stated that parking would not be available and Appellant failed to provide assurances to the Government that it would provide the required parking. Second, the Government charged that it was induced to enter into the lease by misrepresentation as to the availability of parking. Finally, the Government argued that Appellant misstated a material fact during the formation of the lease and misled the Government, such that the Government=s reliance on the material fact is a unilateral mistake and the basis for recission.

The Appellant replied to the Government=s motion. In addressing the matter of the parking spaces, Appellant=s counsel stated in its introduction to its response and in its cross motion that the lease provided that the landlord would furnish to the Government Aonsite parking for 400 vehicles as available (100 Secured for Government vehicles.)@ Appellant=s counsel stated that by the plain terms of the lease, the Government was not Aguaranteed@ parking for 400 spaces. Counsel then continued noting that as to parking, AAt all times Beacon Cyperport complied with the terms of the lease and in fact permitted the Government to use more parking spaces than required under the lease.@ In its cross motion for summary judgement, Appellant claimed that the Government failed to comply with the notice provisions of the contract and failed to give Beacon the opportunity to cure the alleged default. The Government filed no reply to the cross motion.

The Board has jurisdiction over this appeal pursuant to the Contract Disputes Act of l978 (CDA), 41 U.S.C. ' ' 601-613, as amended.

FINDINGS OF FACT

The Lease

1. On September 10, 1999, the Contracting Officer (CO), Theresa Gmiterko of APHIS, prepared an Advertisement Request Form to the Miami Herald, that stated that USDA wished to lease space. As to parking, it stated, AParking is required for up to 400 vehicles.@ (Exhibit (Ex.) 1 at 4.) On October 28, 1999, Miami presented two separate Lease Proposals to the Government, one for professional office space and the other for warehouse space. Neither proposal addressed parking. (Ex. 1 at 10-14.) In an undated Pre-Negotiations Memorandum, the CO prepared a review of a market survey of available sites. The Memorandum noted that a lease package was sent to Miami on November 5, 1999, and noted that the Lessor sent back some minor changes. The CO pointed out that the Lessor wanted to add Aas available@ by the onsite parking for 400 vehicles. The CO then stated, A I discussed this change with Kelly Pierce, Marketing Director, on November 5, 1999. She said that they could not designate a certain area for our use - parking was on a first come first serve basis - but there were plenty of spaces available.@ (Ex. 1 at 15-17). On November 5, 1999, Miami wrote to the CO and stated that pursuant to the CO=s conversation with Ms. Pierce, Miami submitted the duly signed first two pages of the lease. In a handwritten note someone, presumably the CO, confirmed that the Lessor could not set a certain area for Government use for parking, that it would be on a first come basis but there would be plenty available. The Standard Form Two lease was modified to add after, AOnsite parking for 400 vehicles (100 Secured for Government vehicles),@ the words Aas available.@ (Ex. 2 at 19-21) The parties then entered into Lease No. 57-6395-0-017, dated November 15, 1999. Miami was to provide specific office and warehouse space, some to be

delivered on November 15, 1999, with additional space to be delivered on January 1, and February 1, 2000. The space was to be used for the USDA/State of Florida Citrus Canker Eradication Program (or other occupant as the Government may substitute). The lease ran from November 15, 1999, through November 30, 2004, Asubject to termination and renewal rights as may be hereinafter set forth.@ The lease set forth no renewal option, but stated that the Government may terminate at any time on or after November 30, 2003, by giving at least 180 days notice in writing to the lessor. The lease specified that no rental shall accrue after the effective date of termination and stated that the Government shall pay rent per month in arrears; with rent for a lesser period to be prorated. (Ex. 2 at 30-31, 43 (& 6).) Through Supplemental Lease Agreement One, the parties altered the final date for space to be delivered and altered the payment schedule (annual and monthly rental amounts). (Ex. 2 at 69).[1]

2. The lease identified what the lessor was to furnish to the Government, as part of the rental consideration, including the following:

> Onsite parking for 400 vehicles as available (100 Secured for Government vehicles)

The words Aas available@ appeared after the word Avehicles,@ in the signed lease, as opposed to appearing after the parenthetical A(100 Secured for Government vehicles),@ as was the case in the earlier exchanges (Ex. 2 at 31 (& 6)).

3. The lease was an integrated agreement and provided that, AThis Lease, upon execution, contains the entire agreement of the parties and no prior written or oral agreement, express or implied, shall be admissible to contradict the provisions of the Lease.@ (Ex. 2 at 43 (552.270-38, -INTEGRATED AGREEMENT (AUG 1992)). The lease contained a Mutuality of Obligation clause, (552.270-39 (AUG 1992)) which read as follows:

> The obligations and covenants of the Lessor, and the Government=s obligations to rent and other Government obligations and covenants, arising under or related to this Lease, are interdependent. The Government may, upon issuance of and delivery to Lessor of a final decision asserting a claim against Lessor, set off such claim, in whole or in part, as against any payment or payments then or thereafter due the Lessor under this lease. No setoff pursuant to this clause shall constitute a breach by the Government of this lease.

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[1] The lease also contains General Services Administration (GSA) Form 3517B, General Clauses, dated 5/98; GSA Form 3518, Representations and Certifications dated 5/98; floor plans; and rider 1 (Ex. 2 at 31 (& 7)).

(Ex. 2 at 43 (& 9).)

4. The lease contained the following additional clauses:

> Failure in Performance clause (552.270-17 (AUG 1992)):
>
> The covenant to pay rent and the covenant to provide any service, utility, maintenance, or repair required under this lease are interdependent. . . . Alternatively, the Government may deduct from any payments under this lease, then or thereafter due, an amount which reflects the reduced value of the contract requirement not performed. No deduction from rent pursuant to this clause shall constitute a default by the Government under this lease. These remedies are not exclusive and are in addition to any other remedies which may be available under this lease or at law.

(Ex. 2 at 44 (& 15).)

> Default by Lessor During the Term clause, (552.270-33 (AUG 1992)):
>
> (a) Each of the following shall constitute a default by Lessor under this lease:
>
> (1) Failure to maintain, repair, operate or service the premises as and when specified in this lease, or failure to perform any other requirement of this lease as and when required provided any such failure shall remain uncured for a period of thirty (30) days next following Lessor=s receipt of notice thereof from the Contracting Officer or an authorized representative.
>
> . . . .
>
> (b) If a default occurs, the Government may, by notice to Lessor, terminate this lease for default and if so terminated, the Government shall be entitled to the damages specified in the Default in Delivery-Time Extensions clause.

(Ex. 2 at 44 (& 16).) The clause referenced in the final sentence is found in the contract (Ex. 2 at 43 & 11)) and in regulation, 48 CFR 552.270-28 (JUN 1994).

Parking space availability

5. By letter dated September 9, 2000, the CO wrote to Miami regarding concerns over potholes and specifically requested secured parking for an additional 100 Government vehicles. The CO

asked Miami to provide an estimate for the cost of those additional parking spaces and continued that a Supplemental Lease Agreement would be issued to show the change. Apparently, Miami responded by telephone, for at the bottom of the September 9 letter is a handwritten note, dated September 19, 2000, which states that Agerman leiva@ called and appeared to leave the message, Awill not be able to provide 400 spaces w/i 60 days. New construction 200,000 sf. WH.@ We assume that the WH stands for warehouse. While it is not certain, it is probable that the note recording the telephone call was written by the CO. (Ex. 3 at 75.) By letter of September 19, 2000, to the CO, Ms. Leiva confirmed her telephone call with the CO that morning. There she said on behalf of Miami:

> In reference to our telephone conversation of this morning, I would like to confirm to you that your request of additional secured parking for 100 extra Government vehicles cannot be accommodated in our facility.
>
> * * * *
>
> Furthermore, I also informed you that, as per the contract which calls for the use of 400 parking spaces for vehicles as available of which 100 are the secured parking for Government vehicles, in the next 60 days we will commence construction of additional warehousing space (the building permits have been obtained and the impact fees already paid). The only parking spaces that will be available at that time will be the existing 100 secured spaces for Government vehicles. Those spaces may be used for either Government vehicles or private employee vehicles if the private employee vehicles take the place of the Government vehicles.

(Ex. 3 at 76-77.)

6. It is of note that the original lease called for the 100 secured spaces to be for Government and not private vehicles. It is also of note that the above is responding to a Government request for 100 additional secured spaces, and given the context of the response, the reference to Aonly spaces that will be available,@ may very well be referring to the Aonly secured spaces that will be available.@ In its response, Miami is saying those 100 secured spaces could be used by Government as well as private vehicles, even though the lease allowed only secured parking for Government vehicles.

7. The CO responded to Miami=s above letter by letter dated September 26, 2000, stating in part:

> Your letter, dated September 19, 2000, indicates that construction of an additional warehouse will commence in 60 days and that our 400 parking spaces would no longer be available. It is mandatory that we have 400 parking spaces available for our use somewhere on the premises as indicated on the lease. This was a requirement of ours when looking to rent space in the Miami area; without this parking, the space is useless.

The CO then continued, noting that she had received a letter indicating that Miami had been purchased. She asked if the new warehouse was something that the purchaser was planning or that Miami had planned. She then stated, A I am not in a position to sign the AEstoppel Certificate@ indicating our current status of the lease when were (sic) not sure.@ She then closed stating, APlease indicate where our 400 parking spaces will be located before the construction begins.@ (Ex. 3 at 79.)

8. Miami responded by letter of October 5, 2000. It pointed out that the CO had stated that it was mandatory that the Government have 400 parking spaces available, and indicated that such condition was a requirement of the lease. (Ex. 3 at 80.) Miami continued with the following:

> The lease, dated November 15, 1999 and prepared by your office, did not and does not guarantee nor require the availability of 400 parking spaces. It simply calls for Aonsite parking for 400 vehicles as available (100 Secured for Government Vehicles).@
>
> If you now find it mandatory that you have 400 on-site parking spaces, we will consider releasing the USDA from its lease upon the execution and exchange of mutual releases.

