



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DENIED: June 28, 2007

CBCA 397

MMI CAPITAL, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

J. Hatcher Graham, Warner Robins, GA, counsel for Appellant.

Torrie N. Harris, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **DeGRAFF**, and **GOODMAN**.

**DeGRAFF**, Board Judge.

Appellant submitted a claim to respondent for unabsorbed overhead costs which it says it incurred as the result of a lease term beginning four months later than expected. When respondent took no action on the claim, appellant filed this appeal. The Board held a hearing April 11-13, 2006, and the parties completed their post-hearing briefing in March 2007. Because we do not find respondent was responsible for the delay to the beginning of the lease term, we deny the appeal.

## Findings of Fact

### The Solicitation

In the spring of 2002, the General Services Administration (GSA) issued a solicitation for offers to lease office space in Greenville, North Carolina. Offers were due May 29, 2002. Exhibit 1.1.

The solicitation said GSA wanted a building which had the potential for efficient layout, contained approximately 10,000 usable square feet of space, and complied with all the requirements set out in the solicitation. The solicitation did not require a potential lessor to offer space in a newly constructed building. Potential lessors were required to provide GSA with one-eighth-inch or larger scale blue line plans of the space they were offering for lease. The plans were supposed to be Computer-Aided Design (CAD) files in AutoCAD format. All architectural features of the space were supposed to be shown accurately. If GSA were to ask for more informative plans, the offeror was required to provide them within ten working days. GSA's intent was to lease a building shell and receive the benefit of a tenant improvement allowance. Exhibit 1.1 at ¶¶ 1.1, 1.9, 1.10, 1.14.

The building shell was to be provided at the lessor's expense and was to include certain specified components. Among the shell components were the base structure and building enclosure elements, restrooms, service areas, and common areas such as lobbies, fire corridors, and stairs. The shell components also included a complete acoustical tile ceiling system, exterior doors and doors to lobbies and common areas, permanent partitions, finished floors in common areas, plumbing in common areas such as toilet rooms and janitor closets, central heating/ventilating/air conditioning (HVAC) systems and all associated duct work, electrical closets and distribution panels with specified capacities, lighting installed in the ceiling grid, and a telecommunications room. Exhibit 1.1 at ¶ 1.11.

The tenant improvement allowance would cover the cost of tenant improvements within the leased space. The tenant improvements would be identified by the Government after the lease was awarded and were to be constructed by the lessor in accordance with Government-approved design intent drawings. Exhibit 1.1 at ¶¶ 1.10, 1.12, 1.13. Tenant improvements included items such as interior doors and door hardware, office subdividing partitions, window coverings, and electrical, telephone, and data outlets within the leased space. Exhibit 1.1 at ¶¶ 5.8, 5.9, 5.13, 5.17, 6.11. No costs associated with the building shell itself were to be paid from the tenant improvement allowance. Exhibit 1.1 at ¶¶ 1.12.

The solicitation contained a section titled “Construction Schedule of Tenant Improvements,” which said the construction schedule would commence upon lease award and would be divided into six tasks. First was the generation of design intent drawings. Second was the Government’s approval of the design intent drawings. The next four tasks were the lessor’s generation of working construction drawings and documents for the tenant improvements shown on the approved design intent drawings, the Government’s review of these drawings and documents, construction of the tenant improvements, and the Government’s acceptance of the space. Exhibit 1.1 at ¶ 3.15.

Regarding the design intent drawings, the solicitation said the Government was required to prepare and provide approved design intent drawings detailing the tenant improvements to be made by the lessor within the area leased by GSA. Design intent drawings were defined as fully dimensioned drawings of the leased space which contained enough information to prepare construction drawings. They were to show furniture locations, telephone and data outlet types and locations, specifications needed to calculate electrical and HVAC loads, and finish, color, and signage selections. Design intent drawings were due to the lessor within thirty working days after the award of the lease. Exhibit 1.1 at ¶ 3.15(a).

The lessor was supposed to prepare working construction drawings within fifteen working days after it received the Government’s approved design intent drawings. Work shown on the drawings which was building shell work was supposed to be clearly identified as such. Exhibit 1.1 at ¶ 3.15(b).

If the lessor did not deliver the premises by the required delivery date due to an excusable delay (which included acts of the Government), GSA would extend the delivery date and the extension would be the lessor’s “sole remedy.” Exhibit 1.1 (GSA Form 3517B at 3, 5).

### Offer and Acceptance

On May 28, 2002, Heath & Associates, Inc. (Heath), submitted an offer in response to GSA’s solicitation. Exhibit 1.1 (GSA Form 3518 at 4). Our record does not include a complete copy of the offer, so we do not know what, if any, drawings Heath submitted to GSA with its offer. Heath planned to construct a building and lease space in the building to GSA, but we do not know whether the offer mentioned this plan. Transcript at 103.

The record contains a drawing prepared by the architect hired by Heath to work on the Greenville project (Heath’s architect) and dated August 9, 2002, two months after Heath submitted its offer. The drawing shows a large rectangle overlaid with horizontal and

vertical lines which represented column lines and which divided the large rectangle into twelve smaller rectangles. The drawing shows the overall length and width of each of the rectangles, but does not show the sizes of the columns themselves. The drawing does not show doors, windows, restrooms, corridors, or any architectural features. It is simply a rectangle divided into twelve smaller rectangles by the column lines. Exhibits 4, 8, 104; Transcript at 11-15.

On September 17, GSA accepted Heath's offer to lease space to the Government. GSA sent a lease to Heath and asked Heath to sign it and return it to GSA. The lease term was to begin June 1, 2003, and was for a maximum term of ten years. The lease, which included the terms of the solicitation, said the Government's space layouts would be provided within thirty days from September 17. The lease also said the tenant improvement allowance was \$264,873.51. Exhibits 1.1, 202.

The tenant agency in the Greenville space was to be the Internal Revenue Service (IRS). IRS intended to use approximately one-fourth of the space as a taxpayer assistance center (TAC) and the remainder as other office space. Exhibit 7 at 5.

Carol A. Snipes was an interior designer and space planner in the Facilities Management branch of IRS's Real Estate Management Section in Richmond, Virginia, and she was the project manager for the Greenville lease. Ms. Snipes had been in the Facilities Management branch for seventeen years and had worked on between fifty and sixty layout designs for IRS office space. Her responsibility as project manager for the Greenville lease was to work with IRS employees and determine space requirements such as how many conference rooms and how many workstations would be needed. Once the requirements were identified, she would work with GSA, IRS employees, architects, engineers, telecommunications staff, and security staff to develop a space layout and floor plans. Transcript at 284-90; Exhibit 7 at 5.

In late August, before GSA awarded the lease to Heath, Ms. Snipes asked GSA when she could expect to receive drawings of the building shell. She said once she had them, she could schedule a meeting with her project team and begin space layout work. Exhibit 2. She made this same request in mid-September. Exhibit 6. Ms. Snipes expected the shell drawings would show the building's perimeter, the location of its columns, and the location of service areas such as restrooms, the HVAC room, and the electrical room. She needed to know what the building shell looked like so she would know how much space she had to work with when she laid out the interior space. Transcript at 337-38.

On September 23, GSA responded to Ms. Snipes's question about Heath's shell drawings. GSA said it would follow up on her request. Exhibit 6.

October 2002

According to the lease, the Government's approved design intent drawings were to be provided to Heath on October 30, 2002, which was thirty working days after September 17. Exhibit 1.1. On October 1, 2002, GSA contacted Ms. Snipes and told her she would soon receive a plan for the building, showing dimensions and column spacing. Also, GSA said Heath intended to provide a tentative construction schedule. Exhibit 7 at 2.

On October 2, Heath told GSA the design and construction process would need to proceed quickly in order to complete construction of the building so IRS could move in by June 2003, and Heath set out its planned schedule, as follows. Heath said GSA would receive new drawings from Heath's architect on October 3. Based upon its experience working with GSA, Heath expected the Government would then need sixty days to complete its design intent drawings. However, Heath said, its architect would need to know by mid-October where all exterior doors and windows were to be located and would need to know by the end of October the locations, sizes, and configurations for all bathrooms, janitorial closets, mechanical closets, and utility closets. In addition, Heath said, its architect would find helpful having a document outlining the number of rooms, their desired sizes, and general technical specifications. Exhibit 7 at 3-4; Transcript at 136.

