UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART : February 11, 2016

CBCA 3628

PJB JACKSON-AMERICAN, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Robert C. MacKichan, Jr. of Holland & Knight LLP, Washington D.C.; and Jacob W. Scott of Vedder Price P.C., Washington, DC, counsel for Appellant.

Catherine Crow, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **VERGILIO**, and **POLLACK**.

POLLACK, Board Judge.

The appeal arises out of the cancellation of a lease between the General Services Administration (GSA) and PJB Jackson-American, LLC (PJB) to house the United States Forest Service (FS) in a building in Jackson, Mississippi. For purposes of this decision, we will generally use the term cancellation when referring to the agency's actions that (a) prohibited PJB from attaining a build-out to enable tenant occupancy and (b) ultimately repudiated the lease. Appellant claims a total of $2,967,636.90, of which $2,800,000 is for the cancellation of the lease. The remainder is for damages after award that were associated with maintaining the property (carrying costs), as well as costs associated with the Government's changes to the lease.

Appellant claims a nineteen-month delay or nineteen months of additional carrying costs, which it fully attributes to actions of GSA. Appellant bases its claim for cancellation damages on a diminution of value theory, while GSA asserts that recovery must be calculated on an expectancy basis. A hearing was held in Washington, D.C. on November 12 and 13, 2014.

At the time of the hearing, appellant added to its claimed damages $236,156.51, which it characterized as un-reimbursed out-of-pocket costs. GSA objected, contending that the Board lacked jurisdiction to hear this claim because appellant had not previously presented the costs or the subject matter to the contracting officer (CO) for final decision. The Board allowed testimony on this matter at the hearing, but reserved the issue of jurisdiction for later determination.

The lease in issue called for a fifteen-year term, starting at the date of occupancy. However, the lease gave the Government the right to cancel after ten years, subject to providing the lessor with 120-days' notice. The lease was awarded on March 8, 2011. GSA formally directed appellant to stop work preparing the space for occupancy by letter of December 21, 2012, prior to the lessee taking occupancy. GSA had earlier, on or about December 5, 2012, directed appellant to stop all work, anticipating the formal notice. In the period between award of the lease and cancellation, PJB performed significant design and other work in preparation for occupancy, including design, as well as extensive efforts in costing the warm lit shell and tenant improvements (TIs) necessary for occupancy. At the time of cancellation, no physical work on either the TIs or warm lit shell had been performed.

GSA concedes that appellant is owed some compensation due to the cancellation of the lease, money for added architectural/engineering (A/E) work, plus a small amount of added carrying costs during part of 2012, which GSA acknowledged was attributable to the extended time of performance. In his final decision of August 28, 2013, the CO recognized entitlement to costs due to added carrying time caused by delays or stretch out in the design segment of the lease, added design costs, and costs directly attributable to the cancellation. By the time of the hearing, however, GSA changed the numbers significantly; it now denies entitlement to the vast majority of the earlier-recognized claimed carrying costs. The parties do not agree on the calculation of damages resulting from the cancellation of the lease. At the time of the final decision, appellant had not yet entered into a mitigating lease. Therefore, that was not reflected in the final decision calculation. Both parties agree that a reduction for mitigation is appropriate, although they disagree as to the amount. To date, GSA has paid nothing on any segment of the claim.

Findings of Fact

Nicholas Properties, LLC (Nicholas) entered into a lease with GSA on March 8, 2011. The lease was for in excess of 28,000 rentable square feet of office area and related space in an existing building located in Ridgeland, Mississippi. The facility was to be used by the FS. A substantial portion of the existing building was a warehouse, with the remainder being offices. The initial lease provided for occupancy to begin on July 2, 2011, and to continue through June 30, 2026, subject to termination and renewal rights as otherwise set forth in the lease.

The solicitation for offers provided at paragraph 1.3, "The lease term is for fifteen (15), ten years firm years. GSA may terminate this lease in whole or part after (10) years on 120 days written notice to the Lessor." Paragraph 6 of the lease provided that the Government would develop space plans subsequent to award and that all tenant alterations were to be completed by the lease effective date identified under paragraph 2. The lease further provided, "Lease term to be effective on the date of occupancy, if different from the date identified in Paragraph 2." Paragraph 2 indicated a July 2011 occupancy date.

Prior to the FS taking occupancy, appellant had to complete the design and then construct the warm lit shell (which included lobbies, common areas, and core areas of the building, as well as complete TIs called for by GSA to meet specific needs of the FS. The cost for warm lit shell improvements was to be borne by the lessor. The TIs were items specific to the area being rented by the agency and ultimately were to be recovered through the rent being paid to the lessor. Payment of rent was not to commence until the work on the warm lit shell and TIs was completed. At that time, the building would be deemed to be ready for occupancy.

On or about April 25, 2011, PJB purchased the property from Nicholas for $1,800,000. Thereafter, PJB and GSA entered into a novation agreement, dated May 17, 2011, with PJB taking over the lease. Nothing in the novation agreement or original lease addressed lost value as a damage, should the lease end prematurely. There was no termination for convenience clause. Mr. Bruce Ash, one of the principals of PJB, testified that PJB's primary focus has been properties with federal tenants, leased through GSA.