(Ex. 3 at 80.)

9. The above letter contained no further explanation or amplification. One can reasonably draw from the above that Miami made a distinction between 400 mandatory spaces and 400 as available spaces, with Miami viewing the lease as requiring 400 spaces be available on a first come first serve basis. According to Miami, the Government viewed the lease to call for 400 guaranteed spaces. On the record before us there is a lack of clarity, even now, as to exactly what the parties were contending as to their respective understandings of the lease obligation at the time of the material letter and at the time of the default. For purposes of this motion and not here deciding the issue (so as to allow the parties to ultimately explain), we read the language A400 spaces as available (100 guaranteed),@ as not requiring that Miami do more than make another 300 non-secured spaces available on site (not necessarily to the Government only, but on a first come first serve basis).

10. Thereafter, the CO again wrote to Miami, this letter dated September 19, 2000. The CO stated that in response to the submission of the signed copy of an AEstoppel Letter,@ that as an agency of the Federal Government, she could only provide limited verification. She then provided some limited verification. She went on, however, in the final paragraph of the letter to state that on September 19, 2000, USDA was notified that within 60 days the 400 onsite parking spaces as shown on Standard Form Two, would no longer be available. Standard Form Two is the lease agreement. At least as to the copy of the form in the file, the document contains nothing beyond the simple description as to the 400 as available spaces quoted in Finding of Fact (FF) 2 above. The CO stated that the parking spaces are a critical part of the Government requirement that needs to be addressed further. She concluded by noting that any change in Lessor or proposed changes to the lease terms and conditions must be communicated to the Federal Government and documented by a Supplemental Agreement. (Ex. 2 at 81.) In looking at the above, we need to take into account that at the start of the lease, Miami had represented, and apparently the Government understood, that

there would be well over 400 spaces throughout the facility. The statement was made that while Miami could not designate spots in a particular area, there would be plenty of spaces to choose from, thus well over 400 available. (FF 1.) It is logical that in putting up new warehouses, where parking existed, the number of overall spaces would have been decreased. Thus, we can reasonably infer that if at the time the lease was executed, there were well over 400 spaces that could be used by the Government on a first come first serve basis to meet the contract obligation of 300 non-secured spaces, then once warehouse construction would have begun, that overall pool, be it 400 or 1,000, would have been reduced. What we do not know is reduced to what. That needs to be resolved before deciding if Miami was indicating a refusal to perform.

11. Beacon acquired the property effective October 18, 2000 (Ex. 3 at 86). This was after the above letters were exchanged.

12. As referenced earlier, as part of the transfer from Miami to Beacon, the Government was provided with an Estoppel Certificate. The Certificate had been sent to the Government by Miami on September 15, 2000. On the Estoppel Certificate the tenant, in this case the Government, was asked to certify to the new landlord, Beacon, 12 conditions. Among those conditions were that the lease had not been canceled, modified, assigned, extended or amended. Also the Government was being asked to certify that the lease was in full force and effect, free from default, and the tenant had no claims against the landlord. (Ex. 3 at 83-84.) By e-mail transmission of October 19, 2000, Deneen Wheeler of APHIS communicated with the CO telling her that CCEP wanted to remain in the building if 100 secured parking spaces were available to both POV=s (privately owned vehicles) and Government vehicles. She asked the CO to get it in writing from the new owner. She also stated that if CCEP retained the lease, it would, if possible, want to reduce the footage being leased. (Ex. 3 at 85.)

13. The CO responded to her on October 21, telling Ms. Wheeler that she (the CO) had signed the estoppel letter and that she would have to wait until the next week to talk to the new property manager regarding the parking. She indicated she needed some information from Ms. Wheeler and then would negotiate on a partial release of space. (Ex. 3 at 85.)

14. Jorge B. San Miguel was the managing director for Beacon Cyberport. Soon after Beacon took over the lease, he said that he had discussions with representatives of the Government, including Ms. Gmiterko, the CO, as to the potential impact of the development plans for the property. In his affidavit he states, AAs I explained to Ms. Gmiterko, although construction would impact the total number of parking spaces available, during and after construction, Beacon Cyberport=s planned development was not going to affect its ability to comply with the lease provisions during parking.@ (San Miguel (Affidavit (Aff.) 7.) He provided no specific date for when he explained the above to the CO, nor did he provide any further details as to what he meant by Anot going to affect its ability to comply with the lease provisions during parking.@ However, at a minimum, taking inferences in favor of Appellant, his statements would have been confirmation that Beacon would provide the 400 spaces required by the lease. Also, although no specific time was identified as to the date of the above discussions, it is evident that the discussions took place after Beacon took over and probably after the Government signed the estoppel letter.

15. In addition to the above, Mr. San Miguel, in his affidavit at paragraph 9, addressed discussions between himself and Government over the 400 spaces. In paragraph 9 of his affidavit, Mr. San Miguel stated that the Government insisted in those conversations that it be guaranteed parking spaces for 400 vehicles and went as far as to demand that it be specifically assigned parking spaces in the secured area. He said that on November 3, 2000, he received a telefax from the CO reiterating the Government insistence that it be given 400 parking spaces. The record does not contain a November 3 telefax. According to Mr. San Miguel, the CO stated that if the Government was not provided with 400 parking spaces it would request a partial release of a portion of its leased premises. (San Miguel Aff. 8.) Mr. San Miguel stated that he took the position that such a requirement, the guarantee of 400 spaces, exceeded the terms of the lease. Mr. San Miguel stated that Beacon continued to take the position that it would meet the 400 spaces. (San Miguel Aff. 9.) If Beacon communicated as claimed by Mr. San Miguel that it would meet 400 spaces, then that would have been a confirmation of its intention to meet the lease for 400 as available spots. There is no document confirming or verifying the statements in Mr. San Miguel=s affidavit. (San Miguel Aff. 9.) What is clear however, is that if these statements were made, they were made after the earlier Miami letters. Since the statements claim to have provided assurances to the Government of 400 as available spaces, if those assurances were indeed made, they would supercede the earlier representations by Miami as to a lack of spaces (even if Miami was referring to all the spaces on the site and not just guaranteed spaces).

16. By facsimile dated November 9, 2000, to Mr. San Miguel, the CO advised him that she would be out of the office for several days and that she wanted to touch base on some issues regarding the lease. She stated that the Government was notified on October 19, 2000 (from the context it appears she meant September 19) that its 400 parking spaces would no longer be available due to construction of a new building on site. She described parking as a critical part of the Government requirement. (Ex. 3 at 92.) She then listed three issues to be addressed. The first was the status of construction and how long the Government would have the 400 spaces. The second noted that if not provided the 400 spaces, then a need to relocate employees and a partial release of space would be required. Finally, as to her third issue, she noted, Awe require uncontrolled access to our 100 secured spaces. Currently we have to pass through U.S. Customs.@ She asked Mr. San Miguel to review for discussions on November 13. Nothing in the CO=s letter addressed the matter of competing interpretations and the Appellant=s claim that the Government was insisting on guaranteed and not simply as available spaces. Nothing in the CO=s letter is necessarily inconsistent with a position one would take if the new construction was changing a situation where there were multiple spaces (well over 400) and now drawing it down to 400 or less that would have to be competed for with others.

17. On or about late November, negotiations began between Mr. San Miguel and Government representatives (Mr. William James and the CO) regarding an amendment to the lease that would reduce the total square footage leased and occupied (San Miguel Aff. 10). On December 8, Mr. San Miguel forwarded a proposed lease amendment that was consistent with the Government request to reduce the total space (Ex. 3 at 100, San Miguel Aff. 10). The proposed amendment reduced the

leased space by 5,000 feet. As to the parking space, the proposed amended lease provided the following:

> 2. Parking space: Parking Space: Four hundred (400) (One hundred (100) secured for governmental vehicles.), as available shall be revised to provide for only the One hundred (100) secured for governmental vehicles, which spaces shall be relocated to an area to be agreed upon by Tenant and Landlord.

According to Mr. San Miguel, beginning in December 2000, it was the Government that initiated the negotiations as to modifying the lease and reducing the total square footage leased and occupied by USDA. Mr. San Miguel stated that Mr. James of APHIS explained that USDA no longer required the amount of space provided for under the lease as a result of various legal proceedings in courts in the State of Florida and before the Florida Department of Agriculture. These cases had the effect of curtailing, if not suspending completely, the Citrus Canker program, the program for which APHIS had leased the premises. Mr. James informed Mr. San Miguel, that as a result of the legal proceedings, Government workers were being furloughed. (San Miguel Aff. 10,11, 13.)

18. Thereafter, through December 2000 and January 2001, there were several internal government e-mails regarding parking and downsizing the lease. It appears that discussions were going on between the Government and Beacon. (Ex. 3 at 104-11.) There are no letters in the record from the Government to Beacon during this time frame threatening termination or demanding that Beacon provide assurance as to 400 spaces or otherwise face possible default.

19. By a January 23, 2001, e-mail transmission from Michael Hornyak of APHIS to the CO, Mr. Hornyak forwarded to the CO an e-mail he had received from Mr. James, dated January 18, 2001. In that e-mail, Mr. James discussed a meeting he had on January 12 and 18, with Mr. San Miguel, and forwarded to the CO and Mr. Hornyak what he was hearing as to offers to resolve the rental space. The parties were discussing the feasibility of maintaining the rental space. One option involved different space within the complex and appears not to be relevant to the issues in the motions before us. The other option involved staying in the current space and addressed parking. In regard to parking, Mr. James stated, AAnd guess what? He has now agreed to allow us to keep the entire secured parking area out back for our government cars, and also will now give us 100 assigned spaces in front of the building for our POV=s.@ (Ex. 3 at 112-14.) It appears that the parties were at that point discussing Appellant providing 200 guaranteed spaces. It follows from the offer of 200 spaces, that at least that number of spaces was available on the site.