Heath also said that as the Government was completing its interior layout, Heath would be completing the shell design and obtaining building permits. Heath said it expected to begin shell construction in mid-December 2002 and finish at the end of January 2003. Heath said negotiations regarding tenant improvements ought to be completed between mid-December 2002 and the end of January 2003, so Heath would have the following four months to complete the tenant improvements. Exhibit 7 at 3-4.

In response to Heath's plan, GSA told Heath it would like Heath's architect to show all the service areas and exterior windows and doors on his drawings. Doing so, said GSA, would minimize the time needed to construct the building shell and would ensure the architectural features of the proposed building would be consistent with those of the office park where the building was to be constructed and would be within Heath's building shell construction budget. GSA said when it received Heath's shell floor plan on October 3, it would forward it to IRS for review, pending receipt of a revised floor plan showing service areas and exterior doors and windows. GSA also said when it received the revised floor plan, it would forward the plan to IRS, which could then proceed to lay out its space. Exhibit 7 at 3. Ms. Snipes told GSA she looked forward to receiving the building shell drawing, so IRS could begin its interior space planning. Exhibit 7.

On October 4, Heath told Ms. Snipes it hoped to have drawings to her either that day or on October 7. On October 8, Heath's architect sent via electronic mail a drawing to GSA and to Ms. Snipes. The drawing was numbered the same as the August 9 drawing. Like the August 9 drawing, the drawing Ms. Snipes received on October 8 contained column lines, but did not show column widths and did not show the location of windows, restrooms, mechanical/electrical closets, and other service areas. Also, the drawing was not in AutoCAD format. The drawing said it was drawn to a one-eighth-inch scale, and although Ms. Snipes was able to convert the drawing and read it, the drawing could not be plotted to a one-eighth inch scale. Ms. Snipes told GSA about the problems with the drawing. Exhibit 7; Transcript at 295. The record does not establish that Ms. Snipes received any drawings from Heath or GSA before October 8. Ms. Snipes identified the August 9 drawing as an early shell drawing she received from Heath's architect. Transcript at 327-28. If the drawing Heath gave GSA and Ms. Snipes on October 8 is any different from the August 9 drawing, the difference is not established in our record.

On October 9, GSA told Heath about the problems Ms. Snipes had identified with the drawing she received. GSA said it had previously asked Heath to provide plans showing service areas so IRS could proceed with its space layout. GSA said IRS could not begin its space layout until it had drawings showing service areas. GSA also told Heath it needed to know the "status on the signing of the lease contract." Exhibit 7 at 11.

In early October, Heath told Ms. Snipes she could contact its architect directly so they could keep the project moving, and she spoke with him on October 11 about the problems with the drawing she received on October 8. She sent the architect's drawing back to him so he could convert it to a properly scaled drawing. The architect told Ms. Snipes that Heath had not asked him to prepare drawings showing building shell components such as restrooms and electrical closets, and said he would contact Heath and ask whether he ought to prepare drawings showing service areas. Exhibit 7 at 15; Transcript at 294-95. Also on October 11, Ms. Snipes sent Heath's architect the elevation drawings for another IRS building which had been constructed approximately ten years earlier and a photograph given to GSA by Heath, which showed a building similar to the one Heath planned to construct in Greenville. Exhibit 201.

Heath did not feel it needed to decide where items such as service areas, exterior doors, and windows, which were components of the building shell, were going to be located. In Heath's view, because the building had not yet been built and because IRS would be using the building, Heath had no constraints on where it could place the building shell's components. Heath thought IRS might as well decide where the shell components were to be located and told its architect to tell IRS to decide where it wanted them. Heath thought it was IRS's contractual obligation to "lay those out" and felt there was "little point" in

Heath deciding where the shell components would be located because if it did, IRS would most likely change them. Heath communicated its views to Ms. Snipes and its architect. Transcript at 140-44.

Ms. Snipes received a one-eighth-inch scale drawing of the building from Heath's architect on the afternoon of October 11. Ms. Snipes considered this to be the first usable drawing of the building shell she received, although the drawing did not show service areas, columns, or exterior doors or windows. She asked Heath's architect if he could block out restrooms and service areas and return the plan to her, but there is no evidence contained in the record to show he did so. Ms. Snipes blocked out all of the interior space and added workstation locations, and met with IRS project team members on October 17. Based upon feedback received after the meeting, Ms. Snipes revised the drawing. Exhibits 1, 7, 7.1; Transcript at 302.

On October 30 or 31, Ms. Snipes faxed what she called a "preliminary draft plan" to Heath, Heath's architect, and GSA. The drawing was dated October 29, and blocked out locations and relative sizes of exterior doors, the front vestibule, the public toilet, emergency exits, corridors, the restrooms, a janitor's closet, the mechanical/HVAC room, the telecommunications room, and the electrical room. It also blocked out the locations and relative sizes of two managers' offices, a conference room, a file room, a mail room, two interview rooms, a copier/supply room, a tax compliance officer's room, and a break room. The drawing contained dimensions for the interview room, the mail room, the mechanical/HVAC room, and the electrical room. In open spaces, the draft plan showed the locations and relative sizes of workstations and office furniture. Ms. Snipes's drawing contained a note which said "bathrooms like Soc. Sec.", and she attached a drawing which showed how the restrooms were configured in a nearby Social Security Administration office. Exhibits 10, 11.

Ms. Snipes thought her October 29 drawing met the need for a preliminary layout of the space and gave Heath the information it said on October 2 that it needed. Neither Heath nor its architect ever told Ms. Snipes they were unable to proceed once they had her drawing dated October 29. So far as Ms. Snipes knew, Heath's architect was proceeding to develop the building shell, to add more details, and to develop the drawings needed in order to obtain a shell building permit. Although the October 29 drawing continued to be refined as the project moved forward, few changes were made to the basic configuration (the number of offices, the number of workstations, the placement of offices, the placement of service areas, and the approximate sizes of the rooms). The shell perimeter remained the same, the only change being one suggested by Heath's architect in late October or early November, which was to recess the vestibules. Exhibits 10, 14, 104; Transcript at 302-04, 315-17.

The October 29 drawing by itself could not have been used by Heath to obtain a building permit for the shell. The lease, however, did not require the Government to produce a drawing which could be used to design the building shell, to obtain a permit to construct the shell, or to construct the shell. Heath was supposed to provide the building shell, and the Government's obligation was to provide a drawing which showed the desired tenant improvements within the leased space so Heath could prepare construction drawings for the tenant improvements. Although the October 29 drawing was a draft and therefore subject to change, it allowed Heath's architect to start his layout work and begin working toward final drawings. Transcript at 16-17, 84; Exhibit 1.1.

### November 2002 - April 2003

#### Summary

In order to obtain a permit to construct the building shell, the lessor needed drawings which showed building elevations, the footprint of the building, the foundation, the structural steel, the roof, and wall type section details. Mechanical, electrical, and plumbing drawings were not needed in order to obtain the shell building permit.

Ms. Snipes worked with the lessor's architect to refine her October 29 drawing. She gave him what she called a "proposed final plan" on December 14, 2002, after which she began working on the telecommunications and electric plans. The configuration of the space in mid-December was much the same as shown on the October 29 drawing.

On February, 14, 2003, the architect produced the drawings the lessor needed to obtain a shell building permit. On March 10, the lessor applied for a shell building permit and encountered delays in obtaining the permit due to a problem with the legal description of the property.

In March and April, Ms. Snipes provided information regarding tenant improvements such as finishes, systems furniture, a reflected ceiling plan, lighting, telecommunications and electric locations, and the buildout of the TAC area. The lessor obtained its shell building permit on April 23.

