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| **OMNI DEVELOPMENT CORPORATION,** | ) | **AGBCA Nos. 97-203-1** |
| | ) | **98-182-1** |
| Appellant | ) | |
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| **Representing the Appellant:** | ) | |
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**RULING ON MOTIONS FOR SUMMARY JUDGMENT**

**June 29, 2001**

**Before HOURY, POLLACK, and VERGILIO (presiding), Administrative Judges.**

**Opinion for the Board by Administrative Judge POLLACK, Separate Dissenting Opinion by Administrative Judge VERGILIO.**

These appeals arise out of contract and Lease No. 57-84M8-7-0002, between Omni Development Corporation (Omni or Appellant) of Spanish Fork, Utah and the U. S. Department of Agriculture, Forest Service (FS), Fishlake National Forest, Richfield, Utah. Omni was to lease two distinct spaces to the FS. The FS terminated one of the leases for default. On September 10, 1997, the Board received Omni's timely notice of appeal of the default termination. The Board docketed the appeal as AGBCA No. 97-203-1.

Thereafter, on July 10, 1998, the Board received a separate notice of appeal from the Appellant wherein Omni disputed the Contracting Officer's (CO's) denial of Omni's claim for $2,203,767.25. That claim is for expenses and lost profits that Omni says resulted from the termination. This second appeal was docketed as AGBCA No. 98-182-1.

The Board has jurisdiction over these timely-filed appeals pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended. The FS contends that the termination for default was proper and has filed a motion for summary judgment, with supporting memorandum. Appellant has filed an opposition to the motion as well as its own cross-motion for summary judgment, with supporting memorandum. The parties thereafter provided additional submissions and legal argument.

## FINDINGS OF FACT

1. The FS issued a solicitation for offers (SFO) to lease space for (1) a fire center and (2) a main office building (supervisor's office) to house a forest supervisor and other federal agencies. (Appeal File (AF) 63). The Government reserved the right to award separate leases for each of the two distinct spaces (AF 55).

2. The solicitation contained an SFO Table of Contents that was broken down into subsections 1 through 9, as well as some additional unnumbered pages. Subsection 1, Summary and Overview contained Paragraphs 1.1 through 1.9. These were designated amount and type of space; location; lease term/termination; offer due date; occupancy date; how to offer; negotiations; price evaluation (present value), and award. Subsection 2 was identified as award factors. Subsection 3 was Miscellaneous and Subsections 4 and 5 dealt with architectural. Subsections 6 through 9 were essentially technical specifications. (AF 59-110.) At Subsection 1, Summary and Overview, Paragraph 1.5, titled Occupancy Date, the solicitation specified that the space was required to be ready for occupancy by November 1, 1996, but also stated that the Government reserved the right to negotiate the possession date with any offeror (AF 63).

**Summary and Overview**

3. At Paragraph 1.9, titled Award, the solicitation provided as follows:

> Within 15 calendar days after award, the successful offeror/lessor shall provide to the CO [contracting officer] evidence of:
>
> > (a) A firm commitment of funds in an amount sufficient to perform the work required under this leasehold agreement. . . .

(AF 67.)

4. At Paragraph 3.9, titled Construction Schedule (under Miscellaneous) the solicitation provided that the successful offeror would be required to submit a tentative construction schedule with dates for completion of construction phases within 15 days, and a finalized construction schedule "no later than 30 days after award." (AF 69.)

5. A separate section, titled General Clauses, contained at Paragraph 11, Default in Delivery -- Time Extensions (June 1994) clause, 48 CFR 552.270-28, states in pertinent part:

> (a) With respect to Lessor's obligation to deliver the premises substantially complete by the delivery date (as such date may be modified pursuant to this lease), time is of the essence. If the Lessor fails to prosecute the work with the diligence that will insure its substantial completion by the delivery date or fails to substantially complete the work by such date, the Government may by notice to the Lessor terminate this lease, which termination shall be effective when received by Lessor. . . . .
>
> (c) Notwithstanding paragraph (a) of this clause, this lease shall not be terminated under this clause nor the Lessor charged with damages under this clause, if (1) the delay in substantially completing the work arises from excusable delays and (2) the Lessor within 10 days from the beginning of any such delay (unless extended in writing by the Contracting Officer) provides notice to the Contracting Officer of the causes of delay.

(AF 125-26.)

5. The General Clauses section also contained at Paragraph 37, a Disputes clause (AF 136), 48 CFR 52.233-1, Disputes (Dec. 1991).

6. By letter dated April 23, 1996, the FS informed Omni that the Government was accepting Omni's offer for both the fire center and main building. The Government said the parties would meet on April 25 and hopefully at that meeting could "finalize the lease, discuss space layout, coordination between the Forest Service, the lessor and the other agencies involved, and time frames." (AF 217.)

7. On May 8, 1996, the contractor and FS held a pre-work meeting (AF 296-99). During the period of May 8, 1996 through June 6, 1996, the Government made changes in the floor plan (AF 236). At a meeting of June 6, 1996, the Appellant discussed a plan he had to change the location of the building to an alternative site nearby, owned by the city of Richfield. At that time, Appellant said he would submit a formal request to change the location of the building, if the city of Richfield approved Omni's plan to construct there. (AF 291-92.) This alternative location was ultimately (as of August 1996) agreed to by the city as the site for the building (Quayle Affidavit (Aff.) 30).

8. In July 1996, Appellant submitted a set of drawings for the office building for FS review (AF 287). The Regional Architect for the FS reviewed the drawings and recorded his comments (AF 287-89). The architect recognized that the drawings were far from finished and therefore limited his review to Uniform Building Code, Disabilities Act Access and general architectural comments (AF 287-89).

9. In September 1996, an FS official told Appellant that he understood that the Bureau of Land Management (BLM) was looking for space and believed that co-locating BLM with the FS would serve both agencies. He encouraged Appellant to submit a proposal to BLM, calling for BLM to lease space in the building. Omni submitted a proposal on the BLM solicitation on October 21, 1996. During the time BLM was evaluating Omni's proposal, Omni could not prepare a final set of construction plans or move forward on its loan application with its lender, Bank One, on the office building project. Incorporating BLM into the project involved a new set of plans and prevented completion of the appraisal. That served to delay work on the office building until January 1997. During the period that Omni's proposal was under review by BLM, Omni had several conversations with the FS. The FS acknowledged that the BLM matter was inhibiting Omni's ability to proceed with finalizing building plans, obtaining a building permit and securing financing. At that time, the FS requested that Omni proceed with construction of the fire center, ahead of the office building, as the FS needed the fire center by June 1, 1997. The FS indicated that the occupancy date of the office building, although important, was not as critical; and the building could wait on BLM's decision as to co-locating. (Quayle Aff. 33-34, 38-39, 41-42, 44, 46, 49.)

10. In late October 1996, the City of Richfield granted Omni permission to enter the property and start preparing the site for construction of an office building. Omni did some staking and had a loader grade and level the ground and spread and compact some fill. (Quayle Aff. 37.) Also, by January of 1997, construction was underway on the Interagency Fire Center (Quayle Aff. 48).

11. By letter dated January 15, 1997, Omni was informed that the BLM was no longer interested in leasing space with Omni. Thereafter, Omni continued to pursue fulfilling its obligations under the contract here in dispute. (Quayle Aff. 49, 51.)

12. On or about January 21, 1997, Appellant received a letter from the FS regarding proposed changes to the building plan of the office building. The letter stated that work was progressing on the fire center with an expected finish in April 1997, and that occupancy of the new office building will likely not occur until August 1997. (Quayle Aff. 50, (Exhibit (Ex.) O.)

13. The daily diary narrative of the FS for February 6, 1997, shows that the FS asked Omni about "the holdup on the office building." (AF 276.) Omni responded that they had to have a commercial appraisal completed before they could finalize. Omni indicated that it expected that funding would be in place by next week and work would start soon (AF 276). Concerns and interchange continued through February between the FS and Appellant. On February 10, Bob Quayle of Omni was at the site to take pictures, which Omni indicated were needed to help get the final financial hurdle crossed in order to start construction of the office building. (AF 273.)

14. By letter dated March 3, 1997, the CO wrote to the Appellant:

> Over the last two weeks, I have received a couple of calls from your bank regarding the financing on the Richfield office [that is, the main office portion of the lease]. Since I awarded that lease to you on April 23, 1996 and not much progress has been

> made on the larger structure covered by this lease, I'm establishing some time frames for information to be submitted that will assure us that this building will be built in the near future.
>
> By March 14, 1997, please provide me with firm, financing papers from your bank. By March 24, 1997, please provide me with a set of final drawings. I need to do some space calculations and can not do that until I have a set of drawings reflecting all the changes. By March 24, 1997 I also need a progress schedule for the actual construction of the larger complex.

(AF 215.)

15. On March 13, 1997, Bank One (Omni's anticipated lender) wrote to Appellant that it desired to structure on behalf of Omni, a credit facility, the terms of which it summarized in the letter. This indicated Bank One's willingness to review an application for financing. The letter stated that it was not a formal commitment for financing nor an offer to enter into an agreement. The letter did state however, "but it does indicate our willingness to structure such a facility in reliance upon the information you provided us." The letter continued that a requirement for continuing the loan approval process was a deposit of sufficient funds to assure completion of the project. (AF 214.)