20. On January 31, 2000, Beacon forwarded a proposed lease amendment, reflecting the change to 100 secured and 100 assigned spaces in lieu of the 400 (Ex. 3 at 117).

21. In an e-mail dated February 21, Mr. San Miguel referenced a meeting the prior Friday, and confirmed that Beacon was prepared to amend the lease as discussed. On that same day, the CO faxed a communication to Mr. Hornyak and Ms. Wheeler, asking them what they wanted to do as to the amendment. (Ex. 3 at 121.)

22. From December 2000 into March 2001, Mr. San Miguel spoke and corresponded with Mr. James and the CO to see if the parties could reach an agreement on the lease amendments. During the time frame, Mr. James explained that USDA was involved in a series of lawsuits relating to the eradication program for which the Government had leased the premises. Mr. James explained that various government workers involved with the project were being furloughed. Unable to reach an agreement, on March 21, 2001, Mr. San Miguel wrote a letter to the CO, where he stated:

> Since, you have not responded, I have reached the conclusion that you are no longer interested in amending the terms of your current lease. Although you expressed some interest in modifying the terms of the lease, we have not reached an agreement and therefore our prior discussions are not binding on either party. Your lease has not been compromised in any way. You have been and will fully be obligated on the terms and conditions of the lease and we expect that you will continue to live up to all the obligations as set forth in the lease.
>
> I also want to take the opportunity to remind you that as construction begins on the site, parking availability will change from time to time. Accordingly, your employees will not have access to four hundred parking spaces on a going forward basis.

(Ex. 3 at 125.)

23. Mr. San Miguel said that to address what he characterized as the Government=s repeated and unjustified demands for guaranteed parking and assigned spaces, he advised the Government that due to construction, parking availability would change from time to time and Ayour employees would not have access to four hundred spaces on a going forward basis.@ He stated that the purpose of the latter statement was to make clear to the Government that the Government would not be guaranteed 400 parking spaces or be given assigned spaces as had been demanded. He said that while Beacon would not agree with Government demands that he said were inconsistent with the lease, it was Beacon=s intent at all times to continue to abide by its obligation to provide onsite parking for 400 vehicles as available (100 secured for Government vehicles.) According to the Appellant, Beacon was not repudiating the contract and at all times had the intention to meet its obligation. (Ex. 4 at 125, San Miguel Aff. 2.)

24. The next day, by letter dated March 22, 2001, the Government informed the lessor that the lease Ais hereby terminated in accordance with General Clauses (GSA Form 3517B) Paragraph 16, Default by Lessor During the Term.@ The letter also stated:

> The lease states that we will have 400 onsite parking spaces, as available (100 secured for Government vehicles). We had requested additional secured parking spaces in our letter dated September 9, 2000, to Miami Free Zone (Lessor). It was at that time we were notified not only could they not provide additional parking spaces, within 60 days they would commence construction of additional warehouse space

> and that the only parking spaces that would be available would be the 100 secured spaces.
>
> You had purchased the site shortly after and we had been trying to work out a solution that would be suitable to both parties. Your last correspond[a]nce (via e-mail 2/21/01) offered a reduction of 7,715 s.f. of space with 60 parking spaces in front of building and 50 parking spaces in the secured area, at a rental rate that is almost double/s.f. In other words, you proposed to release 3 the amount of space and offered only 3 of the parking spaces and we would pay almost the same rental amount. Your proposed option is not in the best interest of the Government. Parking for 400 vehicles was and still is a critical part of our requirements.
>
> If you cannot provide the 400 onsite parking spaces as indicated on the lease, you are, therefore, considered to be in default. We will, therefore, be vacating the leased space by May 15, 2001, and the lease will be terminated effective that date.

(Ex. 4 at 126.) The letter did not provide notice of the lessor=s appeal rights (Ex. 4 at 126).

25. Mr. San Miguel received the termination letter and had his attorney respond within 30 days. In that letter from its counsel, dated April 19, 2001 (Ex. 4 at 127), counsel for Beacon stated that it was unclear from the Government letter of March 22, 2001 if the lease is or will be terminated for default. The letter continued.

> In any event, there is no legal basis for the USDA=s termination of the lease, whether it be effective as of the date of your March 22, 2001 letter or as of May 15, 2001, the date you advise that the USDA will be vacating the premises. The Landlord presently is in compliance with all terms of the lease, including the lease provision relating to parking. Moreover, Landlord=s plans for continued development of the Beacon Cyberport will not affect its ability to comply with the parking availability requirement in the Lease. Notwithstanding [the managing director=s] March 21, 2001 letter, Landlord will continue to provide to the USDA onsite parking for 400 vehicles as available, 100 of which will be secured for government vehicles.
>
> Accordingly, your March 22, 2001 letter is ineffective to terminate the Lease and the Landlord expects that the USDA will continue to honor all obligations hereunder.

26. By letter dated May 4, 2001, to the Government, the Lessor (through its attorney) sought a response to its letter of April 19. The May 4 letter specifies that the lessor Awas not presently in default under any term of the lease and that no future plans for development at the Beacon Cyberport would affect Landlord=s obligations.@ (Ex. 4 at 129-30.)

27. In a letter to the Government dated May 9, 2001, among other items raised, the Lessor noted that it accepted the Government tender of possession of the property (i.e., the Government has vacated the premises, such that they are returned to the Lessor), Awithout waiver of any rights or remedies under the lease, including but not limited to its right to continue to collect monthly rent during the term of the lease.@ (Ex. 4 at 131-32).

28. By letter dated May 24, 2001, the Appellant filed a certified claim to the CO, seeking to recover $11,387.55 for unpaid rent for the month of May 2001; $958,167.17 for lost rent payments for the remainder of the term of the lease (through November 30, 2004); interest under the CDA, 41 U.S.C. ' 611; and all costs as may be recovered under applicable law (Ex. 4 at 133-61). By letter dated July 23, 2001, the CO denied the claim. The decision provided the lessor with notice of its appeal rights. (Ex. 4 at 163-65.)

29. In the Government=s Answers to Interrogatories at paragraph 13, the Government stated, Athe Government terminated the lease because of the Appellant=s letters of September 19 and October 5, 2000, providing that parking required by the lease would not be available and because Appellant subsequently failed to provide assurances to the government that the required parking would be available.@

30. In her affidavit, the CO stated, when the Government rejected the proposed lease language (referring there to Appellant=s March 21 letter), Athe Lessor informed us that we had to live up to the obligations of the lease, but that it would not. The Lessor reminded us that construction would change the parking availability, and that employees would not have access to four hundred spaces. Based on this final repudiation of the lease terms, and on all other warnings issued before that, the Government was without recourse to do anything but terminate the lease and move out the remainder of the employees.@ (Gmiterko Aff. 21-22.)

31. According to the affidavit of Mr. San Miguel, at all times prior to the termination, the property had general parking for more than 1,050 vehicles, in addition to parking for 100 vehicles in the secured area. At all times the Government had more than 400 spaces in general unsecured and over 100 in secured. (San Miguel Aff. 5, 6.)

32. On May 24, 2001, within 10 days of the effective date of the Government termination of the lease, Beacon filed a claim with the CO. By letter of July 23, 2001, the CO denied Appellant=s claim. On October 3, 2001, the Board received the notice of appeal, in which the lessor disputes the validity of the termination for default and seeks to recover damages from the Government.

DISCUSSION

MOTION TO DISMISS

In seeking dismissal for lack of jurisdiction, the Government maintains that the appeal is untimely, because it was filed more than 90 days after the lessor=s receipt of the notice of termination for

default. The letter containing the Government claim does not notify the lessor of its appeal rights. Without the statutorily-required notice of appeal rights, the appeal period does not commence with the lessor=s receipt of the letter.

GOVERNMENT MOTION FOR SUMMARY JUDGMENT

ANTICIPATORY REPUDIATION

In its decision in Anderson v. Liberty Lobby, 477 U.S. 242 (1986), the Supreme Court stated in relation to deciding summary judgment:

> . . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Adickes, 398 U.S., at 158-159, 90 S. Ct., at 1608-1609. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. Kennedy v. Silas Mason Co. 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948).

While the mere existence of a scintilla of evidence in support of a party=s position will not be sufficient to defeat a motion for summary judgment, where there is colorable evidence upon which a jury or fact finder can find in favor of the plaintiff on evidence presented, then summary judgment is not appropriate. Anderson, supra. In deciding a motion for summary judgment, we are not to resolve factual disputes but instead are to ascertain whether material disputes of fact are present. DynCorp. ASBCA No. 49714, 97-2 BCA & 29,233; Cal High Tech, Inc. ASBCA No. 50773, 99-1 BCA & 30,221. All significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. Mingus Constructors, Inc. v. U.S., 812 F. 2d 1387, 1390 (Fed. Cir. 1987), Dairyland Power Coop. v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994). It is in this light that we examine the respective motions.

The Government motion as to the default is predicated on one of two alternate bases. First, the charge is made that the default is justified due to Appellant=s anticipatory repudiation of the contract. Second, the Government charges that default should be sustained because Appellant failed to adequately provide assurances. In regard to the latter, the Government cites Danzig v. AEC Corporation, 224 F.3d 1333 (Fed. Cir. 2000).