#### Details

In order to obtain a shell building permit, Heath needed construction drawings showing building elevations, the footprint of the building, the foundation, the structural steel, the roof, and wall type sections. Transcript at 17-18, 75, 83. Mechanical, electrical, and plumbing drawings were not needed in order to obtain a permit and begin construction

of the shell. Transcript at 76-79. A drawing showing furniture locations was not needed in order to obtain a shell building permit and begin construction. Transcript at 86. Ms. Snipes and Heath's architect understood the development of drawings is a continuing process. Typically, details will be added and changes will be made until final drawings are produced. Transcript at 49-50, 309-10. Even after the permitting process begins, changes can be made to drawings. Exhibit 96 at 21-22.

On November 1, in response to a question from Heath's architect, Ms. Snipes sent her October 29 drawing to Heath, GSA, and Heath's architect and outlined in bold pen the blocks which would require full-height partition walls. These blocks included building shell components, such as the restrooms, the janitor's closet, and other service areas, as well as some tenant improvements. Full-height walls were not shown around two areas labeled "tax compliance" and "interview," and a handwritten note showed these areas would receive systems furniture panels. Ms. Snipes told Heath, GSA, and Heath's architect that although the October 29 drawing was a draft, she did not expect the interior walls would change very much. Exhibit 14; Transcript at 310-11.

On November 4, Heath's architect provided Ms. Snipes with a drawing which contains the partition walls shown on Ms. Snipes's November 1 drawing and the restrooms shown on her October 29 drawing. The November 4 drawing also shows recessed vestibules. Like Ms. Snipes's October 29 drawing, the architect's November 4 drawing blocked out the space and showed the locations and relative sizes of the rooms. Unlike Ms. Snipes's drawing, the architect's November 4 drawing did not contain dimensions of any rooms. Exhibits 13, 19.

On November 13, Heath sent GSA a copy of the lease signed by Miller L. Heath III, Manager. Heath had altered the lease, however, to show the lessor of the property in Greenville would be MMI Capital, LLC (MMI), not Heath & Associates. Exhibit 202. Subsequently, GSA retyped the lease to show the lessor as MMI Capital, Inc., and the contracting officer signed it. Exhibit 1.1. The record does not establish why MMI took the place of Heath or why MMI took nearly two months after award to sign the lease.

On November 19, MMI's architect (formerly referred to as Heath's architect) provided Ms. Snipes with a building elevation drawing, and on November 20, Ms. Snipes had a discussion with MMI regarding building elevation drawings. They discussed the number of windows planned for the building, the style of the windows, the exterior finish colors, and possible HVAC issues which might arise because of the placement of the windows. On November 21, MMI's architect sent Ms. Snipes four elevation drawings of the building MMI intended to build in Greenville. These drawings showed the locations of doors, a few exterior colors, and the locations and styles of windows. On November 21,

Ms. Snipes told MMI's architect she would appreciate receiving a shell drawing which showed the size of the telecommunications room as ten feet by ten feet, interior access to the electrical closet, a water fountain outside the men's room, and the removal of walls in two areas (labeled "tax compliance" and "interview") which her November 1 drawing showed would receive systems furniture instead of being enclosed by partition walls. Ms. Snipes said once she received the drawing, she would insert all workstations, furniture, and equipment into the drawing and circulate it for approval, and then she could proceed to work on telecommunications and electric locations. On November 25, she pointed out to MMI's architect the sections of the lease which explained which components of the shell needed permanent partitions. She also said the entrance to the public restroom needed to be moved from the TAC area to the vestibule. Exhibits 13, 16, 203. Also on November 25, Ms. Snipes sent GSA, MMI, and MMI's architect a set of guidelines for mailrooms and asked to what extent it would be possible to adhere to the guidelines at a reasonable cost. One of the guidelines concerned how mailrooms ought to be ventilated. Exhibit 17.

On November 26, Ms. Snipes contacted MMI's architect and told him IRS national standards required specific finishes in interior office spaces. She provided him with examples of the specific products needed for carpet tile, vinyl carpet tile, quarry tile, and vinyl wall coverings. She said she would provide additional information soon. She again asked for a revised shell drawing so she could complete her final furniture plan. Exhibit 13. On November 27, MMI's architect prepared a dimensioned drawing of the building shell. It appears he sent this drawing to Ms. Snipes because this same day, she told him the managers' offices, the conference room, and the file room needed to be larger, a door needed to be added to the copy room, what had up until then been labeled the mailroom needed to become the interview room, and what had been labeled the interview room needed to become the mailroom. She sent him a drawing marked with these changes. Exhibits 18, 20, 104; Transcript at 311-12.

At the end of November, Ms. Snipes believed the floor plan was progressing toward becoming final. She planned to hold a project team meeting in mid-December and then circulate the final plan within IRS for approval. When the final plan was circulating, she expected to begin work on the construction drawings, including electric and telecommunications penetrations. She understood MMI planned to begin construction of the building shell in January 2003. Exhibit 13.

On December 2, Ms. Snipes sent MMI's architect a portion of a drawing to show him how the file room could be extended. Exhibit 23. MMI's architect sent Ms. Snipes a computer file containing a drawing on December 3. Although the first file the architect sent was blank, when Ms. Snipes called this to his attention he promptly sent another file which Ms. Snipes was able to open and use after she changed the drawing's scale. A few hours

later, Ms. Snipes told MMI's architect she needed his revised drawing which showed the changes to the public restroom, the conference room, and the file room, among others. Apparently, the architect provided Ms. Snipes with a new drawing, because on December 4, she told him the drawing did not show the change to the entrance to the public restroom. Exhibit 21.

Ms. Snipes provided a "proposed final plan" to MMI's architect on approximately December 14. This plan shows doors, windows, interior walls, restrooms, and service areas, as well as furniture and workstations. Exhibits 1, 26. Although this plan is not exactly the same as Ms. Snipes's October 29 drawing, the two are not altogether different. The configuration of the TAC area had not changed since October 29. The locations of the interior rooms had not changed, although the relative sizes of some rooms were different from the sizes shown on the October 29 drawing. The workstations were nearly all in the same places, although some had been rotated in a direction different from the direction they faced in the October 29 drawing. Exhibits 10, 26.

In January, Ms. Snipes understood MMI intended to begin construction of the shell in February. Exhibit 1. By late January or early February 2003, Ms. Snipes had completed a final floorplan layout. The differences between this plan and the December 14 proposed final plan were minor: two sets of workstations had been moved so they abutted one another, and two other workstations were reconfigured, but not moved. In late January, Ms. Snipes told MMI she was working on the telecommunications and electric plans. Exhibits 26, 104, 205.

By February 4, 2003, Ms. Snipes had added telecommunications and electric locations to her final floorplan layout. Exhibits 31, 32; Transcript at 347. On February 5, Ms. Snipes sent the proposed plan to IRS's telecommunications staff and MMI's architect for review. She told MMI's architect to note that IRS did not plan to use power poles to distribute power to workstations located in open areas, which meant telecommunications and electric service for workstations located in open areas needed to be run in the floor ducts. Ms. Snipes asked the architect to let her know if he had any concerns or suggestions. Exhibit 33.

On approximately February 7, Ms. Snipes circulated the final floor plan layout for approval within the IRS. Exhibit 34. A few days later, MMI met with construction contractors to solicit bids for constructing the shell. MMI told Ms. Snipes that in order for the City of Greenville to approve MMI's plans, the interior walls would have to be removed from the drawings. Exhibit 30; Transcript at 318-19.

On February 14, MMI's architect produced architectural drawings A-1 through A-8 and structural drawings S-1 through S-7. Drawing A-1 shows a floor plan of the building, including exterior doors and windows, the dimensions of the rooms including those for the service areas, placement of interior walls, doors and windows, toilets, wall type sections, a door schedule, and a finish schedule which shows the types of finish materials to be used. Drawing A-2 is a reflected ceiling plan; A-3 is a roof plan; and A-4 shows elevations. Drawings A-5 and A-6 show wall sections and plan sections, and A-7 and A-8 show various other construction details. The structural drawings show the plans for a slab-on-grade building, including a foundation plan, a roof framing plan, framing elevations, a roof deck plan, and section details. The structural drawings were sealed by a structural engineer on February 17. Although Drawing A-1 contains more detail than did Ms. Snipes's original October 29 drawing, the configuration of the interior space was nearly the same on both drawings. Exhibits 10, 104.