16. In March 1997, Omni's loan application with Bank One began to stall, due to changes within Bank One. However, Omni continued to pursue financing from several sources. (Quayle Aff. 58-60, 63, 65, 69, 72.) At that time, Omni began discussions with John C. Pitcher of Equitable Life and Casualty about securing a loan. Omni did this because it was having time concerns as to Bank One. Also Equitable had a more favorable rate. Mr. Pitcher had told Omni that Equitable preferred financing the construction of Government leased buildings and could process the application from start to finish in 30 days. On March 27, 1997, Omni submitted the application to Equitable. (Quayle Aff. 60.)

17. On March 27, 1997, Appellant met with the CO. They discussed financing of the main office building. Omni stated that its loan application could be processed within 30 days. (Quayle Aff. 61.) On March 28, 1997, the CO noted a discussion was held about termination for default and the FS decided to give Appellant 30 more days to provide proof of financing (AF 261).

18. In a letter, dated March 31, 1997, the CO advised some other agencies that were going to occupy the main office along with the FS, that since awarding the lease, the lessor had run into problems with the original site, zoning on the new site, and finalizing financing. Further,

> The lessor has requested time to pursue an alternative source of financing and I have allowed him until April 30th to get his financing settled. At that point in time, the agencies will have to decide their next step. The reason I have been so lenient with the lessor, is his price per square foot is low and I don't think we will see that again if we have to start the process over.

(AF 207.)

19. The CO informed Omni by letter dated March 31, 1997:

> I relayed to the Fishlake National Forest your most recent proposal to pursue a parallel line of financing through an insurance company. I explained that within 30 days you would have either the financing and could start construction or you would know for certain that financing was not available. It is agreeable to allow you this 30 days; however, I will need a letter of intention from your insurance company by this Friday, April 4th. In this letter I would like to see their proposal outlined with firm dates for their final decision.
>
> If neither line of financing can be confirmed in 30 days (by April 30th), the government agencies will then have to decide whether or not we want to continue with this lease for the larger structure or whether we will start over in seeking leased space.

(AF 206; Quayle Aff. 62.)

20. On April 7, 1997, Mr. Pitcher of Equitable wrote to the CO and advised her that Equitable had reviewed information supplied by Omni and had its appraiser review the earlier summary appraisal report. The letter continued, "In general, please understand that we have funded BLM and Forest Service leased buildings. This type of financing is our number one preferred style of mortgage lending. Though we don't have an appraisal or loan application to permit us to really get into this deal, we have every expectation of funding a combination construction-permanent loan for the borrower subject to the finalized lease which we understand should be completed on the 25th of this month." (AF 205.)

21. As of the middle of April 1997, Omni did not have financing nor had it provided any proof of financing to the FS. Nevertheless, the FS prepared a formal lease with a date of April 14, 1997. The properties leased by Omni to the Government were (a) the fire center and (b) the main office. The contract (lease agreement) included the solicitation terms and provisions, including specified General Services Administration (GSA) forms which were part of the solicitation. Among the terms and provisions in the GSA forms were the specifications set forth in (Findings of Fact (FF) 2-3). The lease was for a 10-year firm term, subject to renewal and termination during the renewal period. The lease stated that the tentative occupancy date for the main office was December 31, 1997 (AF 49, 50). The lease, however, was not executed at that time (AF 238).

22. On April 18, Ms. Deborah Hinricks took over as the Leasing Contracting Officer from the prior CO, Ms. Lippire (AF 14).

23. On April 18, 1997, Bank One contacted the FS and requested a signed lease in order to process the financing for the office building project (AF 258). The FS prepared the lease as it was also required for the occupancy of the fire center (AF 264). The fire center was near completion at

that time and a final inspection which generated a punch list was conducted on March 24, 1997 (AF 209, 253, 260, 263).

24. On April 25, 1997, a meeting was held during which the lease SF-2 for both office spaces was signed. FS notes state that Appellant expected to close his construction loan on May 2, 1997, leased on receiving the signed SF-2 and that Appellant would submit a construction schedule by May 5. The occupancy date for the fire center was changed to May 1. (AF 255.) The lease differed from terms listed in the award letter of April 23, 1996. It had a different party name, different address and set a tentative completion date of December 31, 1997, rather than November 1, 1996 (as set forth in SFO) (AF 49-50, 63, 217, 255). At the time the lease was signed, the lessor did not own the land on which the main office building was to be constructed, the building plans were not yet approved, and the lessor lacked a firm commitment for financing. There is no correspondence or evidence indicating that at the time the parties signed the lease, the FS had put forth or placed any particular conditions or time frames on these matters. In later correspondence, the CO's cure notice of June 6, 1997, the CO references that a request for financing was made at a meeting of April 25, 1997. (AF 38-39.)

25. In a meeting of May 9, 1997, the Government asked Appellant about the construction schedule and financing (AF 200-03; Quayle Aff. 80). The CO extended some of the earlier due dates which had been set out in correspondence and required Appellant to submit a construction schedule by May 12 and to submit progress reports every 14 days. (AF 200-01.) The FS discussed the option of assessing actual damages based on increased costs as it negotiates its succeeding lease with the current lessor and also noted the option of terminating for default if the building does not proceed soon (AF 200). The FS stated that it needed documentation of the loan "as soon as possible. . . by the 19th at the latest" (AF 203). At this meeting, Omni had delivered two sets of engineer approved "final" building plans. The parties discussed the acquisition of the building permit and Omni agreed it would submit the plans to the County Building Department after the FS had completed one final review. (Quayle Aff. 80.) Omni's plans were reviewed by the FS architect and he requested relatively simple changes. Further, the architect indicated he did not need to see the plans again, as long as the county said it met code, and it was acceptable for Omni to redline the new changes into the plan (AF 200, 246-47; Quayle Aff. 82; Moffett Aff. 8.)

26. On May 12, 1997, Omni faxed the FS a copy of its construction schedule. The schedule included 30 days for unforseen delays and was based on the assumption that Omni would not use any acceleration techniques. (Quayle Aff. 81.) Another meeting was held on May 19, 1997. The parties discussed the financing. According to the FS, Omni stated that it was unsure of where it was with financing. According to the FS notes, Mr. Pitcher had told the CO that Omni needed to submit its appraisal and it would take about 2 weeks after that to get the loan approved. Omni said that Mr. Pitcher had an appraisal that Omni submitted but Mr. Pitcher was indicating he needed more information and needed to deal directly with the appraiser. The appraisal provided to Mr. Pitcher was dated February 6, 1997. (AF 193.) On May 19, 1997, the parties discussed the construction plans. The FS architect, who participated by telephone, stated that the FS would not need to review the plans again, as long as the plans were approved by the county. The changes he requested were relatively simple and it was Omni's understanding that redlining these changes onto the existing

plans to finalize them was acceptable to the FS. After the necessary changes were redlined onto the final plans, Omni submitted the building plans to the city for one final review in late May. (Quayle Aff. 82.)

27. On May 20, 1997, Zion Bank contacted the FS asking that payments on the fire center be assigned to them because Appellant had applied for financing to build the office building (AF 243). On May 27, 1997, the Administrative CO (ACO) spoke with Zion Bank and a bank official confirmed that Appellant was applying for financing with that bank and that Zion expected to complete the approval process in about 3 weeks. The Zion official was talking with the appraiser that morning regarding the appraised value of the property. (AF 240.) Also on May 27, the ACO also discussed Omni's other pending loan application with Mr. Pitcher of Equitable. The ACO was told that Omni's appraiser had still not provided the material necessary for Equitable to go forward with the loan approval. She was told that after the information was received, the loan approval would take at least 2 weeks. (AF 233.)

28. On May 29, 1997, Appellant was notified by telephone that the FS intended to terminate the supervisor's office portion of the lease by default because of failure to obtain financing (AF 240). Appellant asked the CO to discuss the pending loan application with Equitable. The CO agreed to a conference call which was scheduled for May 30. No call was received that day (AF 240).

29. Appellant provided the CO with a letter dated May 30, 1997, stating in pertinent part:

> It is my intention to comply with the lease by providing a building by Dec. 31, 1997 and to follow the building schedule as submitted on May 12, 1997 as per your request. In order to do so the building should be started near the first of July 1997.
>
> John Pitcher of Equitable Life and Casualty has given me a date prior to that time for his recording of his loan on the property, thus allowing us to start construction by that date or sooner.

(AF 187.)