Anticipatory repudiation requires a positive, definite, unconditional, and unequivocal manifestation of intent not to render the promised performance when the time fixed by the contract shall arrive. United States v. DeKonty Corp., 922 F.2d 826, 828 (Fed. Cir. 1991). As the Armed Services Board of Contract Appeals (ASBCA) in its decision on reconsideration stated in the oft cited case of

Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA & 13082; aff=d 78-2 BCA & 13,429 at 65,638:

> The distinction which respondent urges upon us is intended to permit a finding of anticipatory repudiation whenever the promisee might ›reasonably= infer from the promisor=s words or actions an intention not to render the promised performance. However, respondent=s argument poses a distinction without a difference and is without merit. The U.C.C. standard pressed by respondent is entirely consistent with the common law standard which we have applied. Moreover, the significant adjectives ›unequivocal= and ›clear= have the identical meaning in their respective contexts. ›Clear= means ›Obvious; beyond reasonable doubt.= Black=s Law Dictionary (4th Ed. 1951). ›Unequivocal= means ›Clear; plain capable of being understood in only one way, or as clearly demonstrated; free from uncertainty, or without doubt; and, when used with reference to the burden of proof, it implies proof of the highest possible character and it imports proof of the nature of mathematical certainty.= *Ibid*. (emphasis added). The latter term is also synonymous with ›unambiguous= which means Asusceptible of but one meaning.= *Ibid*. Accordingly, regardless of whether we apply the U.C.C. ›Demonstrates a clear determination= test urged by respondent or the common law ›unequivocal manifestation= standard, in order to find that appellant=s actions constituted an anticipatory repudiation we must be satisfied objectively that such actions were manifested to respondent in a manner susceptible of only one reasonable interpretation. Respondent must have perceived unequivocally appellant=s alleged intention not to perform, and the fact that this intention might ›reasonably= be inferred is not enough. In view of the impeccable pedigree of the common law standard, and its heretofore consistent application by this Board, we prefer to continue to apply the ›positive, definite, unconditional, and unequivocal manifestation of intent= test articulated in Mission Valve and Pump Company, supra.@

As the ASBCA further addressed in Martin Suchan, ASBCA No. 22521, 83-1 BCA & 16,323:

> We are not concerned with the reasonable inference which the contracting officer may have drawn. What is critical is that the contractor must have clearly and unequivocally conveyed to the contracting officer by words or deeds or a combination of both that he was not going to perform.

To prove abandonment or anticipatory repudiation, the Government must prove that the Appellant=s words or conduct manifested a positive unequivocal and unconditional intent not to perform the contract in any event or at any time. James W. Sprayberry Const., IBCA No. 2130, 87-1 BCA & 19,645; Alta Construction Co., PSBCA No. 1463, 90-1 BCA & 22, 527, 90-3 BCA & 22,916. A mere statement of non-intention to perform, without more, does not necessarily negate the termination clause or right to cure. Dingley v. Oler, 117 U.S. 490, 508 (1886), Corbin on Contracts, 973. As stated by the Court of Claims in Murphy v. United States, 164 Ct. Cl. 332, 349 (1964) (dealing with interpreting a clause), Aprovisions authorizing termination for anticipatory breach

effect a result in the nature of a forfeiture and are not to be liberally construed.@ The principle of treating repudiation narrowly, would also logically apply to interpreting alleged repudiation language from a letter.

When we examine the evidence before us in this appeal, the Government has not yet proved anticipatory repudiation by the Appellant so as to justify granting its motion. Instead, the evidence, taken in a light most favorable to Appellant is such that Appellant could well prove that it did not repudiate the contract and that the Government interpretation of its actions and the Government exercise of default is unreasonable.

In deciding whether we should grant summary judgment, we find problems with the CO=s default termination and more particularly with the CO=s conclusion that the Appellant was stating that it could not provide 400 spaces. Appellant has stated in its affidavit that it consistently assured the Government that it would have 400 spaces available on site, notwithstanding any new construction. When we examine the letters between the parties and take into account statements by Appellant as to the presence of over 1,000 spaces on the property, Appellant=s contention that it did not repudiate appears provable and as such, summary judgment in this case is inappropriate.

We start first with the September 19, 2000 letter, referred to by the CO in her final decision. The CO characterized that letter as a refusal to provide more than 100 spaces. A fair look at that September letter does not automatically lead us to that same conclusion. A fair look at the September letter does not undisputably show that the Appellant was refusing to provide 400 Aas available@ spaces. While the letter mentions the 400 spaces as part of a description of the lease obligations, the letter clearly is addressing the Government request for 100 extra spaces of secured parking. That request for 100 more secured spaces was more than what the lease required and thus was a sought after addition by the Government to the lease. When one then reads the following paragraph (which the Government claims is Appellant=s refusal to provide 400 spaces) in the context of it, being a response to the Government=s request for 100 additional secured spaces, it appears that the Government interpretation may be misplaced. The September 19 letter states:

> Furthermore, I also informed you that, as per the contract which calls for the use of 400 parking spaces for vehicles as available of which 100 are the secured parking for Government vehicles, in the next 60 days we will commence construction of additional warehousing space (the building permits have been obtained and the impact fees already paid). The only parking spaces that will be available at that time, will be the existing 100 secured spaces for Government vehicles. Those spaces may be used for either Government vehicles or private employee vehicles if the private employee vehicles take the place of the Government vehicles.

The letter does not necessarily refer to spaces other than secured spaces. What the letter appears to address when viewed as a whole, instead of piecemeal, is that Miami is simply stating that it cannot provide an additional 100 secured spaces on this contract (which calls for 400 of which 100 are secured), and when it refers to the only parking spaces that will be available, it is referring to the

only secured spaces that will be available. In that regard, Miami tells the Government that all that will be available to meet the Government=s new request will be the existing 100 secured spaces.

For purposes of finding summary judgment, nothing in the September 19 letter necessarily constitutes a refusal to provide the general parking called for in the lease. Further, a reading against repudiation is particularly probable because Miami then discussed the possibility of using the 100 secured spaces for both Government and private vehicles. Under the original lease, the secured space could only be used by Government vehicles. To get to a refusal as to the 400, we have to adopt the Government=s version of the contested interpretation of the letter and find Appellant=s description to be unsupportable. The surrounding circumstances in this case do not make the letter as clear as the Government contends.

For us to properly understand the September 19 letter will require us to take into account, and make, factual determinations as to surrounding circumstances. A number of those factual determinations are contested, including how many spaces were actually available for use and where. Where there are contested material facts, which may affect the outcome of the proceeding, we are prohibited from resolving those facts on summary judgment against the non-moving party. We reiterate that one can read the letter in context to be a discussion of the secured and not general spaces. At a minimum, a contrary conclusion or any conclusion that expands the letter to cover all spaces cannot be reached if we apply the summary judgment principle of construing all reasonable inferences in favor of the non-moving party.

We do not read the September 19 letter in a vacuum. We recognize that in the Government reply of September 26, 2000, the Government said that the earlier letter indicated to it that its 400 spaces would not be available. The Government then says that it is mandatory that it have 400 parking spaces available for its use, somewhere on the premises as indicated on the lease. Appellant=s response by its October 5 letter, again highlights what appears to be the competing interpretations or understandings of what needs to be provided. Nowhere in the October 5 letter does Appellant state that it will not provide 400 spaces as available. Rather, as in the earlier letter, it repeats that the lease calls for Aon site parking for 400 vehicles as available (100 Secured for Government vehicles).@ Miami then states that Aif the Government@ finds it mandatory to have 400 on site spaces, it would consider releasing the Government from the lease. In the context of the September 26 letter, Miami again may have been differentiating what it saw as a demand for guaranteed spaces from what it understood as to the 400 spaces Aas available@ spaces addressed in the lease. Under Miami=s reading, the lease requires it to have 400 spaces on the site, of which only 100 were guaranteed and the rest were to be on a first come first serve basis. What it sees the Government demanding, when the Government asks for mandatory spaces, is a guarantee that there will always be 400 spaces that will be used by the Government and not others. Once again, as with the earlier September letter, for us to read the letter as a refusal to meet the lease obligations, we must favorably interpret the language against the non moving party and in favor of the Government.

Further, given the undeveloped record, if we then read the March 21, 2001, letter in context of the above and in the context of surrounding circumstances, it again appears reasonable that the Appellant=s reference to employees not having access to 400 parking spaces on a going forward basis may be referring to guaranteed spaces and not the remaining 300 first come first serve spaces.

We reiterate that Mr. San Miguel stated in his affidavit that there were and remain over 1,000 spaces on the site. If that proves out as a fact, it would be entirely consistent with Appellant=s contention that it was only referring to a demand for guaranteed spaces. If there are over 1,000 spaces then it would be illogical for Appellant to be telling the Government that there would not be first come-first- serve spaces available for its use on the site. We will not grant summary judgment on the basis of an interpretation of language which is not logical on its face, absent some further development of the facts and a conclusion as to the exact number of spaces available.

Finally, it appears from the record that this site had multiple tenants. Thus, even if there were 1,000 spaces being competed for (and in early correspondence the parties stated that there were plenty of spaces on site, but that Miami could not specifically designate 400 spaces for USDA), depending on the number of other tenants, APHIS might or might not be able to have parking for 400 vehicles on any given day. If, because of construction, the pool of 1,000 spaces reduced down to 300 spaces (exclusive of the 100 secured spaces), then the likelihood of many of the APHIS employees finding spaces on any given day would diminish dramatically. That said, however, as long as there were 300 spaces open for competition, and as long as Beacon provided the 100 secured spaces in addition, then at least on the interpretation we are now using, it appears that the lease conditions as to parking would have been met.

In the context of the above, we cannot, for purposes of summary judgment, conclude that the only possible result from the evidence would be a finding that Appellant repudiated the lease. To make a fair conclusion in this appeal we need to verify certain alleged facts, so as to understand the interpretation given by the parties to the language and to examine other surrounding circumstances that shed light on whether the Government was justified in understanding the Appellant to be repudiating the contract. Given the record before us, there is insufficient evidence to prove on motion, that Appellant made a positive, unequivocal and definite statement that it would not perform as per its obligation.