On February 19, Ms. Snipes contacted MMI's architect regarding the proposed telecommunications and electric plan which she had sent to him on February 5. Specifically, she asked how he was planning to run and route conduit for cabling. She said the IRS telecommunications staff wanted to know whether he was planning to route conduit in the floor between the telecommunications closet and workstations in open areas, or whether he was planning to route this conduit over the ceiling, down the walls, and into the floor. Ms. Snipes told MMI's architect the IRS telecommunications staff suggested the latter route, the one from the ceiling, might be less costly.<sup>1</sup> Exhibit 30.

In mid-February, the telecommunications and electric plans were circulating within the IRS. Ms. Snipes told another IRS employee that the basic floor plan layout had not changed much since early November 2002, and the final plan was very close to the plan which was circulated in mid-December. Exhibit 30. The exhibits contained in the record support her statement. The final plan was very close to the one Ms. Snipes blocked out on October 29, 2002. Exhibits 14, 26, 32.

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<sup>1</sup> In a building with a concrete floor, such as the one MMI planned to construct, telecommunications and electric conduit can be run in the walls, above the ceiling, or in raceways (ducts) in the concrete slab. Transcript at 30-31. If conduit is to be run in raceways to workstations, it is necessary to know where the workstations will be located in order to determine where the raceways will be located, and this needs to be determined before concrete is poured. Transcript at 30-31, 332-33. MMI constructed its building so the conduit running to workstations located in open areas was run through raceways in the slab and other conduit was run in other locations. Transcript at 332.

After discussions with MMI, furniture vendors, and the IRS data and telecommunications staff, Ms. Snipes sent GSA, MMI, and MMI's architect floor plans showing telecommunications and electric locations on February 25 and 26. Ms. Snipes said she believed this completed the telecommunications and electric plans. Exhibits 30, 40.

On February 28, Ms. Snipes sent MMI and MMI's architect information about the systems furniture, made by Knoll, which would be installed in the office space. The information included details regarding how power would be supplied to the furniture. Exhibits 42, 43. She also sent MMI and its architect information regarding a containment hood for ventilating the mailroom and said IRS was interested in such a hood. Exhibit 204.

On March 5, Ms. Snipes provided MMI and its architect with an example of a reflected ceiling plan for the TAC area. This plan shows a bulkhead in the ceiling of the TAC area. Exhibit 47. She also provided details regarding two changes to the telecommunications and electric plan, the first of which deleted a receptacle and the second of which moved a receptacle. Also on March 5, Ms. Snipes provided MMI's project engineer with a typical reflected ceiling plan showing IRS national office standards for lighting. Exhibits 44, 46. By March 5, Ms. Snipes had collected all of the necessary approvals within IRS for the final floor plan. Exhibits 44, 104.

By March 6 or 7, MMI's project engineer had completed his mechanical, electrical, and plumbing drawings. The project engineer told Ms. Snipes that although the process of obtaining a permit would begin, the drawings could be changed to suit IRS's needs. He expected to prepare final drawings based upon discussions with MMI and IRS. On March 7, the project engineer gave Ms. Snipes a list of the outstanding engineering issues which needed to be resolved. Specifically, he asked whether any special ventilation was needed for the conference room, and he posed several questions about the mailroom containment hood. Also, he told Ms. Snipes he needed copies of drawings which showed electrical and voice/data outlets, because the copies he had were of poor quality. He also asked for a clean copy of the information regarding the systems furniture wiring. He gave Ms. Snipes a copy of the reflected ceiling plan which he said had been prepared to obtain a permit and asked her to let him know what reflected ceiling plan she wanted. Finally, he asked Ms. Snipes for a drawing of the layout of the building in AutoCAD format. Exhibits 44, 96 at 21-22. The same day, Ms. Snipes responded to his questions about the reflected ceiling plan and said several items shown on the plan could be eliminated. She also responded to his questions about the conference room and provided him with the February 4 approved furniture layout showing telecommunications and electric penetrations. She said she would give him the remaining information, which concerned the office systems furniture and the hood in the mailroom, on March 12. Exhibit 44.

On March 10, MMI submitted some of its February 14 drawings to the City of Greenville to obtain a permit to construct the shell of the building. Obtaining a permit usually takes two to three weeks. Transcript at 78-80, 85, 88; Exhibit 100.

Ms. Snipes contacted MMI several times to ask about its progress toward obtaining a building permit for the shell. Transcript at 318-19. In early March, Ms. Snipes asked MMI's project engineer whether a shell building permit had been obtained. The project engineer told Ms. Snipes he did not know the status of the permit and suggested she check with MMI. He then told MMI of Ms. Snipes's inquiry and said he had "dodged the issue" when he answered her question. Ms. Snipes recalled that in March or April, MMI told her there was a delay in obtaining a permit because the legal description of the property had to be changed. Exhibit 96 at 21; Transcript at 319-20.

On March 12, Ms. Snipes met with MMI, MMI's architect, MMI's project engineer, IRS telecommunications personnel, and GSA. One topic of discussion was telecommunications cabling. Also discussed were lighting and options for ventilating the mailroom. MMI said it would provide information concerning the cost of installing a containment hood and the cost of an alternate means of ventilating the room. At this meeting, Ms. Snipes provided copies of the approved workstation layout, the proposed design intent plan showing telecommunications and electrical information, and furniture product specifications for Knoll systems furniture for the office area and Herman Miller systems furniture for the TAC area. MMI's project engineer agreed to provide a plan within a few days, showing the number of electrical circuits to be installed. IRS agreed to verify dimensions for floor penetrations for telecommunications and electric needs. Ms. Snipes provided information about finish requirements and MMI's architect stressed that IRS needed to provide information for all finishes as soon as possible so MMI could develop detailed project cost estimates. Exhibits 4.1, 44, 50, 104.

On March 18, Ms. Snipes circulated telecommunications and electric plans within the IRS for review. Exhibit 51. On March 19, she sent MMI, its architect, and its engineer drawings to which she had added dimensions for certain areas and notes regarding moving the locations for wall power and telecommunications in one area. She also told them new systems furniture was going to be purchased for two managers' offices and showed on a drawing where an electrical box would be needed for the furniture. She sent another drawing which asked MMI's architect a few questions and which said that, after talking with him, she agreed it would make construction easier if drywall were used in the small conference room. One of Ms. Snipes's questions concerned how to eliminate an area of dead space which ran the length of one office. Exhibit 52. She asked her question about the dead space again on March 27. Exhibit 54.

MMI signed a contract with C.A. Lewis on March 20, for construction of the shell and the tenant improvements. Exhibits 6.1, 96 at 16, 23.

On April 1, Ms. Snipes sent MMI's architect information regarding several items they had discussed earlier in the day regarding the buildout of the office space. She sent this same information to GSA and MMI. The information concerned using plywood to reinforce the walls in the two managers' offices, adding one telecommunications/data penetration, adding sound insulation to the conference room walls, using drywall to build out two rooms in the TAC area, moving the wall of one room in the TAC area so it was even with a column line, and resolving the issue regarding the area of dead space in one office. She also suggested the location and ceiling heights for the bulkhead in the TAC area, as well as the lights required for this area, and asked MMI's architect to give her his thoughts about the TAC bulkhead and ceiling. She said once revisions to the TAC area were made, this would complete the changes to the design intent drawings. Exhibits 56, 58. It appears MMI's architect made revisions to the floor plan in response to Ms. Snipes's information and provided a revised plan to her on April 2. On April 4, Ms. Snipes asked MMI and its architect to review a set of marked up drawings and to call her to discuss them. She said some of the changes shown on the April 2 revised plan could not be integrated with the workstation layout. Exhibits 59, 104; Transcript at 356-57.