30. By letter dated June 6, 1997, the CO issued the letter that triggered the termination and set certain time frames in the cure language (AF 38-39). The letter also responded to Appellant's May 30, 1997 letter, where Appellant expressed its intention to proceed with the supervisor's portion of the lease "in accordance with" Appellant's building schedule of May 12, 1997. The CO pointed out that based on Omni's schedule, Omni was to apply for a building permit within 5 days of review and resolution of plans by the FS and submit completed construction drawings within 10 days of review and resolution of the plans by the FS engineer. The CO pointed out that final resolution was completed during the meeting of May 19, 1997. She then calculated dates for progress milestones in relation to the time schedule he provided. It showed issuance of building permit and completion of construction drawings by May 24. It showed the start of construction and site work by July 5-19; it showed other activities, with the last item, carpet, set for December 2-31, 1997. She then stated:

> As of this date, we have not received the final construction drawings. You have not submitted a firm written commitment for project financing from your lending institution as required by the lease and as requested in our meetings of April 25 and again May 9, nor have you submitted any evidence that you have applied for, or obtained a building permit.
>
> Your lack of progress has created serious concerns about whether you have the capacity to proceed, and are able to provide, a finished, professional office building by December 31, 1997. In your letter of May 30, 1997, you stated you would do as the lease required; however, you have already fallen behind on your schedule.
>
> . . . .
>
> This letter will serve as written notification that the Government considers your failure to submit final drawings, a firm written commitment for the financing of this project from your lending institution, and evidence of the issuance of a building permit from the City of Richfield as conditions that are endangering performance of the Supervisor's Office portion of the lease. Therefore, unless I have verifiable documentation in hand that these conditions are cured no later than 2:00 PM, on the tenth day after your receipt of this letter, the Government will terminate a portion of this lease for default under the terms and conditions of the GSAR 552.270-28, Default in Delivery - Time Extensions (June 1994) clause of the lease.
>
> In addition, should you be able to cure the condition cited above and fail to meet any of your construction milestone dates, it would be questionable as to your ability to complete the office by December 31, 1997. Therefore, this is your notice that should you fail to meet any of the completion dates established in your construction schedule as summarized above, I may terminate this contract for default without further notice.

(AF 38-39.)

31. The FS sent the cure letter on Friday, June 6, by Federal Express, with Saturday delivery requested (AF 40). The letter was not delivered to the lessor or one of its agents; rather, it was delivered on Saturday, June 7, to an individual at a business co-located in a building complex with the same address (AF 35; Quayle Aff. 88). On June 9 or 10, the Government was aware that the lessor was of the view that it had not yet received the notice (AF 185; Quayle Aff. 87). On June 10, 1997, a copy of the notice was faxed to Appellant (AF 41). The Appellant did not obtain the letter until Tuesday, June 10, 1997 and at that time read it (Quayle Aff 89).

32. On June 10, 1997, the ACO's notes show that she held a telephone conversation with Mr. Pitcher of Equitable regarding the status of the financing on the lease. There was no indication as to who placed the call. According to her notes, Mr. Pitcher said he received approval from Omni's appraiser on June 9, 1997. He continued that he was preparing loan documents for loan committee

approval at the next meeting. He identified the tentative meeting dates as June 12, June 13, and June 16. If approved, Mr. Pitcher said he would be able to issue a firm commitment for financing within 2 to 3 days and the loan would close about 2 weeks after commitment is issued, pending no further holdups. (AF 233.) According to Mr. Pitcher, by this date, he had concluded that Omni's loan application satisfied Equitable's criteria, that he would recommend to the loan committee and based on his past track record it would be approved (Pitcher Aff. 15).

33. On June 17, 1997, the Appellant spoke to the CO from Appellant's counsel's office. Appellant called the CO to discuss the status of Omni's efforts to start construction. Omni told the CO that Omni intended to redline the final changes by the Government onto the building plans (noting they were minor). Omni told her that the final construction drawings were awaiting approval of the county building department and that Omni expected to have a building permit around June 25 or 26. (AF 227, Quayle Aff. 93.) Omni told the ACO that Mr. Pitcher said that Equitable would issue a loan commitment on June 25 (Quayle Aff. 93). On June 17, 1997, Mr. Pitcher had written to Appellant to address the time frame for the loan. In his letter he referenced earlier telling Appellant (the prior week) that the Board was meeting in Florida. He noted that he had completed his writeup and recommendations for the loan and distributed it to the committee members. He continued that the loan committee meeting is scheduled for Friday of this week and assuming the loan is approved, it would likely be Wednesday before he could have the loan commitment for Appellant. As soon as it would be signed and returned by Appellant, Mr. Pitcher would prepare for closing. (AF 183.)

34. On the same day, soon after the above conversation, Appellant's attorney spoke to the CO regarding the cure notice (AF 33-36; Quayle Aff. 94). The attorney followed the June 17 conversation with a letter to the CO, dated June 18, 1997. In that letter, the attorney made a number of points. He stated on the subject of deadlines that the schedule that Appellant had provided to FS the prior month had over 30 days of cushion. He noted that Quayle (Omni), through experience, had been taught that one should always include cushion time for emergencies that can arise. (AF 33.) As to each of the three issues set out by the CO, the attorney stated as follows:

> **Building Permit:** Mr. Quayle has made application for the building permit. The city building inspector is reviewing the plans submitted to be sure that all of the requirements imposed after the previous review have been incorporated. The city expects to have completed their final review before the end of this week. The deadline for obtaining the building permit, after the final approval, would be the first week of July, before construction begins.
>
> **Final Plans:** Mr. Quayle has indicated that a couple of minor changes were agreed to that need to be incorporated in the current set of plans. Those changes have already been made to the working sets of plans in Mr. Quayle's possession. As soon as he receives final city approval, he will have those changes, as well as any other changes mandated by the city, redlined onto your sets of plans. He will have that done before construction begins.

> **Loan Commitment:** The deadline for the loan commitment and documents is the day before construction begins. Mr. Quayle is ready, willing and able to start the construction, as soon as he receives the loan. So far, he has received all of the approvals needed, except for the final approval from the insurance company board, which he expects by early next week. Apparently the board has a meeting in Florida that delayed its ability to act on this matter until they return, the end of this week. Mr. Quayle shares your frustration with the "banking" speed of lenders and is doing everything in his power to move his loan application through the system, as quickly as possible.

35. In addition to the above, the attorney then went through the delays. He stated that factors on the FS side have included government shutdown, shutdown due to budgetary problems and numerous plan changes. He said that his client had indicated to him that there were over a dozen major plan changes in the past year. He noted that some of the changes involved converting open areas to dedicated offices and then going back to more flexible open areas; rearranging areas to accommodate changes in staff; and attempts to avoid personnel conflicts by reassigning which areas of the building would be designated for which workers. Other changes arose because of FS and BLM requests. The attorney acknowledged that additional delays were caused due to the original land owner changing the terms of the sale, challenges as to financing, and personnel changes at the bank. (AF 34-35.) Finally, he addressed the fact that the FS had brought on a new CO and her approach caught Appellant off guard. His letter was faxed to the CO at 11:51 am on June 18. (AF 32-36.)

36. At some point prior to the CO terminating but after the telephone conversation with the attorney on June 17, 1997, an FS note includes a discussion as to whether Omni could complete if not terminated. According to an FS engineer who was consulted by contracting, if the contractor was a well organized professional and stayed on top of things, it would be a challenge but "he's seen buildings this size completed." (App. Ex. 22.) According to Omni, even if it had not closed until July 14, it still had time to complete construction because of extra time built in (Quayle Aff. 110).

37. By letter dated June 18, 1997, which was faxed that afternoon at approximately 3:09 p.m. (and also sent via regular mail) (thus after receipt by the FS of Appellant's counsel's letter of that date), the CO defaulted Omni. As to the attorney's letter, the CO stated no additional information regarding the ability to obtain financing was provided. (Hinricks Aff. 23.) She therefore sent the termination letter. It said in part:

> Reference my June 6, 1997 letter which was delivered on June 7. The ten-day cure notice period expired on June 17 at 2:00 p.m. In our telephone conversation yesterday, June 17 at 1:20 p.m., you stated that you would be unable to furnish final construction drawings, a firm commitment for financing or evidence of the issuance of the building permit for the Supervisor's Office portion of this lease, as required by my cure notice, until sometime during the week of June 23. This timeline is not acceptable according to your own construction schedule. You stated that you would be working on an accelerated schedule but you have provided no evidence to show how you would accomplish the project by December 31, 1997.

> Because you have failed to cure the deficiencies, this is your notification that the Supervisor's Office portion of [the lease] is hereby terminated under Clause GSAR 552.270-28, . . . effective today.

(AF 29-32.) The letter was also delivered by Federal Express on June 19, 1997, and accepted at Appellant's business address. (AF 31.)

38. Appellant has stated that it deemed and understood the termination notice to be void because the 10-day cure period had not elapsed. On June 23, 1997, the Appellant informed the CO that it was still actively arranging for financing and anticipating the commencement of construction in early July. (Quayle Aff. 95-97; Appellant's Memorandum in Opposition to the Government's Motion at 75-76.)