We are mindful of the fact that there is another side to this appeal and one could possible conclude or infer from the correspondence and internal communications of Government officials, that during negotiations from December through February, Appellant was putting forward to the USDA that 400 overall spaces would not be available. However, on the record before us, and given the statements of Mr. San Miguel, we cannot, absent rejecting colorable evidence presented by Appellant, come to a summary judgment conclusion that Appellant was positively and unequivocally refusing to perform its lease obligation as to parking.

FAILURE TO PROVIDE ASSURANCES

The parties were negotiating for a modification to the lease during January and February 2001. The letter which the Government describes as the repudiation was sent by Appellant in March 2001, and it was sent because it appeared negotiations had broken down. There was no request being made by the Government for assurances from at least December 2000 until the date of termination. As a matter of law and fact, reliance on Danzig is without merit. The potential inapplicability of Danzig is further supported by the recent decision of the Court of Federal Claims in Cross Petroleum, Inc. v.

United States, No. 97-251C, 2002 WL 31441207, where the court overturned a default termination and addressed claims of lack of assurance in a contract with a cure notice.

MISREPRESENTATION AND MISSTATED FACT

The record presented to us does not establish a basis for granting summary judgment. These are matters that must be developed before we can properly even consider summary judgment. Further, if the spaces were available, as Appellant has contended in his affidavit, then there is a strong question as to whether there is any sustainable Government action at all, as to these issues.

FAILURE TO ISSUE CURE

It is well established that a termination for default is a drastic sanction which can only be imposed for good cause and on the basis of solid evidence. J. D. Hedin v. United States, 408 F. 2d 424, 431 (Ct. Cl. 1969); H.N. Bailey & Associates v. United States, 196 Ct. Cl. 156, 449 F. 2d 387 (1971). The Government has the burden of proving the propriety of the default termination by a preponderance of the evidence. Charles West, PSBCA No. 3655, 96-1 BCA & 28,211, citing Lisbon Contractors, Inc. v. United States, 828 F. 2d 759, 765 (Fed. Cir. 1987). In exercising its right to terminate for default, more than in any other action, the Government must turn square corners in order to prevail. K & M Const., ENG BCA Nos. 2998, et al., 73-2 BCA & 10,034. Where a contract contains a cure notice provision, the provisions of that cure as to formal notice, will prevail over some lesser demand for assurances. Cross Petroleum, Inc. v. United States, supra.

On its face, the Default clause of the lease appears to require that a failure must remain uncured for 30 days after notice of the failure to the Lessor by the Government before the Government can terminate for such failure. There is no question that the Government did not give such notice nor did it allow the Appellant time to cure. There is however a legal exception to requiring a cure notice. A lack of notice will not be fatal where the termination is made because of anticipatory repudiation or abandonment of the lease or contract. Reddy-Buffaloes Pump, Inc., ENG BCA Nos. 6049, 6115, 96-1 BCA & 28,111. As discussed in the section above, the matter of anticipatory repudiation is central to this appeal. It remains unresolved. Thus, Appellant=s Motion is denied.

ONGOING DIALOGUE

Starting some time in November 2000, and lasting into late February 2001, Appellant and the Government were engaged in negotiations regarding changing the terms of the lease. This involved both changes as to parking and as to the square footage of the overall leased property. Each party was attempting to secure the best deal for itself. Notwithstanding the fact that the discussions clearly called for reducing parking spaces, at no time during those discussions did the Government threaten or even mention default. Some time in late February or early March, talks broke down. The Appellant then sent the March 21 letter, which has been discussed in detail earlier in this decision. As Mr. San Miguel stated, he sent the letter because the Government was no longer responding and he wanted to address the earlier demands of the Government for guaranteed and assigned spaces. The Government, within 24 hours, terminated the contract. In its brief, Appellant=s

counsel points out that none of the prior communications between the Appellant and Government referenced the default clause and none ever stated that the Government believed Beacon to be in default of its obligations under the lease. There is some case law dealing with default in the context of an on-going dialogue. See Delfour, Inc., VABCA No. 2049 et. al., 89-1 BCA & 1394; A.J.C.A., GSBCA No. 11541, 11557, 94-2 BCA & 26,949, and Marine and Industrial Insulators, Inc., VABCA No. 2499, 88-3 BCA & 21,120. To the extent that these cases may be relevant, they require resolution of facts as well as application of law and are not appropriately resolvable on summary judgment.

ESTOPPEL AND MATERIAL BREACH

If we interpret Miami=s September 2000 letter in the manner put forth by the Government, the Government was aware as of September 2000, and continued to believe thereafter that the 400 spaces it was entitled to under the lease were going to disappear but for the secured spaces. Nevertheless, discussions proceeded between the Government and the Appellant as to modifying the lease, with no hint of termination. Further, the Government signed an Estoppel Certificate, well after the Miami letters and thus with full knowledge of Miami=s perceived position. These facts raise questions as to the legal effect of the Estoppel Certificate signing and what impacts, if any, it had as to the rights of Beacon, the successor lessor. That is particularly important here because absent the earlier letters from Miami, the only letter even suggesting a refusal (and interpretation of that letter is disputed), is Beacon=s March 21 letter. This then raises a question, as to whether such an isolated letter, standing alone, even if apparently clear in refusing to move forward, is sufficient, absent a cure, to justify a termination. There is a legal and to some extent factual question as to whether such a single statement can qualify as sufficiently unequivocal, positive and unconditional, so as to invalidate the operation of a cure notice. In researching this motion, we have found no case where repudiation was based on a comparable fact situation to this and where the final act of repudiation was not supported by earlier and surrounding confirming actions. In that regard we also note that the parties have not extensively dealt with or briefed this issue. Proceeding will allow that development to occur.

CONTRACT LANGUAGE

The wording in the lease which is crucial to this case is AOnsite parking for 400 vehicles as available (100 secured for Government Vehicles).@ Neither party has provided us a clear a definition of what they meant by Aonsite@ and what they meant by Aas available.@ Hearing the parties= evidence as to what they understood to be the meaning of those terms prior to the dispute and hearing evidence on what they intended the wording to mean, when used in various letters and other correspondence, will enable us to render a fairer and more accurate decision as to the propriety of the default.

COMMENT ON DISSENT

Once again, the dissenting judge, as he has in prior opinions, abandons and ignores the well-settled legal principles requiring all significant doubt over material factual issues to be resolved in favor of the non-moving party. Once again the dissenting judge fails to apply reasonable inferences in the non-moving party=s favor. Instead, the dissenting judge sets up the scenario where summary judgment cases are treated the same as submissions on the record. We decline to follow the dissenting judge in his clear misunderstanding and misapplication of the law. But for the limited examples below, we will not dissect the dissent. Rather, we expect that any reasonable reader, will recognize why the dissent so misses the mark.

At page 12 the dissent states, AThe lessor insists or suggests that it is not obligated to make spaces available,@ citing 3 of its Findings of Fact. Two of those findings, are findings relating to Miami and not to Beacon. Two of the referenced findings predated the verbal assurances of parking compliance made by Appellant after it took over the lease. (San Miguel Aff. 8 and 9.) The third finding cites to the March 21 letter from Beacon, a letter, that if read in the context of (1) Mr. San Miguel=s affidavit (specifically paragraphs as to verbal assurances provided APHIS by Beacon); (2) letters between Beacon and APHIS, which discuss secured and guaranteed spaces, as opposed to Aas available parking;@ and (3) Appellant=s assertion that there were more than 400 spaces available as of March 21, is not nearly as crystal clear as the dissent attempts to portray it. In fact, as we pointed out earlier in this opinion, one can read the March 21 letter to be a discussion of guaranteed, and not general, Aas available@ spaces. Further, if over a thousand spaces were available for use, as asserted by Mr. San Miguel in his affidavit, then a statement claiming a lack of 400 spaces appears illogical and raises questions. Finally, despite the dissent statement to the contrary, all of the above information was known and available to the CO. We see the role of this Board as finding the true facts, applying the law and thereby rendering justice. The dissent, in our view short circuits that process.

Finally, the dissent also gives short shrift to the cure notice. We have recognized and so stated earlier in our majority opinion, that lack of a cure notice may not be fatal in the case of anticipatory repudiation. That said, the matter of anticipatory repudiation remains at issue, as does the effect of the letter in the context of a negotiation process which had been in play for several months.

DECISION

The Government=s Motion to Dismiss and the parties= respective Motions for Summary Judgment are denied.

_____

HOWARD A. POLLACK
Administrative Judge

Concurring:

ANNE W. WESTBROOK
Administrative Judge

Opinion by Administrative Judge VERGILIO, concurring in part, dissenting in part.

I write in dissent, expressing frustration with a panel that misconstrues the record and the law in resolving motions for summary judgment, as it undermines the ability of a party to obtain summary judgment. An informal, expeditious, and inexpensive resolution of this dispute is not attainable with the given panel, despite the record which beckons for a resolution on the existing record. While one may conclude that the majority is denying motions for summary judgment such that the full record can be developed, what underlies this dispute are legal issues that are to be resolved without the time and expense of so proceeding. By looking outside of the language of the contract and by considering statements of intended meaning (which are inconsistent with the written material) not available to the contracting officer at the time of termination, the majority decision reflects an approach which makes it impossible for a contracting officer and Government counsel to administer a contract properly.