On April 10, Ms. Snipes told MMI's architect she had received a plan from him which she expected to review soon. Also, she sent him an installation plan for the TAC area furniture. Exhibit 60. The next day, April 11, Ms. Snipes contacted MMI's architect and told him the width of two of the areas to be enclosed in the TAC needed to be reduced in order to accommodate the installation of workstation furniture shown on the plan which she sent him on April 10. Ms. Snipes thought reducing the width of the rooms meant the doors from the vestibule into the TAC would have to be moved approximately one foot so the edge of the tile floor would run straight from the doors to the walls of the rooms. Exhibit 61.

On April 11, Ms. Snipes told another IRS employee that construction was supposed to begin soon. She said she expected to move into the new space in August. She also said she was working with the architect and MMI to resolve interior construction issues. Exhibit 56 at 19.

On April 15, MMI's architect completed a revision of architectural drawings A-1 and A-2, the floor plan and the reflected ceiling plan. The revisions consisted of adding a layer of plywood in the two managers' offices, using drywall in the small conference room, adding the bulkhead in the TAC area, using drywall to build out two rooms in the TAC area instead of using systems furniture in these rooms and moving the wall of one of these rooms so it was even with a column line, resolving the issue regarding the area of dead space in one

office, and extending the tile floor in the TAC. The architect's April 15 drawing also changed the size of the HVAC and electrical rooms and moved the door to the electrical room, which were not changes suggested by the Government, so far as our record shows. Although Ms. Snipes thought the doors from the vestibule into the TAC would have to be moved, the April 15 drawing shows they were in the same place they had been since the February 14 drawings were completed. Exhibit 104.

On April 23, MMI obtained its shell building permit. Exhibit 96 at 16; Transcript at 81. Earlier in April, C.A. Lewis had given Ms. Snipes color charts for exterior brick options. On April 23, Ms. Snipes told MMI which two colors she preferred, but said she would defer to the architect's color preference. Exhibit 62.

In late April, Ms. Snipes was working with the IRS interior designer to finalize the arrangement of furnishings in the space. Exhibit 56 at 24. She contacted MMI's project engineer, who she understood was finalizing his plans, and asked him to look at an attached drawing which moved a counter station and which would require adding telecommunications and electrical outlets. Ms. Snipes asked if it was too late to include these items in the plans. If so, she said it would be done as a change order. In addition, she wanted to make sure MMI's project engineer knew telecommunications and electric outlets needed to be changed in the TAC area where the two rooms were to be built out with drywall instead of receiving systems furniture. Exhibits 56 at 26, 65.

### May - September 2003

#### Summary

MMI constructed the building shell and the tenant improvements between May and September 2003. During this time, Ms. Snipes requested very few changes. She told MMI three electric receptacles and junction boxes could be eliminated, asked if an ice maker connection could be installed in the break room, added a few lights, and provided finish information. Construction was completed within the time MMI and its construction contractor expected it to be completed.

#### Details

Mr. Heath testified that MMI's construction activities themselves were not delayed, Transcript at 121, and his testimony is supported by other evidence in the record. MMI expected shell construction would take six weeks and tenant improvements construction would take four months, for a total of five and one-half months. Exhibit 7 at 4. C.A. Lewis expected to take eighteen weeks, or approximately four and one-half months, to complete

construction. Transcript at 91. C.A. Lewis gave its subcontractors a schedule which showed construction would take four months. Exhibit 96 at 26, 27; Transcript at 90, 97. As explained below, construction began on May 11 or 12 and was completed sometime before September 23, for a total construction time of a little more than four months.

The first construction activity scheduled for the building was digging footings for the foundation. Exhibit 96 at 27. On May 1, C.A. Lewis told MMI that foundation work for the building shell had begun “this week”, and said it needed electrical and lighting requirements from IRS in order to prevent delays to the project. MMI transmitted C.A. Lewis’s information to GSA and said the only thing which could delay the project was getting the final electrical drawings. MMI told GSA Ms. Snipes was working with MMI’s engineer and its architect to complete these drawings. Exhibit 67.

On May 7, Ms. Snipes received a set of plans from MMI’s architect. Unfortunately, the plans were contained in a compact disk which was unreadable. Exhibit 70.

Although C.A. Lewis said on May 1 that foundation work for the shell began the week of May 1, it appears that work actually began later than this. C.A. Lewis subsequently said it began foundation work on May 11, and a chart which tracked C.A. Lewis’s actual progress shows foundation work began with digging footings on May 12. Transcript at 89-91; Exhibit 96 at 16, 27. We find the foundation work began on May 11 or 12, not May 1.

On May 19, Ms. Snipes told MMI’s architect that the set of plans (apparently a hard copy) she received on May 7 did not contain the electrical plan. She needed to see the plan to make sure it included all of the changes and additions previously discussed. She had reviewed the reflected ceiling plan, noticed it did not include some lights which ought to have been included, and told the architect she would again provide information regarding these lights. She also said she was ready to give MMI information regarding interior building finishes (carpet, wall coverings, vinyl baseboard, etc.). This same date, Ms. Snipes informed GSA she would not be able to complete her review until she received electrical and lighting plans. Exhibits 71, 72.

MMI’s architect told Ms. Snipes she ought to contact MMI’s project engineer to obtain the electrical plan. Also, he said he would send her another copy of the plans contained on the disk. He suspected the disk he sent to her was blank because of a problem with the equipment he used to create the disk. Exhibit 72.

C.A. Lewis poured footings on May 19 and 20, and began roughing in the slab on May 21. Exhibit 96 at 27; Transcript at 90.

MMI's project engineer produced revised plumbing, mechanical, and engineering drawings dated May 23. Exhibits 96 at 4, 104. This same date, Ms. Snipes sent a memorandum to MMI, its architect, and its engineer regarding her review of what she thought were the final drawings for the project. Apparently, she had obtained the electrical plan from someone because regarding the plan, she noted that three receptacles needed to be shown as dedicated to specific pieces of office equipment, and three junction boxes could be eliminated due to changes made to furniture for the managers' offices. Regarding the reflected ceiling plan, she noted four areas, two of which she had mentioned previously, where a few lights needed to be added. The plans showing interior wall locations were fine, and the plumbing plans were fine, except the IRS asked that an ice maker connection be added in the employee break room. For the most part, the plan for the doors was correct. Ms. Snipes provided additions to the finish schedule. She also had a few questions about the handicapped employees' restroom. Exhibit 73.

On May 27, C.A. Lewis received the revised plumbing, mechanical, and electrical drawings from MMI's project engineer. C.A. Lewis said it would begin to implement the changes immediately and would let MMI know about additional costs and impact to the schedule. Also, C.A. Lewis asked MMI to forward any IRS comments regarding the architectural drawings. Exhibit 96 at 24.

C.A. Lewis began setting structural steel on May 28. Exhibit 96 at 27; Transcript at 90.

On May 29, C.A. Lewis gave its subcontractors a construction schedule and asked them to arrange to meet it. The schedule showed construction had begun with digging footings on May 12, and would end with punch list items being taken care of between September 10 and September 12. Exhibit 96 at 26, 27; Transcript at 90, 97.

On June 5, C.A. Lewis told MMI it needed a revised set of architectural drawings to show the bulkhead in the TAC area and the use of drywall to build out two rooms in the TAC area. C.A. Lewis said the plumbing, mechanical, and electrical drawings contained one minor plumbing change for which there would be no price increase. It said it was proceeding with installing floor boxes, but was not proceeding with other electrical changes shown on the project engineer's drawings until MMI confirmed that the changes were required. The other electrical changes C.A. Lewis mentioned were requirements for a cable tray, an isolated grounding system, and light fixture changes. Requirements for isolated grounding and cable trays were contained in the lease. C.A. Lewis told MMI it had received a price quote of a few hundred dollars for minor HVAC changes related to the file room. It also said color selections were needed soon in order to avoid delays. Exhibits 1.1 at ¶¶ 6.11, 6.14, 208.