39. On Friday June 20 or Monday June 23, Equitable considered the application and approved construction and a permanent loan (Pitcher Aff. 17). Mr. Pitcher of Equitable said that he could have issued a commitment no later than June 25, had Quayle (Omni) not asked him to suspend work because of the FS termination. He said they could have closed the loan between July 4 and 14. (Pitcher Aff. 12, 20; Quayle Aff. 67, 107.) On June 25, 1997, the building inspector reviewed the plans and the review was faxed to Appellant on June 25, 1997. Corrections were not difficult to make and could have been completed by end of June. At that point all the county building department needed to approve was to recheck to assure all issues were resolved. (Hicks Aff. 13-14; Quayle Aff. 101-02.) The building department would have issued Omni a building permit on the same day that (1) the building department rechecked both set of plans and confirmed that all issues had been resolved, (2) Omni submitted a completed application for a building permit and Omni paid the permit fee (Hicks Aff. 15; Quayle Aff. 101).

40. In a letter dated June 25, 1997, to the Appellant, MIC Corp. confirmed receipt of a signed loan application agreement from Omni, dated June 19, 1997. The letter informed the Appellant that its loan proposal met the basic underwriting criteria and asked Appellant to submit a written commitment and signed lease from the Government to occupy the building upon completion of the facility. According to Omni, it could have secured a loan from MIC by July 3, 1997 (AF 23; Quayle Aff. 84, 91, 95, 98, 100, 109; Ogden Aff. 16.) Omni characterized MIC's letter as a firm commitment to finance their construction (Quayle Aff. 97). Omni stated that the Loan Application Agreement it executed on June 20, 1997, with MIC required Omni to pay a fee of $50,000 in the event that MIC issued a loan commitment within 30 days of execution of the agreement and Omni subsequently failed to complete the loan transaction. Mr. Quayle stated that he agreed to this arrangement on behalf of Omni because he believed the cure notice did not expire until June 20, that the CO's termination decision on June 18 was void, and that MIC could close on a construction loan faster than Equitable. (Quayle Aff. 5.)

41. In a letter dated June 26, 1997, Federal National Finance Corporation committed to permanent financing with an interest rate and other terms to be negotiated at the time the lessor makes formal application. "This commitment to provide permanent funds, is of course, contingent

upon your being the successful bidder on the proposed lease with the U.S. Forest Service. Further, our commitment to lend funds will be subject to a lease with the U.S. Forest Service, providing annual net income sufficient to pay debt service that yields a minimum debt coverage ratio of 1.10 to 1." (AF 24-25.)

42. By letter dated June 27, 1997, the Acting Director of Acquisition Services wrote to Appellant and referenced a meeting he attended the day before with a principal of the Appellant and another individual. He concluded in the letter that the default should stand. (AF 26.)

43. By letter of July 25, 1997 (AF 17-22), Omni's new counsel presented a letter to the CO asking her to withdraw the termination on the basis that it was improper and unauthorized, on both procedural and substantive grounds. As a threshold matter, we need to note that counsel asserts that Omni did not receive the cure letter until June 11. That appears to be an error as Mr. Quayle of Omni acknowledges in his Affidavit that he had the cure notice on June 10 (counsel may be referring to Federal Express and Quayle to the fax) (Quayle Aff. 89.) Counsel first made the argument that the cure notice was procedurally defective in that the termination was issued before the 10 days had run. Accordingly, counsel asserted that the termination was invalid. Counsel then turned to the substance and essentially repeated the arguments made previously to the FS, by Appellant and prior counsel, as to the three stated items in the cure notice. Counsel also pointed out that the lease was dated April 14, 1997 (in fact it was not signed until April 25). Counsel stated that the completion date was December 31, 1997, and that none of the deficiencies cited in the CO's letter would have delayed the start of construction on July 5, 1997, or more important, the December 31 completion date. Counsel concluded "You were informed that the items you requested would be available prior to the date established for the commencement of construction. Moreover, you were aware that construction would begin on the established date." (AF 17-22.)

44. By letter of August 26, 1997, the CO responded to the above letter. First, she addressed the delivery of the cure notice. She then noted that even if the notice was not effective until June 11, "Your client did not cure the default. The enclosures provided by your office are not firm written commitments of project financing from a lending institution." She noted that the letters were from two new financing companies and that the FS had previously received different letters with similar language from two other financial institutions. She stated that had she given Appellant until June 22, a loan was still not approved. She then addressed a few other matters and concluded that the termination would stand. (AF 13-14.)

45. On September 10, 1997, the Board received a notice of appeal from Omni where it contested the termination for default of the main office portion of its lease. It was docketed as AGBCA No. 97-203-1. On July 10, 1998, the Board received a notice of appeal on the FS decision denying Omni's dollar claim for $2,203,767.25, said to represent expenses and lost profits resulting from the termination. That was docketed, as AGBCA No. 98-182-1.

46. On June 21, 1999, the FS filed its Motion for Summary Judgment. The Motion asserted that the Board should find the termination justified because there were no questions of material fact for the Board to ascertain, any factual disputes that might exist were not case determinative and finally

Appellant could not prove essential elements of its case. In addition the FS set out affirmative matters, one of which was that the contract was voidable due to material representations by the contractor prior to award. The FS also argued that Omni should be terminated because it did not have a building site. Thereafter, Appellant filed its response. In addition the Appellant filed a Cross Motion. It contended (1) that the FS evidence, even when viewed in a light most favorable to it, would not enable a reasonable trier of fact to conclude that, as of June 18, 1997, there was no reasonable likelihood Omni could complete the building by December 31, 1997, and (2) Respondent has insufficient evidence to overcome estoppel of the CO from terminating the lease prior to the expiration of the cure period. Thereafter, the FS filed a renewed Motion for Summary Judgment. That emphasized the Court of Appeals for the Federal Circuit decision in Danzig v. AEC Corp., 224 F.3d 1333, 1338 (Fed. Cir. 2000). Appellant responded to that renewed Motion.

## DISCUSSION

### STANDARD

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, Inc., 477 U.S. 242, 247-48, 255 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A material fact is one which may effect the outcome of the case. Anderson v. Liberty, supra. All evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable factual inferences should be drawn in favor of the nonmoving party. Dairyland Power Coop. v. United States, 16 F.3d 1197, 1202 (Fed Cir. 1994).

As the Armed Services Board of Contract Appeals (ASBCA) stated in Jez Enterprises, Inc., ASBCA No. 51851, 00-2 BCA ¶ 30,939:

> Our task is not to resolve factual disputes, but to ascertain whether material disputes of fact are present. General Dynamics Corp., ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851.

### DEFINING THE ISSUES

But for the FS argument of anticipatory repudiation (failure to provide adequate assurances) and Appellant's contentions that the FS used defective default procedures, this appeal presents the classic default dispute over failure to make progress (failure to show due diligence), so as to endanger performance. The law on failure to make progress is well settled. The validity of a termination essentially turns on whether the CO at the time of the termination had a reasonable basis to conclude that there was no likelihood that the contractor could complete on time. Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 765 (Fed. Cir. 1987). Such a determination normally requires examining and weighing the information before the CO at the time of the termination and deciding if, with that information, the CO was reasonable in concluding that a default was necessary. In evaluating the reasonableness of a termination of this nature, some of the items that need to be considered, examined and weighed are the status of the project at the time, how

much time remained to complete, the resources available to the contractor, the ability of the contractor to execute steps needed to perform the work and the materiality of any interim failures to meet milestones.

**FAILURE TO SHOW DUE DILIGENCE**

The CO set out her reasons for terminating the Appellant in her letter of June 18, 1997. She stated that in the telephone conversation of June 17, 1997, with the Appellant, responding to the cure notice, the Appellant stated that he would be unable to furnish final construction drawings, a firm commitment for financing or provide evidence of the issuance of the building permit for the supervisor's office portion of this lease, until sometime during the week of June 23, which was after the time specified for such actions in her cure notice. She stated "This timeline is not acceptable according to your own construction schedule. You stated that you would be working on an accelerated schedule but you have provided no evidence to show how you would accomplish the project by December 31, 1997." She then concluded that "Because you have failed to cure the deficiencies," she was terminating the contract. (FF 37.)

It appears from the wording of her decision that the CO terminated this contract because she concluded, after receiving Appellant's response to her cure notice and reviewing his schedule, that Appellant could not complete in a timely manner. The CO took into account the status of the three matters she specifically addressed in her cure notice, those being the building permit, the loan and the construction drawings. Further, it is reasonable to conclude that she took into account the history of the project and the fact that construction had not yet begun on the office building. (FF 37.) Her decision does not establish that she terminated the Appellant solely due to the breach of one of the deadlines, although that was certainly a factor.

The legal standard for judging the validity of a termination for failure to make progress is that the Government must establish that the CO reasonably determined that there was "no reasonable likelihood that the [contractor] could perform the entire contract effort within the time remaining for contract performance." Lisbon Contractors, Inc., supra. In order to meet the Lisbon standard, the Government is not required to show that contractor performance was impossible, however, in order for termination to be sustained, there must be a showing of no reasonable likelihood of timely completion.

Here, the parties have presented competing views as to whether the facts support that the CO was justified in concluding that there was no reasonable likelihood that the contractor could perform the contract within the allotted time. Since this is before us on a summary judgment basis, we must conduct our evaluation of the competing factual views, by taking all reasonable inferences in favor of the nonmoving party. Here, the Appellant has presented a number of points (and we will not exhaust them all), which if proven could serve as a basis for a reasonable finder of fact to conclude that the CO did not have a reasonable basis to come to the conclusion that there was no reasonable likelihood that Appellant could complete on time.