This case may be summarized readily. The lease required the lessor to make 400 parking spaces available with the premises throughout the term of the lease. The lessor sought to make available fewer spaces than the lease required. The Government insisted that the lessor fulfill its lease obligations. After various negotiations, the lessor informed the Government by letter dated March 21, 2001, that with construction to begin, Government Aemployees will not have access to four hundred parking spaces on a going forward basis.@ The Government issued a notice of termination for default. After the lessor received that notice, the lessor responded with a confirmation of the Government=s interpretation of the March 21 letter, as it stated that notwithstanding the language in that letter, the lessor will continue to provide parking spaces in accordance with the terms of the lease. This assurance of continued full compliance with the terms and conditions of the lease came too late. I conclude that the Government properly issued a termination for default based upon the language in the letter of March 21, which unequivocally and clearly indicated that the lessor would not be fulfilling its lease obligations because parking spaces would not be available during times of construction. The lease dictates the obligations of the parties; the Government is not required to accept performance of less than the stated obligations or to negotiate alternative performance. The termination for default was appropriate; therefore, I deny the lessor=s claims to recover damages for an alleged Government breach.

At present, the majority does not interpret the language of the lease or resolve the matter of termination based upon what was before the contracting officer. The majority goes beyond drawing reasonable inferences in favor of the non-moving party, as it reads into the affidavit from the lessor much more than is stated. The affidavit does not state that the lessor guaranteed that 400 spaces would be available at the site after construction begins. The affidavit does not address this principal issue of this dispute. The majority falls into the trap of reading into the affidavit what is not stated,

as it postulates on what may be facts demonstrable with the further development of the record. The error of the majority is more egregious and apparent when one considers that the intent conveyed in the affidavit was not available to the contracting officer at the time of the termination, and the affidavit does not address the lessor=s recognition that the contracting officer correctly interpreted the language in the March 21 letter.

To assist the reader in focusing on the material facts and issues, I provide the following findings of fact, based upon a review of the complete record.

FINDINGS OF FACT

The lease

1. With an effective date of November 15, 1999, the Government (as lessee) and the Miami Free Zone Corporation (as lessor) entered into lease no. 57-6395-0-017 (including GSA Form 3517B, General Clauses, dated 5/98; GSA Form 3518, Representations and Certifications dated 5/98; floor plans; and rider 1 (Exhibit 2 at 31 (& 7))). The lessor is to provide specific office and warehouse space, some to be delivered on November 15, 1999, with additional space to be delivered on January 1, and February 1, 2000, to be used for the USDA/State of Florida Citrus Canker Eradication Program (or other occupant as the Government may substitute). The lease term is November 15, 1999, through November 30, 2004, Asubject to termination and renewal rights as may be hereinafter set forth.@ The lease sets forth no renewal option, but states that the Government may terminate this lease at any time on or after November 30, 2003, by giving at least 180 days notice in writing to the lessor. No rental shall accrue after the effective date of termination. The lease dictates that the Government shall pay rent per month in arrears; rent for a lesser period shall be prorated. (Exhibit 2 at 30-31, 43 (& 6)) (all exhibits are in the appeal file). Supplemental lease agreement one altered the final date for space to be delivered and altered the payment schedule (annual and monthly rental amounts) (Exhibit 2 at 69).

2. The lease specifically identifies what the lessor shall furnish to the Government as part of the rental consideration, including the following:

> Onsite parking for 400 vehicles as available (100 Secured for Government Vehicles)

(Exhibit 2 at 31 (& 6)).

3. The lease is an integrated agreement: AThis Lease, upon execution, contains the entire agreement of the parties and no prior written or oral agreement, express or implied, shall be admissible to contradict the provisions of the Lease.@ (Exhibit 2 at 43 (& 5, 48 CFR 552.270-38, Integrated Agreement (AUG 1992))). The lease contains a Mutuality of Obligation clause, 48 CFR 552.270-39 (AUG 1992):

> The obligations and covenants of the Lessor, and the Government=s obligations to rent and other Government obligations and covenants, arising under or related to this

> Lease, are interdependent. The Government may, upon issuance of and delivery to Lessor of a final decision asserting a claim against Lessor, set off such claim, in whole or in part, as against any payment or payments then or thereafter due the Lessor under this lease. No setoff pursuant to this clause shall constitute a breach by the Government of this lease.

(Exhibit 2 at 43 (& 9).)

4. The lease contains a Failure in Performance clause, 48 CFR 552.270-17 (AUG 1992):

> The covenant to pay rent and the covenant to provide any service, utility, maintenance, or repair required under this lease are interdependent. . . . Alternatively, the Government may deduct from any payments under this lease, then or thereafter due, an amount which reflects the reduced value of the contract requirement not performed. No deduction from rent pursuant to this clause shall constitute a default by the Government under this lease. These remedies are not exclusive and are in addition to any other remedies which may be available under this lease or at law.

(Exhibit 2 at 44 (& 15).)

5. The lease contains a Default by Lessor During the Term clause, 48 CFR 552.270-33 (AUG 1992):

> (a) Each of the following shall constitute a default by Lessor under this lease:
>
> (1) Failure to maintain, repair, operate or service the premises as and when specified in this lease, or failure to perform any other requirement of this lease as and when required provided any such failure shall remain uncured for a period of thirty (30) days next following Lessor=s receipt of notice thereof from the Contracting Officer or an authorized representative.
>
> . . . .
>
> (b) If a default occurs, the Government may, by notice to Lessor, terminate this lease for default and if so terminated, the Government shall be entitled to the damages specified in the Default in Delivery-Time Extensions clause.

(Exhibit 2 at 44 (& 16).) The clause referenced in the final sentence is found in the contract (Exhibit 2 at 43 (& 11)) and in regulation, 48 CFR 552.270-28 (JUN 1994).

Parking space availability

6. The lessor states in a letter dated September 19, 2000, to the contracting officer, referencing a telephone conference of that morning:

> Furthermore, I also informed you that, as per the contract which calls for the use of 400 parking spaces for vehicles as available of which 100 are the secured parking for Government vehicles, in the next 60 days we will commence construction of additional warehousing space (the building permits have been obtained and the impact fees already paid). The only parking spaces that will be available at that time will be the existing 100 secured spaces for Government vehicles. Those spaces may be used for either Government vehicles or private employee vehicles if the private employee vehicles take the place of the Government vehicles.

(Exhibit 3 at 76-77.)

7. The contracting officer responded by letter dated September 26, 2000, stating in part:

> Your letter, dated September 19, 2000, indicates that construction of an additional warehouse will commence in 60 days and that our 400 parking spaces would no longer be available. It is mandatory that we have 400 parking spaces available for our use somewhere on the premises as indicated on the lease. This was a requirement of ours when looking to rent space in the Miami area; without this parking, the space is useless.

(Exhibit 3 at 79.) Although the Government now characterizes this letter as a cure notice, the characterization is not material to the resolution of this appeal.

8. The lessor replies, in pertinent part, by letter dated October 5, 2000:

> The lease, dated November 15, 1999 and prepared by your office, did not and does not guarantee nor require the availability of 400 parking spaces. It simply calls for Aonsite parking for 400 vehicles as available (100 Secured for Government Vehicles)@.
>
> If you now find it mandatory that you have 400 on-site parking spaces, we will consider releasing the USDA from its lease upon the execution and exchange of mutual releases.

(Exhibit 3 at 80.)

9. A letter dated October 20, 2000, under the letterhead of Beacon Cyberport, informs the contracting officer that Beacon Cyberport formerly known as Miami Free Zone is now under the

ownership of Codina Group, Inc. effective October 18, 2000 (Exhibit 3 at 86). A letter dated November 3, 2000, also under the letterhead of Beacon Cyberport, to the contracting officer, states in part: AWe are pleased to inform you that last week we closed on the purchase of the Miami Free Zone@ (Exhibit 3 at 88). The Board need not here resolve the legal question of Beacon Cyberport=s creation; for purposes of resolving these motions, Beacon Cyberport became the lessor, as so treated by the Government.

10. By facsimile dated November 9, 2000, the contracting officer specifies that Athe parking is a very critical part of our requirement at the Miami Free Zone.@ The letter identifies three issues/ questions to be addressed:

> 1. What is the status of the new construction - how long will we have access to the 400 parking spaces?
>
> 2. If we are not provided with the 400 parking spaces, we will need to relocate employees; therefore, a partial release of space is required. . . .
>
> 3. We require uncontrolled access to our 100 secured parking spaces. Currently we have to pass through U.S. Customs.
>
> Please review for discussion the week of November 13th.

(Exhibit 3 at 92.)

11. Correspondence and discussions between the parties did not result in an amendment to the lease, as the Government sought to ensure that it would have sufficient parking spaces (Exhibit 3 at 100, 115-19, 121, 125).

12. After concluding that the Government is not interested in amending the lease, the lessor informs the Government, in a letter dated March 21, 2001:

> I also wanted to take the opportunity to remind you that as construction begins on the site parking availability will change from time to time. Accordingly, your employees will not have access to four hundred parking spaces on a going forward basis.

(Exhibit 3 at 125.)

Termination for default and its aftermath

13. In a letter dated March 22, 2001, the Government informs the lessor that the lease Ais hereby terminated in accordance with General Clauses (GSA Form 3517B) Paragraph 16 >Default by Lessor During the Term=.@ The letter also states:

> The lease states that we will have 400 onsite parking spaces, as available (100 secured for Government vehicles). We had requested additional secured parking spaces in our letter dated September 9, 2000, to Miami Free Zone (Lessor). It was at that time we were notified not only could they not provide additional parking spaces, within 60 days they would commence construction of additional warehouse space and that the only parking spaces that would be available would be the 100 secured spaces.
>
> You had purchased the site shortly after and we had been trying to work out a solution that would be suitable to both parties. Your last correspond[a]nce (via e-mail 2/21/01) offered a reduction of 7,715 s.f. of space with 60 parking spaces in front of building and 50 parking spaces in the secured area, at a rental rate that is almost double/s.f. In other words, you proposed to release 3 the amount of space and offered only 3 of the parking spaces and we would pay almost the same rental amount. Your proposed option is not in the best interest of the Government. Parking for 400 vehicles was and still is a critical part of our requirements.
>
> If you cannot provide the 400 onsite parking spaces as indicated on the lease, you are, therefore, considered to be in default. We will, therefore, be vacating the leased space by May 15, 2001, and the lease will be terminated effective that date.