On June 5, Ms. Snipes told the IRS telecommunications staff the electrical contractor wanted to know whether it would be acceptable to use a type of floor box for electrical and telecommunications receptacles as a substitute for the floor box which was specified. She said she needed a response as soon as possible. Exhibit 75. The next day, Ms. Snipes told MMI the substitute boxes were acceptable. Exhibit 76.

C.A. Lewis began pouring the slab on June 6. Exhibit 96 at 27; Transcript at 90. Usually, C.A. Lewis pours a building's slab before it erects the structural steel. The project manager for C.A. Lewis recalled that, in this instance, C.A. Lewis erected the steel first and waited to pour the slab until it received mechanical, electrical, and plumbing drawings. Transcript at 79.

On June 10, 11, and 12, Ms. Snipes provided MMI and MMI's architect with more interior finish information. She asked the architect to let her know his preferences and said she would then prepare a "finish board" for MMI. Exhibits 74, 77. On June 12, she provided the architect with a suggestion regarding the handicapped employees' restroom and asked if he thought her suggestion was feasible. Exhibit 78.

On June 11, C.A. Lewis began framing the walls, and on June 12, some of the electrical rough-in work had been approved. Exhibits 96 at 27, 100; Transcript at 90.

Between June 17 and June 26, MMI and C.A. Lewis were negotiating the price for changes to the construction work which C.A. Lewis was performing. The changes were needed to provide the material, equipment, and labor necessary to effect revisions to the April 15 architectural drawings and the May 23 plumbing, mechanical, and electrical drawings. Exhibits 6.1 at 4-8, 96 at 5. C.A. Lewis continued framing the walls during this time and then began installing the building's roof. By the end of June, C.A. Lewis began its masonry work and roughing in walls and the ceiling. Exhibit 96 at 27; Transcript at 90.

On June 25, Ms. Snipes stopped by C.A. Lewis's offices and picked up a set of plans which had been set aside for her to review. Although Ms. Snipes did not realize it, the plans which had been set aside for her did not contain the most recent revisions to the plans. Exhibit 79 at 8.

On July 9, Ms. Snipes brought to the attention of MMI's engineer three items which she wanted to make sure were included in the plans. Two of these three items had been discussed at the meeting held on March 12, and the third was something she had mentioned on May 23. Subsequently, she learned the plans which she had been given to review were not the most recent ones available. Exhibits 44, 50, 79 at 8, 12.

On July 11, Ms. Snipes explained to MMI's engineer that she had been given the wrong set of plans to review, and said she wanted to make sure the three items she brought to his attention on July 9 were included in the most recent set of plans. MMI's engineer responded by saying he had been making some changes on his drawings and would send a copy to her, MMI, C.A. Lewis, and MMI's architect. Exhibit 79 at 8, 11.

On July 15, MMI's project engineer sent C.A. Lewis and Ms. Snipes revisions to the mechanical and electrical drawings. Exhibit 81. Also on July 15, C.A. Lewis sent Ms. Snipes its construction schedule. The schedule showed the project was progressing according to C.A. Lewis's plan and that construction would be completed in mid-September. Exhibit 79 at 17, 18.

On July 16, Ms. Snipes notified GSA, MMI, C.A. Lewis, MMI's architect, and MMI's engineer that IRS approved a set of plans dated June 16, provided several items were added to the plans. Most of the items she wished to add concerned finishes, and many of the items had been mentioned by Ms. Snipes in the preceding months. Exhibit 79 at 21.

On July 18, Ms. Snipes provided C.A. Lewis the names and telephone numbers of businesses which could supply the vinyl wallcovering which was supposed to be used in the building. On July 21, one of Ms. Snipes's colleagues responded to C.A. Lewis, who proposed changing the type of interior wall construction to be used for many of the tenant improvement walls, as well as the telecommunications room, at no additional cost to the Government. IRS agreed with the proposal. Exhibit 79 at 36.

The City of Greenville issued a certificate of occupancy on September 23. Exhibit 99. On December 8, 2003, the parties amended the lease to say its term began on October 1, 2003, for a maximum of ten years. Exhibit 1.1 (Supplemental Lease Agreement No. 2).

### The Claim

On August 26, MMI sent GSA what it called a "budget" for construction, architectural, and delay costs. This document contained monthly profit and loss statements of Heath (not MMI) for the five months from November 2002 through March 2003. These statements added expenses for Heath's accounting fees, administrative salaries, automobile expense, liability insurance, medical insurance, interest on loans, penalties, legal fees, licenses and permits, dues and subscriptions, office rent, office supplies, postage, payroll taxes, and telephones and pagers, and the total of these amounts for each month was

designated in the “budget” as Heath’s monthly overhead costs.<sup>2</sup> For example, the total of these amounts shown on the profit and loss statement for November 2002, was \$38,463.09. In addition, the “budget” document contained a chart labeled “GSA Time/Cost Overruns” for each of the six months from November 2002 through April 2003. Each chart listed four projects, one of which was the IRS project in Greenville.<sup>3</sup> Each chart showed the square footage of each of the four projects and the total square footage for all four projects. In November 2002, the square footage shown for the IRS project in Greenville was 9999 square feet and the total square footage for all four projects was 24,855 square feet. The charts allocated a percentage of the monthly overhead costs to each project, according to the project’s percentage of the total number of square feet. For November 2002, the Greenville IRS project was 40.23% of the total number of square feet ( $9999 \div 24,855$ ), and the monthly overhead costs allocated to the project were \$15,473.44 ( $\$38,463.09 \times 40.23\%$ ). MMI said these charts were based upon the “Eichley [sic] Formula.” For each month, the amount of the overhead costs allocated to the Greenville IRS project was shown as “Delay Cost.” The total of the amounts shown for November 2002 through April 2003, is \$54,925.71. Exhibit 6.1. Mr. Heath explained he based his calculation upon square feet of space and not the dollar value of the leases because “there was no income associated with any of [the] projects until the government moved in, so I . . . didn’t have a specific figure to use.” Transcript at 130.

So far as our record reflects, the August 26 document which MMI sent to GSA was the first notice the contracting officer received that MMI believed it had a claim against the Government. The contracting officer was surprised because he thought the project had gone smoothly. Transcript at 218-19.

On October 28, 2003, MMI sent an invoice to GSA for \$34,877.16, which MMI said was the difference between the amount of the tenant improvement allowance and the cost of the improvements “with all delay charges.” MMI also said the \$34,877.16 “represents” the design, construction, and delay costs detailed in its August 26, 2003 letter. Exhibit 95.

MMI submitted a claim to GSA on April 12, 2004. MMI said GSA delayed providing completed design intent drawings which caused MMI to incur six months of unabsorbed overhead costs. MMI said it used the “Eichley formula” to determine it was owed \$37,287. Attached to the claim were charts like those which MMI provided to GSA

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<sup>2</sup> The monthly totals do not reflect substantial end-of-year credits given to Heath for liability insurance and interest on loans. Exhibit 6.1.

<sup>3</sup> The chart appears to have mistakenly labeled the IRS project and an SSA project.

on August 26, 2003. Where the August 26 charts covered the six months from November 2002 through April 2003, the charts attached to the claim covered the four months from June through September 2003. Like the August 26 submission, the claim shows costs for Heath, not MMI. Exhibit 10.1.

When MMI received no contracting officer's decision regarding its claim, MMI filed this appeal. Exhibits 11.1, 12.1.

At the hearing, Mr. Heath explained MMI is claiming "delay" costs for overhead and "other items where we were standing around waiting [and] trying to get this project moved forward." Mr. Heath said MMI was standing by from the date the contract was awarded, waiting to receive design intent drawings. Although MMI was working on other projects, he said, it had to be ready to begin work to prepare drawings as soon as it received design intent drawings from GSA or IRS. Transcript at 120-22.