The record shows that as of the time of the termination, the CO had been told by Appellant that financing would be in place by June 25 (8 days beyond the original cure period) and 4 days beyond the cure period, if we use June 10 as the date Appellant received the cure notice. The Appellant's statement and that of its attorney on the matter gave details as to what steps Omni had taken as to the three matters, who had to act in order to have the financing in place by the June 25 date, what steps remained, the ease of completing those steps and finally how the December 31 completion date would still be met. (FF 33-35.) Further, on June 10, the ACO talked to Mr. Pitcher of Equitable and was told that the appraisal had been completed and that Mr. Pitcher was preparing the loan documents. He also told her that he was forwarding it to the committee for approval. Thus, the CO had confirmation beyond that solely of the Appellant. (FF 32.) The record also shows that the CO had been told by Appellant's counsel prior to her issuing the termination that the schedule being relied upon by the CO had 30 days of cushion and thus there was ample time to absorb an 8-day or more delay in financing (FF 34). Also, the contractor had spoken to an FS engineer and was told that while it would take a professional, the engineer had seen buildings of this magnitude be completed within the remaining time (FF 36).

The record shows that the CO in response to the cure notice, was provided explanations from Appellant's counsel which arguably established that neither the lack of a building permit, status of construction drawings, nor timing of the financing were jeopardizing a timely project completion (FF 34). Finally, the CO had been told by Appellant's counsel that she should consider that through its history, the project had been handled very informally, without serious concern as to enforcing interim dates, and that mode of practice needed to be taken into account by the CO in her evaluation of why the project was not further along. Finally, the CO had before her Omni's statements that it intended and could complete and that it would have the financing piece completed within a few days. (FF 32-33.) Taking the foregoing in a light most favorable for Appellant, one could conclude that the CO may not have had a reasonable basis to conclude that there was no reasonable likelihood that Appellant could finish by the tentative date of December 31, 1997. Because of that, Appellant has provided a sufficient defense to summary judgment.

We are mindful that the FS takes exception to a number of the "facts" set forth by Appellant. It also puts forth other facts which support its justification and actions. That said, on summary judgment we are not at a point to weigh those competing facts. We take no position at this point as to what will be the Board's ultimate conclusion on the propriety of the default or reasonableness of the CO's action. All we decide here, is that it is a matter which requires factual determinations and resolutions and as such is not presently appropriate for summary judgment

## DANZIG AND ANTICIPATORY REPUDIATION

The FS position does not, however, entirely rest on its contention that it meets the Lisbon test. In fact, the FS counsel, in her brief, asserts that a Lisbon analysis is not warranted here. The FS says:

> Propriety of the termination does not turn on whether it was possible for Omni to perform but rather whether the Government received adequate assurances that timely completion would occur.

(Government memorandum at p.31)

The FS has asserted that the Board should grant summary judgment because (1) Omni committed anticipatory repudiation by stating that it could not secure financing by the end of the FS imposed cure period , and (2) that Omni did not provide realistic and reasonable enough assurances to the CO that it could complete on time. The FS relies on Danzig v. AEC Corp., supra. We disagree with how the FS understands the law and Danzig. We also point out that Danzig was not decided on the basis of summary judgment and in fact was the subject of a 12-day hearing at the ASBCA.

Danzig dealt with a much different factual situation than that in this case and to attempt to apply it here is not appropriate or warranted. While Danzig involved a termination by the Navy of a contractor who was failing to make progress so as to endanger performance, the thrust of the court decision dealt with the legal effect of contractor statements and contractor actions which even taken in their best light for the contractor, showed that the contractor could not and would not give the Government an assurance that it would complete in a timely manner. Further, the evidence in Danzig showed that the contractor was shutting down its operation as opposed to taking steps aimed at completion.

In Danzig, the Navy had concerns about the ability of the contractor to complete. The Navy issued a cure notice as a precursor to a possible default action. The Navy told the contractor that it was concerned over the contractor's failure to diligently pursue completion and saw that lack of diligence as endangering performance of the contract. The Navy advised the contractor that unless the condition was cured within 10 days, the Navy would consider terminating the contract for default. The contractor responded and mentioned some general delays by the Navy, but primarily it addressed problems with its surety. The contractor said: the "financial strangulation" by the surety "has progressed to the point of not only preventing AEC from meeting its April 27, 1991 completion date, it has made it impossible for AEC to predict an ultimate completion date at this time. As a matter of fact, unless (the surety and its affiliates restrain [sic] from their present conduct and release the funds currently in (the project's) bank account, it is doubtful that AEC will ever be able to complete the project." The Navy then asked for more clarification and directed AEC to provide a more detailed response. The Navy added that AEC, under the cure notice, needed to cure the dangerously slow work pace.

AEC's answer provided no comfort to the Navy. AEC answered that it "cannot cure the deficiency stated in your cure notice due to the restrictions by the surety." It said "consequently, we cannot give you any assurance as to when the project will be completed." It finally made some further comments as to Government delays but provided no back-up and directed the Navy to earlier correspondence on the project. In a second letter of that same day, AEC advised the Navy that AEC was reducing its work force because of financial restrictions of the surety. The Navy still did not terminate, but issued a show cause giving Appellant another 10 days. AEC did not respond to the show cause. Further, during the final cure period, AEC only had a handful of workers on site. After 10 days the Navy terminated.

AEC appealed the default termination to the ASBCA. The ASBCA held that the termination was invalid, concluding that modifications and delays to AEC's contract performance, attributable to the Government, entitled AEC to an extension of time which changed the contract completion date to May 16, 1991. The Board ruled that the Navy had presented no evidence that Appellant could not have completed by the new date. The Board rejected the Navy argument that there was anticipatory repudiation. The Board relied on its determination that AEC had not expressed an unequivocal unwillingness or inability to perform, and therefore did not repudiate. Finally, the Board rejected the Navy argument that default was justified because AEC failed to give the Navy assurances that it could complete on a timely basis.

On appeal, the Court of Appeals for the Federal Circuit reversed the ASBCA. The court did not overturn or limit Lisbon. Rather, in its decision the court specifically stated that Lisbon was the standard. Instead, what the court did was point out and find, that notwithstanding Lisbon, in the case of AEC, there was an alternative basis for default. That dealt with the alternate grounds raised by the Navy that in response to the cure notice, AEC failed to give the Navy adequate assurances that it could complete on a timely basis or even that it could continue to make progress toward completion. The assurances being talked about by the court in AEC were assurances as to the contractor completing the contract by the due date. The assurances had nothing to do with interim milestones (such as the case here) being inserted by the Navy. The court in discussing its view of assurances, noted that when the Government justifiably issues a cure notice as a precurser to default,

> The contractor has an obligation to take steps to demonstrate or give assurances that progress is being made toward a timely completion of the contract, or to explain that the reasons for any prospective delay in completion of the contract are not the responsibility of the contractor (citations omitted.)

The wording of the court clearly is addressing assurances aimed at showing that there will be completion by the completion date.

As to AEC, the court found that AEC's response did not satisfy its obligation to provide assurance to the Navy that AEC could timely complete the contract. The court focused and cited the various responses of AEC which clearly did not assure or even attempt to assure that AEC would be able to complete the contract by April 27 (the due date). AEC's comments such as, "financial strangulation made it impossible to predict a completion date;" its statement that unless the surety released funds "it is doubtful that AEC will ever be able to complete the project;" and its statement (when the Navy gave it another chance to clarify) that "we cannot give you any assurances as to when the project will be completed," clearly do not provide an adequate response to constitute an "assurance." Coupled with this was the fact that AEC was removing its office equipment and disconnecting its phone. It is not at all surprising that the court found that "under these circumstances, we conclude as a matter of law that AEC failed to respond adequately to the Navy's reasonable request for assurances of timely performance. The Navy is therefore entitled to regard AEC's failure to provide such assurances as a breach of contract."

There is simply no comparison of Danzig to the facts in Omni. In this appeal Omni never repudiated the contract. Omni never said it would not complete by the finish date and in fact specifically said otherwise. It addressed each issue set out by the FS and gave an explanation as to how the matter would be completed, so as to finish the contract on time. (FF 32-35.) The fact that the FS did not like Omni's answers and did not think what Omni provided was adequate assurances, may indeed be enough to sustain the default based on Lisbon (once fact-finding and weighing is completed), but certainly one cannot equate Omni's answers and responses to what AEC provided the Navy in Danzig. Danzig does not invalidate Lisbon. What it does is allow the Government the legal right to terminate (without having to undertake a Lisbon analysis), in those instances where the contractor through words and/or actions makes it clear that it cannot give assurances of completion or specifically advises the Government that it will not meet the date.