(Exhibit 4 at 126.) The letter does not provide notice of the lessor=s appeal rights (Exhibit 4 at 126).

14. By letter dated April 19, 2001, to the Government, the lessor (through its attorney) states that it is unclear from the letter of March 22, 2001, if the lease is or will be terminated for default. The letter continues:

> In any event, there is no legal basis for the USDA=s termination of the lease, whether it be effective as of the date of your March 22, 2001 letter or as of May 15, 2001, the date you advise that the USDA will be vacating the premises. The Landlord presently is in compliance with all terms of the lease, including the lease provision relating to parking. Moreover, Landlord=s plans for continued development of the Beacon Cyberport will not affect its ability to comply with the parking availability requirement in the Lease. Notwithstanding [the managing director=s] March 21, 2001 letter, Landlord will continue to provide to the USDA onsite parking for 400 vehicles as available, 100 of which will be secured for government vehicles.
>
> Accordingly, your March 22, 2001 letter is ineffective to terminate the Lease and the Landlord expects that the USDA will continue to honor all obligations hereunder.

(Exhibit 4 at 127-28, 160-61.)

15. By letter dated May 4, 2001, to the Government, the lessor (through its attorney) seeks a response to its letter of April 19. The letter specifies that the lessor Awas not presently in default under any term of the lease and that no future plans for development at the Beacon Cyberport would affect Landlord=s obligations@ (Exhibit 4 at 129-30).

16. In a letter to the Government dated May 9, 2001, among other items raised, the lessor notes that it accepts the Government tender of possession of the property (i.e., the Government has vacated the premises, such that they are returned to the lessor), Awithout waiver of any rights or remedies under the lease, including but not limited to its right to continue to collect monthly rent during the term of the lease@ (Exhibit 4 at 131-32).

17. A letter dated May 24, 2001, is the lessor=s certified claim to the contracting officer, seeking to recover $11,387.55 for unpaid rent for the month of May 2001; $958,167.17 for lost rent payments for the remainder of the term of the lease (through November 30, 2004); interest under the Contract Disputes Act of 1978 (41 U.S.C. ' ' 601-613, as amended (CDA)), 41 U.S.C. ' 611; and all costs as may be recovered under applicable law (Exhibit 4 at 133-61). By letter dated July 23, 2001, the contracting officer denies the claim; the decision provides the lessor with notice of its appeal rights (Exhibit 4 at 163-65).

18. On October 3, 2001, the Board received the notice of appeal, in which the lessor disputes the validity of the termination for default and seeks to recover damages for the Government=s actions.

Lessor=s affidavit

19. The affidavit of an individual, who assumed day-to-day oversight of operations at the sight for the lessor, after the formation of the lease, contains the following. Omitted are three concluding paragraphs (regarding relief and damages) and introductory paragraphs. The lessor continues to insist upon recovery for a rental period through November 30, 2004, without a recognition or discussion of the lease provision which permits the Government to terminate the lease at any time on or after November 30, 2003, with 180 days notice (Finding of Fact (FF) 1):

> 4. On October 18, 2000, Beacon Cyberport acquired the Property from MFZ [Miami Free Zone Corporation]. In connection with the acquisition of the Property, MFZ assigned to Beacon Cyberport all rights, title, claims and interest it claimed in the subject Lease with the Government.
>
> 5. At all times material hereto, from October 18, 2000, the date on which Beacon Cyberport acquired the Property, through and including May 15, 2001, when the Government abandoned the Property and ceased paying rent, Beacon Cyberport was in full compliance with the terms and conditions of the Lease, including the provision therein requiring Aonsite parking for 400 vehicles as available (100 secured for Government vehicles).@ In fact, at all times material hereto, the Property had general parking for more than 1,050 vehicles, in addition to parking in its secured area.

6. At all times material hereto, the Government had access to more than 400 parking spaces in the general, unsecured lot and, in fact, often took in excess of 170 spaces in the secured parking lot, even though the Lease only provided for 100 secured spaces.

7. Following Beacon Cyberport=s acquisition of the Property in October 2000, I participated in discussions with representatives of the Government, including [the contracting officer], with respect to the potential impact that Beacon Cyberport=s plans for development of the Property might have on the availability of parking. As I explained to [the contracting officer], although construction would impact the total number of parking spaces available, during and after construction, Beacon Cyberport=s planned development was not going to affect its ability to comply with the Lease provision relating to parking.

8. In the course of these discussions, the Government began to demand that it be guaranteed parking spaces for 400 vehicles and went as far as to demand that it be specifically assigned parking spaces in the secured area. On November 3, 2000, I received a telefax from [the contracting officer] reiterating the Government=s insistence that it be given 400 parking spaces. [The contracting officer] stated that, if the Government was provided with 400 parking spaces, it would request a partial release of a portion of its leased premises.

9. In response to the Government=s demands for guaranteed parking for 400 vehicles, I repeatedly made clear to the Government that such demands exceeded the terms of the Lease. On behalf of Beacon Cyberport, however, I advised that Beacon Cyberport would continue to meet its obligation to provide Aonsite parking for 400 vehicles, as available,@ as stated in the Lease.

10. Beginning in or about late November 2000, [the] Deputy Director, USDA, APHIS Regulatory, and [the contracting officer] initiated negotiations with Beacon Cyberport seeking an amendment to the Lease, the effect of which would be to reduce the total square footage leased and occupied by the USDA. In an effort to accommodate the Government, Beacon Cyberport tendered a number of different proposals for amendments to the Lease. On December 8, 2002 [sic], I forwarded to [the contracting officer], a proposed Lease amendment that was consistent with the Government=s request to reduce its total space.

11. Over the next several months, I spoke and corresponded regularly with [the Deputy Director and the contracting officer] to determine if we could reach an agreement on a lease amendment that would meet the needs of Beacon Cyberport and the Government. During this time frame, [the Deputy Director] explained that the USDA was involved in a series of lawsuits relating to the citrus canker eradication program in which the Government was involved and for which the

Government had leased the Leased Premises. [The Deputy Director] further explained that as a result of the lawsuits, Government workers involved with the citrus canker project, who were working out of the Government=s offices at Property, were being furloughed.

12. Unable to reach an agreement on the terms of a proposed Amendment to the Lease, on March 21, 2002, I sent a letter to [the contracting officer] advising that the original Lease would remain in full force and effect. To address the Government=s repeated and unjustified demands for guaranteed parking and assigned spaces, I further advised that, due to contemplated construction on the Property, parking availability would change from time to time and Ayour employees will not have access to four hundred parking spaces on a going forward basis.@ (AF. 125). The purpose of this statement was to make clear to the Government that it would not be guaranteed 400 parking spaces or be given the assigned parking spaces, as had been demanded. While Beacon Cyberport would not agree to the Government=s demands that were inconsistent with the obligations under the Lease, it was Beacon Cyberport=s intent at all times to continue to abide by its obligation to provide Aonsite parking for 400 vehicles as available (100 secured for Government Vehicles).@

13. On March 22, 2001, I received a letter from [the contracting officer], which appeared to be some type of notice for an alleged default and/or termination of the Lease. I immediately referred the matter to Beacon Cyberport=s outside counsel.

14. By letter of April 19, 2001, within thirty (30) days of my receipt of [the contracting officer]=s March 22, 2001 letter, Beacon Cyberport, through its counsel, responded to the March 22, 2001 letter. In this letter, Beacon Cyberport provided assurances to the Government that it would comply with the Lease requirement with respect to parking availability.

15. I received no further communications from [the contracting officer] on this subject. In the absence of any further response, I considered the matter to have been fully addressed to the parties= satisfaction.

16. In April 2001, I was advised by [the Deputy Director] that the furloughed workers were being terminated permanently. However, neither [the Deputy Director] nor [the contracting officer] contacted my office to further discuss a possible Lease amendment. The Government continued to occupy and use the Leased Premises as it had done prior to its March 22, 2001 notice.

17. I first became aware that the Government intended to terminate the Lease and vacate the Leased Premises notwithstanding Beacon Cyberport=s clear and unequivocal assurances with respect to the parking spaces, on or about May 9, 2001, when the Government tendered, albeit belatedly, payment of one-half of the monthly rent due for the month of May 2001. The check for payment reflected that it was to

> cover a period from April through May 15, 2001. Government representatives then contacted Beacon Cyberport advising that it would be surrendering possession of the Lease Premises on May 15, 2001.
>
> 18. Without waiver of any rights or remedies under the Lease, Beacon Cyberport accepted the Government=s surrender of possession of the premises and further declared the Government to be in default under the terms of the Lease by, among other things, improperly terminating the Lease and failing to pay all rent and other Lease charges when due.

DISCUSSION

The Government has filed a motion which seeks dismissal for lack of jurisdiction and for summary judgment. The lessor has filed a reply in opposition and a cross-motion for summary judgment. I provide my analysis and conclusions, followed by a discussion of some of the errors of the majority.

Jurisdiction

In seeking dismissal for lack of jurisdiction, the Government maintains that the appeal is untimely, because it was filed more than 90 days after the lessor=s receipt of the notice of termination for default.

The CDA specifies, in pertinent part:

> All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. . . . The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this Act.

41 U.S.C. ' 605(a) (2000).

The termination for default represents a Government claim. The letter dated March 22, 2001, states that the lease is hereby terminated for default. The letter also provides the effective date of the termination for default. The letter does not provide the lessor with notice of its appeal rights under the CDA. Because the letter lacks the explanation of appeal rights, the appeal period does not commence with the lessor=s receipt of the letter.