Heath owns MMI. MMI holds title to real estate and Heath performs development and construction activities. The two companies keep separate sets of books. When asked whether the two companies had the same overhead expenses, Mr. Heath responded, "They're fairly transparent because we're only developing MMI. . . . We're only actively pursuing projects through MMI. . . ." When asked how one can tell which of the claimed expenses, all of which are identified in the record as Heath's expenses, are attributable to MMI, Mr. Heath said, "[S]ince [MMI] is a subsidiary. . . . those expenses and incomes would then balance back into [sic] directly at the year end." He also said the separation between the two companies was "mainly for liability purposes" and that the overhead expenses of the two companies were exactly the same. Transcript at 181-83.

### Discussion

When GSA and MMI entered into the lease, they agreed the term would begin June 1, 2003, for a maximum of ten years. The lease term began October 1, 2003, four months later than originally planned, for a maximum of ten years. MMI seeks to recover unabsorbed overhead costs which MMI claims resulted from the four-month delay which MMI says was

caused by GSA.<sup>4</sup> In order to evaluate MMI's claim, we look to see when the delay occurred and whether MMI has established that GSA is responsible for the delay.

### I. When Did the Delay Occur?

On October 2, 2002, Mr. Heath told GSA he expected to construct the building shell in six weeks and the tenant improvements in four months, for a total construction time of five and one-half months. C.A. Lewis expected construction of the project to take eighteen weeks, which is approximately four and one-half months. MMI completed construction of the building and the tenant improvements in a little more than four months, beginning May 11 or 12, 2003, and finishing in mid-September 2003. Mr. Heath testified that construction was not delayed. Because the construction work took approximately the same length of time MMI and its construction contractor expected it to take, there is no basis upon which we can conclude the four-month delay to the beginning of the lease term occurred after construction began.

Because there was a four-month delay in beginning the term of the lease and because this delay did not occur after MMI began construction, the delay can only have occurred after GSA accepted MMI's offer on September 17, 2002, and before construction began on May 11 or 12, 2003. Therefore, we look to see whether the four-month delay which occurred before construction began is GSA's responsibility.

### II. Was the Delay GSA's Responsibility?

#### A. Lack of timely, approved design intent drawings

MMI contends the four-month delay in beginning the term of the lease occurred, in part, because GSA did not provide timely, approved design intent drawings as required by the lease. MMI says GSA's failure to provide such drawings caused MMI to delay construction of the building shell. Appellant's Post-Trial Brief at 21-23, 25.

According to the lease, MMI was responsible for providing a building shell. GSA was responsible for providing design intent drawings in order to show the tenant

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<sup>4</sup> In our findings of fact, we explained that until November 13, 2002, MMI did not appear to have any involvement in the lease and all of the actions taken on behalf of the lessor had been taken by Heath. In our discussion, we refer exclusively to MMI, the entity which entered into the lease and submitted a claim to the contracting officer, regardless of whether the events we discuss occurred before, on, or after November 13, 2002.

improvements to be made by MMI within the building shell. GSA was supposed to provide MMI with approved design intent drawings thirty work days after September 17, 2002, which was October 30, 2002, and the drawings were supposed to contain enough information to allow MMI to prepare construction drawings for the tenant improvements.

The IRS' Carol A. Snipes was responsible for developing design intent drawings. Not surprisingly, in order to develop these drawings, Ms. Snipes needed to know what space she would have available within the building shell for the tenant improvements. She needed a drawing of the shell so she would know the locations and sizes of shell components such as restrooms, electrical and mechanical rooms, and columns.

On October 2, 2002, MMI told GSA it needed to know where all exterior doors and windows were to be located, as well as locations, sizes, and configurations for all bathrooms, janitorial closets, mechanical closets, and utility closets. However, according to the lease, it was not GSA's responsibility to provide MMI with this information. Exterior doors, windows, bathrooms, janitorial closets, mechanical closets, and utility closets were part of the building shell which MMI was responsible for providing. GSA was responsible for providing MMI with design intent drawings which showed the tenant improvements to the space within the building shell. GSA responded to MMI, saying when it received MMI's shell drawings showing service areas and exterior doors and windows, it would forward the drawings to IRS which could then begin to lay out the leased space.

MMI sent Ms. Snipes a drawing on October 8. The drawing did not show the location of windows, restrooms, the mechanical closet, the electrical closet, or other service areas. The drawing contained column lines but did not show column widths. Although Ms. Snipes was able to read the drawing, she was not able to plot it to a one-eighth-inch scale even though the drawing said it was drawn to this scale. On October 9, GSA reminded MMI that it had previously asked for drawings showing service areas so IRS could proceed to lay out its space, and GSA told MMI that IRS could not begin to prepare its space layout until it had drawings showing the service areas within the shell.

On October 11, Ms. Snipes asked MMI's architect for a properly scaled drawing showing restrooms, service areas, and the door to the building. The architect said he had not been asked by MMI to prepare such a drawing and he would have to ask MMI whether he should prepare a drawing showing restrooms, HVAC closets, electrical closets, and other such areas. MMI told its architect to tell IRS to decide where it wanted shell components to be located. Because IRS would be using the building and because the building had not yet been built, MMI thought IRS might as well decide where the shell components were to be located. Even though MMI, not GSA, was contractually obligated to provide a building shell, and even though GSA was not responsible for designing or laying out the components

of the shell, MMI left it to the Government to establish the locations and relative sizes of the building shell components.

Ms. Snipes prepared a drawing dated October 29, which she called a preliminary draft plan. This is the first drawing anyone produced which showed shell components located within the rectangular outline of the building shell. The drawing blocked out locations and relative sizes of exterior doors, the front vestibule, the public toilet, emergency exits, corridors, restrooms, a janitor's closet, the HVAC room, the telecommunications room, and the electrical room. The drawing contained dimensions for some of the rooms. These features were components of the building shell, not part of tenant improvements to the space within the shell. Ms. Snipes attached a drawing which showed how restrooms were configured in another government office. Ms. Snipes provided this information to MMI even though the Government was not responsible for locating, sizing, or designing the components of the building shell. Ms. Snipes's October 29 drawing also blocked out locations and relative sizes of tenant improvements, including two managers' offices, a conference room, a file room, a mail room, two interview rooms, a copier/supply room, a tax compliance officer's room, a break room, and the locations and sizes of workstations and office furniture in open spaces.

On October 30 or 31, the day or the day after GSA was obligated to provide MMI with approved design intent drawings which showed the tenant improvements to be made by MMI within the building shell, Ms. Snipes provided MMI with her October 29 drawing. This drawing did not meet the lease's definition of an approved design intent drawing because it was not fully dimensioned and did not show telephone and data outlet types and locations, specifications needed to calculate electrical and HVAC loads, and finish, color, and signage selections. In addition, the drawing had not been approved by GSA.

The lack of timely, approved design intent drawings showing tenant improvements to leased space could certainly delay a landlord's construction of tenant improvements within leased space. However, MMI does not contend the lack of approved design intent drawings delayed its construction of tenant improvements. Rather, MMI argues it could not "start building a building based on [Ms. Snipes's October 29] drawing" and "could not get a permit based on that drawing." Appellant's Post-Trial Brief at 22. If MMI expected to receive design intent drawings which it could use to obtain a permit and begin constructing the building shell, its expectation is not grounded in the terms of the lease. Although MMI used Ms. Snipes's October 29 drawing as the starting point for developing construction drawings for both the shell and the tenant improvements, the lease required MMI to provide the building shell. Because MMI chose to construct a new building, it had to develop construction drawings, obtain a permit, and do whatever else was necessary in order to provide the shell. GSA was required to provide design intent drawings which showed tenant

improvements to the leased space within the shell and which would allow MMI to develop construction drawings for the tenant improvements. GSA was not responsible for providing design intent drawings which would enable MMI to obtain a permit and construct the building shell itself. If MMI's progress was delayed for four months because the October 29 drawing could not be used to obtain a permit and begin construction of a building shell, GSA was not responsible for the delay.