Here the FS errs in its analysis and application of Danzig and the law, for it equates not being able to meet a milestone or condition (set out in a cure notice) with not being able to complete the contract on time. Certainly, the interim milestones are part of an overall evaluation; however, Danzig, in a due diligence case, does not hold that if a contractor tells the Government that it cannot meet a milestone or cure a specific condition (by a date set by the Government), that a default is per se proper. In this case there is substantial evidence presented by Omni, from which a reasonable finder of fact could conclude that notwithstanding Omni not meeting the interim dates, the project itself could likely have been completed by December 31. (FF 32-36, 39-41, 43.) For us to find otherwise would have us deciding this appeal on the facts. Danzig does not hold that a contractor who fails to meet or who advises the Government that it cannot precisely meet an interim deadline set by the Government in a cure notice, is per se subject to a termination for default, without more. In Danzig, the facts were that the contractor provided no assurances and in fact was stating that he either could not or was not sure if he could complete. In Omni, the contractor said it would and could finish by December 31, 1997 and gave supporting evidence why. (FF 32-35.) Once Omni provided those assurances, any application of Danzig becomes inappropriate.

In his dissent, our colleague finds that the default was justified, because Omni in its response to the cure notice failed to satisfy the "requirement" for financing that was set out by the CO. Our colleague, in fact, describes the financing requirement as a contractual requirement and sees the failure to meet that requirement as a breach. We do not disagree that in Omni's answer to the cure notice, it specifically said it would take a few more days than the FS had specified to finalize financing. (FF 33-38) That, however, is not an automatic basis for default.

First, this appeal presents the question of whether there even is an enforceable contract requirement which gives the FS the right to demand financing information within a set time frame. The solicitation did provide that the lessor was to have a firm commitment within 15 calendar days of award. That however, would have made the information due on or about May 8, 1996. (FF 3, 6.) The FS never enforced the matter (FF 24) and to the extent that the FS had an independent right to require financing by a date certain, it is at least questionable if that survived the delay and the signing of the lease on April 1997. Yes, the April 25 lease did incorporate the solicitation provisions. However, to the extent the solicitation provisions addressed financing commitments, the providing of that information was tied into the long expired award date. It was not tied into a date

after execution of the lease. At least to some extent it is illogical to conclude that in signing the lease in late April 1997, the parties were incorporating a requirement that was almost a year overdue and related to an award date that had long ago expired.

Further, even if the CO was attempting to incorporate the provision, and the wording of her termination does not so establish (FF 37), there are certainly questions of waiver that cannot be resolved on this record. Also, the FS issued this default under GSAR 552.270-28. That is a due diligence clause and is a clause invoked where the CO believes Appellant, because of a lack of progress, cannot timely complete (FF 37.) While we are aware that the lack of financing was an important element in the CO's consideration, the CO did not default on a breach of contract basis. Matters such as the status of financing, building permits and drawings are legitimate matters that go into the analysis of the reasonableness of the CO's determination as to whether a contractor is likely to complete on time. They, however, cannot be interposed as interim milestones of such a magnitude that they override and go around Lisbon.

Finally, even if we were to find that there was a surviving contract requirement to independently provide financing information (and separate provisions as to the construction schedule and building permit), then we would still have to address and determine whether failure to meet that requirement was sufficiently material so as to justify termination. Included in that analysis would be consideration of the FS conversations with Mr. Pitcher, and representations by Mr. Quayle of Omni and his attorney regarding completion of the financing by June 25, and their statements and evidence that financing on June 25 and even beyond would not have prevented completion by December 31. (FF 32-36.)

**CURE NOTICE DEFECTS**

Omni has raised both factual and legal questions involving the FS failure to give Omni the full 10 days specified in the FS cure notice (FF 31, 38). Omni raises factual issues as to detrimental reliance and estoppel. Omni raises matters as to the use of a gratuitous cure notice. Among matters, Omni asserts that it was unable to close on a loan or obtain a building permit after June 18, 1997, because the FS refused Omni's request to reconsider the termination decision . (FF 39-40.) Omni asserts that the FS was the anchor tenant and without it, the project was no longer economically feasible. It also says that it continued after the termination to pursue financing but was unable to continue after the FS refused to provide assurances of its continued commitment to occupy space and claims that it became obligated on a fee during the time it felt the cure notice was invalid. (FF 40.) This is a contested matter that requires factual development not only as to what happened but also the reasonableness of Appellant's actions. The FS has challenged the above and put forth its own version as to what happened. It is our sense of the record there are clearly disputed matters that need to be resolved as part of our treatment of the cure procedure. The cure issue involves questions of both law and fact. We need a full development of both. Accordingly, we do not grant Appellant its cross motion for summary judgment on the basis of a premature termination.

**OMNI CROSS MOTION**

Omni argues that the case is ripe for summary judgment in its favor because the FS has failed to produce affidavits or other evidence that conflicts with Omni's sworn statements from various officials. As we pointed out above, in discussing the FS motion, the matter of deciding whether the CO was reasonable in determining that there was no reasonable likelihood that Appellant would complete on time, is one that requires us to weigh various pieces of evidence. Taking all inferences in favor of the FS, there is adequate evidence to support the CO's action. Given the history of the project and a history of assurances that appeared not to be kept; given the contractor's schedule which did set out milestones, which were not being met; and given that matters such as financing and the permit was still not in place; one could conclude that the CO made a reasonable determination. (FF 13-20, 25-28, 30-37.) Promising that something will happen the next week is not a guarantee. Whether the CO reasonably should have waited, in light of the completion date, will depend on how we evaluate the overall facts before her. Further, there are segments of Appellant's evidence that were not necessarily before the CO at the time of the termination and thus to what extent she knew or should have known of the information is another question of fact. Accordingly, the Appellant's cross motion for summary judgment against the FS must fail.

## OTHER MATTERS RAISED

The FS has raised additional matters relating to the ownership of the building and questions of fraudulent representation as to ownership. We find that the record is incomplete and not sufficient to decide those and other mentioned issues on summary judgment.

## RULING

The Board denies the respective cross motions for summary judgment.

_____
**HOWARD A. POLLACK**
Administrative Judge

**I concur**:

_____
**EDWARD HOURY**
Administrative Judge

**VERGILIO, Administrative Judge, dissenting**.

On September 10, 1997, the Board received a notice of appeal, docketed as AGBCA No. 97-203-1, submitted by Omni Development Company (later corrected to that of the lessor, Omni Development Corporation), of Spanish Fork, Utah. The lessor of two distinct spaces to the Government disputes the termination for default of one portion of its lease with the United States of America, administered by the U. S. Department of Agriculture, Forest Service, Fishlake National Forest, Richfield, Utah.

On July 10, 1998, the Board received a notice of appeal, docketed as AGBCA No. 98-182-1, submitted by the lessor. The lessor disputes the denial by the contracting officer of its claim for $2,203,767.25, said to represent expenses and lost profits resulting from what the lessor describes as the improper and legally invalid termination for default of its lease.

The Board has jurisdiction over these timely-filed appeals pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended. Contending that the termination for default was proper, the Government has filed a motion for summary judgment, with supporting memorandum. The lessor has filed an opposition to the Government's motion as well as its own cross-motion for summary judgment, with supporting memorandum, as it contends that the termination for default cannot be supported. The parties provided additional submissions.

The undisputed facts permit me to resolve the disputes--the termination for default is valid. I deny the appeals.

The solicitation and contract specify that within 15 calendar days of award, the lessor shall provide evidence of a firm commitment of funds to perform. At the time of default, approximately 14 months had elapsed from when the Government accepted the lease offer, and 2 months had elapsed from the date the parties signed the lease contract. During the 3 months prior to the default, the Government inquired repeatedly as to the lessor's firm commitment of funds.

The Government issued a cure notice, stating that, among other alleged failings, the lessor must provide evidence of a firm commitment of financing within 10 calendar days of receipt of the notice. Just prior to the termination (and within the cure period), the lessor informed the contracting officer that the lessor would obtain the financing and cure other items after, not within, the cure period. The contracting officer issued the notice of termination for default, concluding that the lessor failed to provide adequate assurances that it could complete the lease space on time. The contracting officer reasonably concluded that the promise of future correction was an insufficient assurance. Lacking financing, the lessor had breached and not cured a fundamental element of the lease.

It is not relevant that the contracting officer incorrectly calculated the cure period. The lessor's statements reflected an anticipatory repudiation of contractual requirements. Moreover, despite the notice of termination for default, the lessor continued to pursue financing, but was unable to obtain financing prior to the expiration of the full cure period. Therefore, the lessor breached a contractual

requirement. The lessor lacked financing; the contracting officer reasonably concluded that timely performance was not assured. The termination for default was reasonable and in accordance with the terms and conditions of the contract.

Accordingly, I grant the Government's motion for summary judgment, deny the lessor's cross-motion for summary judgment, and deny the two appeals.

In denying the Government's motion for summary judgment, the majority proposes to permit the lessor to reform the contract by deleting a contract requirement that the lessor shall provide evidence of a firm commitment of funds in an amount sufficient to perform the work required. This lessor lacked that commitment when the cure period expired; the Government is not implicated as a factor in the lessor's failure to obtain a commitment. By not giving legal effect to contract provisions, the majority unnecessarily and inappropriately complicates a contracting officer's ability to administer a contract, and here burdens the Government with the time and costs in defending a termination for default justified by the facts presented to the contracting officer at the time of default and to this Board in response to a motion for summary judgment. The test here is whether the contracting officer reasonably concluded, based on information available, that the lessor provided inadequate assurances of its ability to complete the project timely; it is irrelevant if the lessor can convince this Board, based on information not provided by the lessor, or available, to the contracting officer, that the lessor was likely to complete the project on time.