The termination for default is not invalidated by the lack of appeal rights; however, the 90-day period within which to file an appeal at this Board does not begin to run with the lessor=s receipt of the letter. Cf. State of Fla., Dept. of Ins. v. United States, 81 F.3d 1093 (Fed. Cir. 1996) (failure to provide notice of appeal rights does not nullify termination for default, but is harmless error

permitting suit to continue, given actual knowledge of rights and election of a forum). Accordingly, I concur with the majority that the Board has jurisdiction over this appeal.

Merits

The constraints placed upon a forum when resolving a motion for summary judgment are well known and often stated. All of the nonmovant=s evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant=s favor. A forum may grant a motion for summary judgment when no genuine issue of material fact remains and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, 477 U.S. 242, 247-48, 255 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Am-Pro Protective Agency, Inc. v. United States, 281 F. 3d 1234,1241 (Fed. Cir. 2002) (AOrdinarily, such an [utterly uncorroborated] affidavit would probably meet the evidentiary standard needed to avoid summary judgment. Indeed, if this were a typical summary judgment issue, one that did not involve a strong presumption in favor of a particular party, the presence of [the] affidavit and the CO=s sworn denials would create a traditional >swearing contest= and thus be inappropriate for summary disposition.@)

Because not every fact in a case is material to its resolution, statements made in an affidavit (which raise different versions of events) may create a Aswearing contest@ which need not resolved. The undisputed facts may compel a legal conclusion, regardless of the resolution of the disputed, non-material facts. Statements made in an affidavit may be so at odds with the written record that a reasonable fact finder would never give credence to the statements. Further, in responding to a motion for summary judgment, the non-moving party may fail to address the critical issues, such that it is only speculation outside of the record which creates a disputed material fact.

The motions before the Board seek an interpretation of the terms of the lease and a ruling on the propriety or not of the termination for default. I find it unnecessary here to reach the other issues raised by the Government, namely whether the Government is entitled to relief because the lessor made material representations during the formation of the lease (that is, the Government notes that in advertising its requirements and in conducting discussions it expressed its need for parking spaces; the Government contends that if the lessor intended that the phrase Aas available@ be inserted to permit the lessor to not satisfy the Government requirements during construction anticipated by the lessor, the lessor actively misled the Government so as to relieve the Government from liability under the lease).

Interpretation of the lease

The interpretation of the lease, to determine the obligations of the parties, is a legal question. No further evidence is required. Particularly in light of the language of the lease, which specifies that the lease constitutes an integrated agreement, neither party has suggested that the factual record needs to be expanded before the Board can resolve the question of interpretation. The evidentiary record has closed regarding the issue of lease interpretation. The lessor maintains that the contract did not provide the Government with a guarantee of 400 parking spaces; rather, the contract provided for spaces as available. (Memorandum of telephone conference held on August 16, 2002.)

The Board must determine the lessor=s obligations pertaining to parking spaces. The lease specifies that the lessor is to provide A[o]nsite parking for 400 vehicles as available (100 Secured for Government Vehicles)@ (FF 2). This requires the lessor to provide parking spaces. If parking spaces are not available, the lessor would be in breach of the terms and conditions of the lease.

The express provision describing the lessor=s obligations regarding parking spaces cannot be ignored. Although every space need not be reserved, and parking spaces need not be specifically designated for use only by occupants or visitors to the leased premises, parking spaces are to exist in conjunction with the leased space. The phrase Aas available@ permits the lessor flexibility in providing parking spaces; it does not entitle the lessor to make no parking spaces available. The lessor insists or suggests that it is not obligated to make any spaces available (FF 6, 8, 12). If one interprets Aas available@ to permit the lessor to make zero or fewer than 400 parking spaces available, then the express contract provision regarding parking spaces has no meaning. By example, that interpretation would permit the lessor to eliminate all available parking spaces, or arrange a paid parking area requiring a fee for each vehicle parked, leaving the Government with no parking on-site, or parking available only at an additional price. Such an interpretation, which renders meaningless the terms describing parking space obligations, is not reasonable and does not prevail.

The lessor=s failure to provide parking spaces during the term of the lease would constitute a breach of the express, material provisions. The lessor was contemplating construction on the site. The lessor notified the Government that with construction to be on-going, the lessor could not guarantee that the parking spaces would be available.

The termination for default

Between September 19, 2000, and March 21, 2001, the Government indicated its requirement to have sufficient parking spaces, as it discussed possible lease amendments with the lessor. By letter dated March 21, 2001, the lessor concluded that a lease amendment was not forthcoming. It notified the Government that as construction begins at the site, access to 400 parking spaces will not exist. The lessor did not propose a means of satisfying its obligations under the lease; rather, it propounded an interpretation of the lease which was inconsistent with its obligations. From this, the Government concluded that the lessor did not intend to fulfill its obligations under the lease. The Government=s need for parking spaces continued to exist. The failure to provide spaces would constitute a material breach of the contract. The Government notified the lessor that the lease was terminated for default, with an effective date in the future, by which time the Government would have vacated the premises (FF 13).

The Government=s actions fully are in accordance with the terms and conditions of the lease. The lessor was obligated to make available parking spaces over the term of the lease. By letter dated March 21, 2001, the lessor informed the Government that such spaces would not be available during construction. This stated intent, which was more than illusory (given the construction proposed for the site), constituted a positive, definite, unconditional, and unequivocal manifestation of intent not to render the promised performance. This was an anticipatory repudiation by the lessor. Cascade

Pacific International v. United States, 773 F.2d 287, 293 (Fed. Cir. 1995); Danzig v. AEC Corp., 224 F.3d 1333, 1338 (Fed. Cir. 2000). The repudiation by the lessor permitted the Government to make plans and move out of the facility to ensure that it would obtain premises with suitable parking its requirements as dictated in the lease. Contrary to the assertions of the lessor, the lease does not require the Government to provide notice of a proposed termination for default and opportunity to cure, when the cause of the default is the anticipatory repudiation of the terms and conditions of the lease.

The lessor=s letter of April 19, 2001, does not affect the sufficiency or supportability of the Government decision to terminate for default the lease. Although the letter purports to promise compliance with the lease terms, it recognizes that the letter of March 21 conveyed the opposite. The Government took appropriate action based upon the repudiation by the lessor. The attempts by the lessor in April and May to ensure that it would abide by the Government=s interpretation of the lease came too late.

In summary, the lease required the lessor to make at least 400 parking spaces available. The lessor stated that the spaces would not be available during upcoming construction. This constituted a repudiation. The Government acted in accordance with the terms of the lease. I uphold the termination for default and deny the claim of the lessor for damages, which is premised upon a Government impropriety in vacating the premises and ending the lease.

The majority

The majority gets mired in irrelevancies and attributes to the affidavit what is not stated or reasonably inferred. The affidavit does not create a disputed material fact. The lease dictates the obligations of the parties. The affidavit does not state what the majority surmises or conjectures. The affidavit cannot alter the language of the lessor=s letter of March 21, 2001. It is the language of that letter and the reasonableness or not of the contracting officer=s action that are here at issue. The lessor=s subsequent letter of April 19, 2001, confirms the interpretation adopted by the contracting officer, as the lessor states, ANotwithstanding [the managing director=s] March 21, 2001 letter, Landlord will continue to provide to the USDA onsite parking for 400 vehicles as available, 100 of which will be secured for government vehicles.@ The affidavit expresses a purpose or intent behind the statement in the letter of March 21, 2001:

> The purpose of this statement was to make clear to the Government that it would not be guaranteed 400 parking spaces or be given the assigned parking spaces, as had been demanded. While Beacon Cyberport would not agree to the Government=s demands that were inconsistent with the obligations under the Lease, it was Beacon Cyberport=s intent at all times to continue to abide by its obligation to provide Aonsite parking for 400 vehicles as available (100 secured for Government vehicles).@

(Affidavit at 4 (& 12).) The intent, which is at odds with the express language of the letter, was not available to the contracting officer at the time of termination, and therefore is not here relevant. For purposes of resolving the pending motions, I assume that the lessor could have fully complied with

the terms and conditions of the lease; however, the explicit language in the letter of March 21, submitted by the lessor, was that the lessor would not be fulfilling its obligations. This justifies the termination for default. The contracting officer was not required to second guess the express statements of the lessor.

The affidavit does not state what the majority seems to infer, namely that the lessor stated that it would comply with the Government=s interpretation of the lease. I conclude that no reasonable fact finder, viewing the record objectively, would conclude that a material fact is in dispute. What the affidavit cannot and does not attempt to do is alter the langauge of the letter of March 21, which states that, with construction to begin, employees will not have access to 400 parking spaces. It is not relevant that at all times prior and subsequent to the letter the lessor complied with the proper interpretation of the lease. In the letter the lessor unequivocally stated that it would not be fulfilling its obligations after construction begins.

The majority removes the contracting actions from real time, as it attempts to focus on the reasonableness or not of the contracting officer=s actions, based upon information not available to the contracting officer. In my view, as stated in dissent in a decision which is not final, the function of the Board is not to so treat a termination for default action : AWhat the majority proposes, places the contracting officer in an untenable position: despite a need for space and numerous requests for assurances, as well as contractual deadlines, the contracting officer must make the correct decision based upon information not provided or available at the time of default.@ Omni Development Corp., AGBCA Nos. 97-203-1, 98-182-1, 01-2 BCA & 31,487 at 155,465. This contracting officer received a letter explicitly stating that parking spaces will not necessarily be available after construction begins. Parking spaces represented a material requirement of the lease. In issuing the termination for default, the contracting officer acted prudently and within the terms of the lease, so as not to place the Government in the position of having leased premises without available parking spaces.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
November 22, 2002