In addition, if any part of MMI's progress was delayed for four months because the October 29 drawing was not an approved design intent drawing, MMI is responsible for the delay. On October 30, GSA was not in a position to provide MMI with anything more than Ms. Snipes's October 29 drawing because the only information MMI had provided regarding the building shell was a drawing showing a rectangle divided into smaller rectangles. MMI could not reasonably have expected GSA to prepare fully dimensioned drawings of tenant improvements to the space within the shell, unless MMI gave GSA a scaled drawing of the shell. MMI could not reasonably have expected GSA to prepare drawings which showed details of tenant improvements to be made within the shell, such as furniture locations and the accompanying telephone and data outlets, without knowing the locations and dimensions of the exterior windows and doors, restrooms, electrical and HVAC closets, and other service areas which would occupy space within the shell. Even after GSA told MMI it needed information about the shell in order to lay out the tenant improvements within the leased space, MMI did not provide anything in addition to the drawing which showed a rectangle divided into smaller rectangles. Instead, MMI took the position that it was up to the Government to determine the locations and sizes of the shell components.

MMI argues it had no obligation to provide GSA with anything more than it did, and says whether its drawing contained the information necessary for GSA to perform its contractual obligations is irrelevant to the issue presented in this case. Appellant's Post-Trial Brief at 20-21; Appellant's Post-Trial Reply Brief at 4. However, MMI had an implied obligation not to hinder GSA's ability to perform its contractual responsibilities in a timely manner. *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1291 (Fed. Cir. 2000). Because MMI insisted the Government assume design responsibility for components of MMI's building shell and did not give the Government the information it needed in order to prepare timely, approved design intent drawings, GSA is not responsible if the absence of such drawings caused a delay to MMI's progress.

Finally, MMI says it took a risk by beginning construction of the building shell without receiving approved design intent drawings from GSA. Appellant's Post-Trial Brief at 22-24. MMI's position is difficult to understand, given the terms of the lease. The lease required MMI to provide a building shell at its expense and required GSA to provide design

intent drawings showing the tenant improvements to the leased space within the shell and to provide a tenant improvement allowance to reimburse MMI for the cost of the tenant improvements. The tenant improvements were supposed to be designed to accommodate the building shell, not vice versa. Constructing the building shell without having the design intent drawings should have involved no more risk than waiting to begin construction of the shell until after receiving the design intent drawings.

### B. Revisions to draft design intent drawings

MMI also contends the four-month delay in beginning the term of the lease occurred, in part, because the Government's "continual revisions" to Ms. Snipes's October 29 drawing delayed MMI's completion of construction drawings, which delayed MMI in obtaining a building permit and constructing its building. Appellant's Post-Trial Brief at 23-24. As explained above, MMI did not experience a delay after it began construction, so whatever drawing revisions were made after construction began did not delay MMI's progress. Therefore, the drawing revisions relevant to MMI's argument are those made before MMI began construction.

In order to obtain a building permit to construct the shell, MMI needed construction drawings which showed building elevations, the footprint of the building, the foundation, the structural steel, the roof, and some wall sections. On October 2, MMI told GSA it would complete its shell design and obtain a permit to construct the shell while the Government was preparing its tenant improvement drawings. This was consistent with the terms of the lease, because drawings of the components of the building shell did not depend upon MMI receiving any information from the Government, which was obligated only to provide drawings showing tenant improvements to the leased space within the shell. The lease said the tenant improvements were to be fitted into the building shell, and did not say a building had to be constructed, much less constructed around tenant improvements.

However, instead of completing its shell design and obtaining its building permit while the Government prepared its tenant improvement drawings, MMI left it to the Government to define the components of the building shell, as well as design the tenant improvements. Ms. Snipes's October 29 drawing was the first drawing produced by anyone which showed the shell as something other than a rectangle divided into smaller rectangles, and, although the Government was not responsible for locating and sizing the shell components, the October 29 drawing blocked out locations and relative sizes of exterior doors, the front vestibule, the public toilet, emergency exits, corridors, restrooms, a janitor's closet, the HVAC room, the telecommunications room, and the electrical room. The drawing also blocked out the locations and relative sizes of tenant improvements, including the locations and relative sizes of two managers' offices, a conference room, a file room, a

mail room, two interview rooms, a copier/supply room, a tax compliance officer's room, and a break room.

In November, the Government made changes to the October 29 drawing. These changes consisted of changing the relative sizes of some rooms, moving or adding three doors, adding a drinking fountain, and trading the position of one room for another. On February 14, 2003, MMI completed the drawings it needed to apply for a permit to construct the building shell. Although MMI's February 14 floor plan drawing contains more detail than did Ms. Snipes's October 29 drawing, the perimeter of the building and the configuration of the interior space were nearly the same on both drawings.

On March 10, 2003, a little more than three weeks after MMI completed its February 14 drawings, it used some of the drawings to apply for a permit to construct the building shell. During these three weeks, Ms. Snipes provided MMI with a reflected ceiling plan and telephone and electrical plan information. Although MMI says it needed GSA to resolve electrical, HVAC, and telephone issues before MMI could complete its construction drawings, Appellant's Post-Trial Reply Brief at 13, the electrical and mechanical drawings were not part of the construction drawings which were needed in order to obtain a permit to construct the shell.

On April 23, 2003, approximately six weeks after MMI applied for its permit to construct the building shell, it received its building permit.<sup>5</sup> Obtaining a permit is usually a two-or three-week process. A problem existed with the legal description of the property, however, which caused MMI to take longer than usual to obtain its permit. MMI began construction on May 11 or 12, approximately three weeks after it received the permit.

Based upon these facts, we cannot conclude the lease term began four months later than anticipated because the Government's revisions to Ms. Snipes's October 29 drawing caused MMI to delay constructing the building shell. The development of drawings is a continuing process, and it is typical for details to be added and changes to be made as final drawings are being developed. The Government suggested some relatively minor revisions to the October 29 drawing during November. Revisions made after November and before February 14, when MMI produced the drawings it needed in order to apply for a permit to construct the shell, changed workstation directions and added telephone and electric locations, which did not affect the drawings MMI needed in order to apply for a permit to

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<sup>5</sup> A few days earlier, MMI's project engineer had turned over his mechanical, electrical, and plumbing drawings to MMI. These drawings were not needed in order to obtain a permit for construction of the shell.

construct the shell. MMI applied for its permit on March 10, using the February 14 drawings. Although revisions were made to the February 14 drawings after March 10, the revisions were made during the time MMI was waiting to receive its building permit, and if any delay was caused by these revisions, it was concurrent with the delay caused by the problem with the building permit.

### C. Summary

The four-month delay to the beginning of the lease term was caused by a combination of several factors. Instead of completing plans for its building shell while the Government made decisions about tenant improvements, MMI left it to the Government to produce a drawing which showed the relative locations and sizes of the building shell components. The Government produced such a drawing on October 29, even though it was responsible for designing only the tenant improvements. MMI did not complete construction drawings for the building shell until three and one-half months after it received the October 29 drawing, and five months after the award of the lease, even though the lease called for the tenant improvements to be designed according to the components of the building shell, not the other way around. When MMI completed the construction drawings it needed to apply for a permit to construct the building shell, it took more than three weeks to apply for the permit. Instead of taking two or three weeks to obtain a shell building permit, MMI took six weeks to obtain a permit due to a problem with the legal description of the property. When MMI received its permit, it began construction three weeks later. The facts do not establish that the Government's actions before construction began caused the four-month delay to the beginning of the lease term.

### III. Damages

Because MMI did not establish that GSA was responsible for a four-month delay to the beginning of the lease term, MMI is not entitled to any recovery. If MMI had been able to show GSA was responsible for the delay, whether the provisions of the lease would have allowed it to recover the damages it claims is doubtful. According to the lease, if MMI did not deliver the premises by the delivery date due to an excusable delay, GSA was supposed to extend the delivery date, which it did, and this extension was to be MMI's "sole remedy." Given our resolution of the merits, we do not need to interpret this clause or consider the argument MMI advances in support of its claim for unabsorbed overhead costs or the sufficiency of the evidence of the claimed costs.

Decision

The appeal is **DENIED**.

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MARTHA H. DeGRAFF  
Board Judge

We concur:

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CATHERINE B. HYATT  
Board Judge

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ALLAN H. GOODMAN  
Board Judge