What the majority proposes, places the contracting officer in a 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 or end of a cure period.

## FINDINGS OF FACT

1. The Government issued a solicitation to lease space for (1) a fire center and (2) a main office building (supervisor's office) to house a forest supervisor and other agencies, preferably within Richfield, Utah (Appeal File at 63 (¶¶ 1.1, 1.2)). The Government reserved the right to award separate leases for each of the two distinct spaces (Appeal File at 55). The solicitation specifies that the space is required to be ready for occupancy by November 1, 1996, but also states that the Government reserves the right to negotiate the possession date with any offeror (Appeal File at 63 (¶ 1.5)).

2. The solicitation directs:

> Within 15 calendar days after award, the successful offeror/Lessor shall provide to the CO [contracting officer] evidence of:

> (a) A firm commitment of funds in an amount sufficient to perform the work required under this leasehold agreement.

(Appeal File at 67 (¶ 1.9)).

3. The solicitation contains a Default in Delivery -- Time Extensions (June 1994) clause, 48 CFR 552.270-28, which states in pertinent part:

> With respect to Lessor's obligation to deliver the premises substantially complete by the delivery date (as such date may be modified pursuant to this lease), time is of the essence. If the Lessor fails to prosecute the work with the diligence that will insure its substantial completion by the delivery date or fails to substantially complete the work by such date, the Government may by notice to the Lessor terminate this lease, which termination shall be effective when received by Lessor.

(Appeal File at 125 (¶ 11(a)).) The clause additionally mandates:

> Notwithstanding paragraph (a) of this clause, this lease shall not be terminated under this clause nor the Lessor charged with damages under this clause, if (1) the delay in substantially completing the work arises from excusable delays and (2) the Lessor within 10 days from the beginning of any such delay (unless extended in writing by the Contracting Officer) provides notice to the Contracting Officer of the causes of delay.

(Appeal File at 126 (¶ 11(c)).)

4. The solicitation defines "notice" to mean "written notice sent by certified or registered mail, Express Mail or comparable service, or delivered by hand. Notice shall be effective on the date delivery is accepted or refused" (Appeal File at 123 (¶ 1), 48 CFR 552.270-10(i), Definitions (Aug. 1992).)

5. The solicitation contains a Disputes clause (Appeal File at 136 (¶ 37), 48 CFR 52.233-1, Disputes (Dec. 1991)).

6. By letter dated April 23, 1996, the Government informed the lessor that the Government is accepting the lessor's offer for both the fire center and main building. A meeting was arranged, at which the Government hoped to "finalize the lease, discuss space layout, coordination between the Forest Service, the lessor and the other agencies involved, and timeframes." (Appeal File at 217.)

7. After April 23, 1996, the parties engaged in discussions and exchanges to finalize plans and a location for each of the two spaces. The Government was aware of the lessor's attempt to obtain a location (other than that identified in the offer) for the main office building. Further, the Government was aware of the lessor's attempts to design space in the main office building such that the Bureau of Land Management would become a tenant. (Appeal File at 259-99.) By letter dated January 15, 1997, the lessor was informed that the Bureau of Land Management was no longer interested in space with the lessor; thereafter the lessor continued to pursue fulfilling its obligations under the contract here in dispute (Affidavit of Robert D. Quayle, Aug. 4, 1999 (Quayle Affidavit), at 19 (¶¶ 49, 51)).

8. By letter dated March 3, 1997, the contracting officer notified Mr. Quayle:

> Over the last two weeks, I have received a couple of calls from your bank regarding the financing on the Richfield office[ that is, the main office portion of the lease]. Since I awarded that lease to you on April 23, 1996 and not much progress has been made on the larger structure covered by this lease, I'm establishing some timeframes for information to be submitted that will assure us that this building will be built in the near future.
>
> By March 14, 1997, please provide me with firm, financing papers from your bank. By March 24, 1997, please provide me with a set of final drawings. I need to do some space calculations and can not do that until I have a set of drawings reflecting all the changes. By March 24, 1997 I also need a progress schedule for the actual construction of the larger complex.

(Appeal File at 215; Quayle Affidavit at 20 (¶ 56).) On March 27, 1997, the lessor met with the Government; discussed was financing of the main office building, and the lessor's understanding that its loan application could be processed within 30 days (Quayle Affidavit at 22 (¶ 61)).

9. In a letter, dated March 31, 1997, to other agencies which were to occupy the main office, the contracting officer stated that since awarding the lease, the lessor ran into problems with the original site, zoning on the new site, and finalizing financing. Further,

> The lessor has requested time to pursue an alternative source of financing and I have allowed him until April 30th to get his financing settled. At that point in time, the agencies will have to decide their next step. The reason I have been so lenient with the lessor, is his price per square foot is low and I don't think we will see that again if we have to start the process over.

(Appeal File at 207.)

10. The contracting officer informed the lessor by letter dated March 31, 1997:

> I relayed to the Fishlake National Forest your most recent proposal to pursue a parallel line of financing through an insurance company. I explained that within 30 days you would have either the financing and could start construction or you would know for certain that financing was not available. It is agreeable to allow you this 30 days; however, I will need a letter of intention from your insurance company by this Friday, April 4th. In this letter I would like to see their proposal outlined with firm dates for their final decision.
>
> If neither line of financing can be confirmed in 30 days (by April 30th), the government agencies will then have to decide whether or not we want to continue with this lease for the larger structure or whether we will start over in seeking leased space.

(Appeal File at 206; Quayle Affidavit at 22 (¶ 62).)

11. The Government and the lessor signed a formal lease with a date of April 14, 1997. The properties leased by the lessor to the Government are (a) the fire center and (b) the main office. The contract (lease agreement) includes the solicitation terms and provisions, including specified General Services Administration (GSA) forms which are part of the solicitation. Thus, the above-referenced provisions (Findings of Fact (FF) 2-5) are part of the contract. The lease is for a 10-year firm term, subject to renewal and termination during the renewal period. (Appeal File at 49.) The lease states that the tentative occupancy date for the main office is December 31, 1997 (Appeal File at 50). The lessor did not own or have rights to the land on which the main office building was to be constructed, the building plans were not yet approved, and the lessor lacked a firm commitment for financing.

12. In a meeting held on May 9, 1997, the Government inquired of the lessor concerning a construction schedule and financing (Appeal File at 200-01; Quayle Affidavit at 27 (¶ 80)).

13. The lessor provided the contracting officer with a letter dated May 30, 1997, stating in pertinent part:

> It is my intention to comply with the lease by providing a building by Dec. 31, 1997 and to follow the building schedule as submitted on May 12, 1997 as per your request. In order to do so the building should be started near the first of July 1997.
>
> [A named individual] of Equitable Life and Casualty has given me a date prior to that time for his recording of his loan on the property, thus allowing us to start construction by that date or sooner.

(Appeal File at 187.)

The notice

14. By letter dated June 6, 1997, the contracting officer informed the lessor:

> As of this date, we have not received the final construction drawings. You have not submitted a firm written commitment for project financing from your lending institution as required by the lease and as requested in our meetings of April 25 and again May 9, nor have you submitted any evidence that you have applied for, or obtained a building permit.
>
> Your lack of progress has created serious concerns about whether you have the capacity to proceed, and are able to provide, a finished, professional office building by December 31, 1997. In your letter of May 30, 1997, you stated you would do as the lease required; however, you have already fallen behind on your schedule.
>
> . . . .
>
> This letter will serve as written notification that the Government considers your failure to submit final drawings, a firm written commitment for the financing of this project from your lending institution, and evidence of the issuance of a building permit from the City of Richfield as conditions that are endangering performance

> of the Supervisor's Office portion of the lease. Therefore, unless I have verifiable documentation in hand that these conditions are cured no later than 2:00 PM, on the tenth day after your receipt of this letter, the Government will terminate a portion of this lease for default under the terms and conditions of the GSAR 552.270-28, Default in Delivery - Time Extensions (June 1994) clause of the lease.

(Appeal File at 38-39). The Government sent the letter by Federal Express, with Saturday delivery requested (Appeal File at 40). The letter was not delivered to the lessor or one of its agents; rather, it was delivered on Saturday, June 7, to an individual at a business co-located in a building complex with the same address (Appeal File at 35; Quayle Affidavit at 30 (¶ 88)). On June 9 or 10, the Government was aware that the lessor was of the view that it had not yet received the notice (Appeal File at 185; Quayle Affidavit at 29-30 (¶ 87)). The lessor did not obtain the letter until Tuesday, June 10, 1997 (Quayle Affidavit at 30 (¶ 89)).

15. According to the lessor, on June 17, 1997, the lessor informed the contracting officer that it would receive a loan commitment on June 25, 1997, and that it expected to obtain the building permit the following week, around June 25 or June 26 (Quayle Affidavit at 32-33 (¶ 93)).[1]

16. By letter dated June 18, 1997, the contracting officer informed the lessor:

> Reference my June 6, 1997 letter which was delivered on June 7. The ten-day cure notice period expired on June 17 at 2:00 p.m. In our telephone conversation yesterday, June 17 at 1:20 p.m., you stated that you would be unable to furnish final construction drawings, a firm commitment for financing or evidence of the issuance of the building permit for the Supervisor's Office portion of this lease, as required by my cure notice, until sometime during the week of June 23. This timeline is not acceptable according to your own construction schedule. You stated that you would be working on an accelerated schedule but you have provided no evidence to show how you would accomplish the project by December 31, 1997.

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[1] In a letter, dated June 17, 1997, an insurance company mortgage underwriter informs the lessor that loan committee is scheduled to meet on June 20. The letter notes, "Assuming that your loan is approved then, it will likely be Wednesday of the following week [i.e., June 25] before I can have your loan commitment for you. As soon as it is signed and returned by you, we will begin to prepare loan documents for the closing." (Appeal File at 183.)

> Because you have failed to cure the deficiencies, this is your notification that the Supervisor's Office portion of [the lease] is hereby terminated under Clause GSAR 552.270-28, . . . effective today.

(Appeal File at 29.)

17. According to the lessor, the lessor deemed the termination notice to be void because the 10-day cure period had not elapsed. On June 23, 1997, the lessor informed the contracting officer that it was still actively arranging for financing and anticipating the commencement of construction in early July. (Quayle Affidavit at 31-33 (¶¶ 89, 95-97); Lessor's Memorandum in Opposition to the Government's Motion at 75-76.)

18. In a letter dated June 25, 1997, to the lessor, a company specifies that it confirms receipt of a signed loan application agreement dated June 19, 1997. The letter informs the lessor that its loan proposal meets the basic underwriting criteria; it asks the lessor to submit a written commitment and signed lease from the Government to occupy the building upon completion of the facility. (Appeal File at 23.)

19. In a letter dated June 26, 1997, a financial corporation (not that in the above finding) commits to permanent financing with an interest rate and other terms to be negotiated at the time the lessor makes formal application. "This commitment to provide permanent funds, is of course, contingent upon your being the successful bidder on the proposed lease with the U.S. Forest Service. Further, our commitment to lend funds will be subject to a lease with the U.S. Forest Service, providing annual net income sufficient to pay debt service that yields a minimum debt coverage ration of 1.10 to 1." (Appeal File at 24.)

20. On September 10, 1997, the Board received a notice of appeal, docketed as AGBCA No. 97-203-1, submitted by the lessor, contesting the termination for default of the main office portion of its lease. On July 10, 1998, the Board received a notice of appeal, docketed as AGBCA No. 98-182-1, submitted by the lessor. The lessor disputes the denial by the contracting officer of its claim for $2,203,767.25, said to represent expenses and lost profits resulting from what the lessor describes as the improper and legally invalid termination for default of its lease.

## DISCUSSION

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, Inc., 477 U.S. 242, 247-48, 255 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

As recently expressed by the U. S. Court of Appeals for the Federal Circuit:

> The law of government contracts has adopted that doctrine [of anticipatory repudiation], expressing it as a requirement that the contractor give reasonable assurances of performance in response to a validly issued cure notice. That rule, as the Restatement explains, rests "on the principle that the parties to a contract look to actual performance 'and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain.'"

Danzig v. AEC Corp., 224 F.3d 1333, 1338 (Fed. Cir. 2000) (citations omitted). The question before this Board is not whether the lessor could have provided the space on time. Rather, the question is whether the contracting officer reasonably concluded that the contractor, in response to the cure notice, failed to provide sufficient assurances that it would complete on time.

The contract required the lessor to have a firm commitment for financing within 15 calendar days of award (FF 2). In March, April, and May 1997, the Government sought assurances from the lessor that financing had been obtained (FF 8, 10, 12). Lacking a firm commitment for financing, the lessor was in breach of the contract. In June 1997, well after the 15 calendar day period to obtain financing had passed, the Government issued a cure notice (FF 14), specifying that the lack of financing (among other alleged failings) created a serious concern as to the lessor's capacity to proceed; because the asserted failings endangered performance, the contracting officer demanded that the conditions be cured, with a reference to the Default in Delivery clause (FF 3). During the cure period and prior to the contracting officer issuing the disputed termination for default, the lessor informed the contracting officer that a loan commitment would be obtained after, not within, the cure period (FF 15). Without financing, there was no assurance that the project would begin so as to enable the lease space to be completed on time. The lessor's failure to satisfy the contractual requirement for financing, particularly given the unfulfilled earlier assurances by the lessor that financing was forthcoming, did not provide the contracting officer with the

requisite assurances that the lease would be satisfied. The contracting officer's decision to terminate for default was reasonable and justified.

Given this result, here I do not resolve the Government's allegation that, in its offer, the lessor fraudulently misrepresented its ownership interests in property, and that such a misrepresentation serves as an independent basis to justify the termination for default. Similarly, I need not explore whether the lessor's alleged failure to provide final construction drawings and a building permit would serve as bases to justify the termination for default.

Other issues raised by the parties

Relying on the Default in Delivery clause (FF 3), the Government contends that it had the contractual right to terminate the contract without a cure notice.[2] The Government asks the Board to make no further inquiry into the procedural aspects of the Government's actions. The reasoning of the Government is faulty. By letter dated June 6, 1997, the Government provided a cure notice which gave the lessor 10 days from receipt to respond to the Government's concerns (FF 4, 14). This notice provided the lessor the cure period to address or correct the concerns addressed by the Government. Had the lessor, within the cure period, obtained financing and responded to the other concerns of the Government,

[2] Appropriately, the contracting officer did not rely upon the Default by Lessor During Term clause (Aug. 1992), 48 CFR 551.270-33 (Appeal File at 127 (¶ 11(a))), which contains different cure notice provisions. That clause is not applicable to this dispute. The lease specifies that the lease term begins after the space is substantially complete and contains the required occupiable square footage (Appeal File at 127 (¶ 20)). The lease term had not begun on the main office space.

the bases for the default would not be supported. Therefore, after issuing the cure notice, the Government could not validly default terminate the contract for the reasons addressed in the cure notice without providing the lessor the opportunity to cure the failings.

The lessor seeks to invalidate the termination for default because the contracting officer issued the notice of termination prior to the expiration of the 10-day cure period. As determined above, the contracting officer reasonably concluded, based upon conversations with the lessor prior to issuing the notice of default, that the lessor would be unable to provide commitments of financing within the cure period. The statements amounted to an anticipatory repudiation of the lease requirements. Moreover, the lessor states that it viewed as legally deficient the default notice and it continued in its attempts to obtain financing. Those post-termination efforts did not result in financial commitments within the cure period, or finalized agreements by June 26, 1997. (FF 17-19.) Thus, the default determination was reasonable at the time made (given the implicit repudiation by the lessor) and at the expiration of the actual cure period (when the lessor still lacked assurances that it would have the financing necessary to proceed with performance).

Contrary to what appears to be an underlying assumption of the lessor, the contract obligated the lessor to do more than simply provide occupiable space no later than December 31, 1997. The contract required the lessor to take initial and interim steps, which were necessary to the successful completion of the project, and which helped to provide assurances of a timely completion of the lease space (FF 2).[3]

In opposing the Government's motion, the lessor maintains that the evidence proves that, as of June 18, 1997, the lessor would have performed the entire contract within the time remaining for contract performance and that it detrimentally relied upon the cure notice it received on June 10, 1997. I need not probe the lessor's ability to obtain ownership of the property and complete construction so as to provide occupiable space by December 31, 1997. As concluded above, the lease required more than a final occupiable space by a given date. The contractual requirements and evidence of assurances are integral parts of the lease. Although

[3] The lease also requires the lessor to provide a construction schedule no later than 30 days after award. The schedule is to identify milestones, including the issuance of a building permit, completed construction documents, and the start of construction. (Appeal File at 69 (¶ 3.9).) However, without financing and without ownership or control over the location, there is no assurance that any of these items could be accomplished.

the lessor asserts that it detrimentally relied upon the cure notice, the lessor stated that it would correct its failures not within, but only after the cure period, and the lessor did not correct the defects within the cure period. Thus, I need not explore the lessor's efforts because the contracting officer lacked the requisite assurances at the time of default.

The lessor asserts in its cross-motion for summary judgment that the material facts demonstrate that the contracting officer acted precipitously, without reasonable basis, and otherwise in derogation of applicable law and regulation when issuing the default termination of the subject lease. The record demonstrates the opposite of the assertions, as the lessor implicitly seeks to reform the lease to permit it additional time to obtain financing.

## RULING

I conclude that the termination for default was properly issued. Accordingly, I deny the lessor's motion for summary judgment and grant the Government's motion for summary judgment. As a result, I deny these two appeals.

_____

**JOSEPH A. VERGILIO**
Administrative Judge

**Issued at Washington, D.C.**
**June 29, 2001**