The March 2011 lease was supplemented through Supplemental Lease Agreement (SLA) 2. SLA 2 provided that it was effective April 27, 2011. However, SLA 2 was not signed until June 24, 2011. SLA 2 amended various provisions of the original lease and specifically increased the rentable square feet and rent. The SLA eliminated an earlier reference to the occupancy and rent starting in July 2011, and substituted language which provided that rent was estimated to begin December 8, 2011, and run through 2021. In its brief and in the certified claim, counsel for PJB has stated that SLA 2 established an occupancy date for the premises of December 8, 2011. The Board finds that December 8 was an estimated, not firm, occupancy date. Curiously, SLA 2 was signed by Nicholas rather than PJB, even though PJB was the lessor by June. Neither party has raised that as a material matter.

The building shell rental rates included in the lease were full service rates and included property financing (exclusive of TIs), insurance, real estate taxes, management fees, profit, and other costs. The required TI costs for the FS were estimated by GSA and the FS to be $826,255, and that cost was to be recovered over time through the rent. No number was set out in the lease or preliminarily identified for costs of preparing the warm lit shell. That was because the warm lit shell costs were to be fully absorbed by the lessor. As to the TI costs, if the costs to appellant for the TIs exceeded the amount estimated by GSA and the FS, then the balance due the lessor was to be paid by rental adjustments or a lump sum to be determined by the Government. If the entire TI allowance was not used, then the lease provided that the Government could adjust the rental rate downward to offset the difference. Under SLA 2, operating costs were set at $126,725.05 per year. Those operating costs were subject to change based upon the consumer price index (CPI) and were to be paid by the lessor. SLA 2 also called for the lessor to pay GSA $144,726.65 in broker commission credit, with fifty percent due after award and the remainder at occupancy. The lease identified the nature of the shell requirements in sections 1.12 and 5-8 of the lease.

The lease called for the TIs to be based on the lowest of three bids to the lessor. The specific language read, "The Lessor understands in lieu of Cost and Pricing Data, his contractor or each of his subcontractors shall solicit three (3) bids for work completed as part of the initial tenant alterations; e.g. for electrical, plumbing, etc. The lowest responsive bid will be accepted. This does not apply to the shell build out." In defending the claim as to the stretch out of the design phase, GSA asserts appellant often failed to meet the three-bid specification and contends that after February 2012, it was that failure which was largely responsible for much of the delay to the project. In his testimony, Mr. Ryan Johnson, the CO, confirmed that the lack of adequate price competition was a problem, but also stated that the more significant issue was arriving at agreed pricing and allocation between the TIs and warm lit shell.

While the costing for the shell and TIs were separate, from a practical standpoint, the costs to complete the two were intertwined. A contractor or subcontractor bidding work to PJB or its prime, such as a price for heating, ventilating, and air conditioning (HVAC) or ceilings, would not break out or allocate pricing between what was going to be needed for the warm lit shell and what was needed as part of the TIs. The appellant generally got a single price for the work and it then was up to the appellant and GSA to allocate the costs.

The record shows that the lessor anticipated spending significantly less to improve the shell than what was perceived by GSA. The FS number for the TIs was understated through most of the process. Both elements contributed to the difficulty in reaching a final number and to the start of construction, a prerequisite for occupancy.

The improvements as to both the warm lit shell and TIs were to be based on a design concept provided to the lessor by the Government. From that concept, appellant was expected to produce design intent drawings (DIDs) and, thereafter, produce construction drawings (CDs). Construction and the follow-on occupancy could not proceed until the costing for TIs was agreed to (allocating costs between TIs and the warm lit shell). Because rent payments would not start until the physical work was completed and the FS took occupancy, it was important for the parties to settle on a design and to negotiate the allocation as to the shell and TIs.

Although lease payments were not to begin until occupancy, the award of the lease started appellant's performance obligations. The obligations and time for completion of various tasks were set out in section 5.12 of the lease. The lease provided that within thirty days of award, the lessor was required to provide DIDs showing the planned TIs. The DIDs were to be based upon the final design requirements provided by the Government. The Government then was to review the DIDs within ten days of receipt, and if necessary, pursuant to section 5.12(B)(2), the lessor was to be provided five days to cure any defects in the DIDs. Once DIDs were approved, the lessor was required to produce CDs, within twenty days. The Government had ten days to review the CDs and appellant had five days to cure any GSA concerns. Within ten days of Government approval of CDs, the lessor was to submit a proposal detailing the cost to complete the TIs. Those costs were to be absorbed by the Government. Once the price of the TIs was negotiated, the Government was to issue a notice to proceed (NTP) for the start of construction. TIs were to be completed within ninety days of receipt of that NTP. At the close of the ninety days, the space was to be ready for acceptance and inspection, with the Government having five days to do that.

The pre-construction design tasks identified in the lease (starting from award) were to consume ninety days. Thereafter, the parties needed to complete price negotiation and allocation of costs between the TIs and the warm lit shell, and thereafter proceed with ninety days for construction. While the lease did not specify a time to be allotted for final negotiation of the TIs and warm lit shell pricing, or allocate time for issuing a NTP with construction, appellant in its certified claim allocated ten days to NTP and further acknowledged that a commercially reasonable time would have been anticipated for negotiation. GSA has provided no alternative time frames for the above.

The parties disagree as to the start date for counting performance for carrying cost purposes. Appellant measures its delays and carrying time by using a start date of March 11, 2011, which pre-dates PJB's involvement in the lease. GSA uses May 19, 2011. We find GSA's date to be the appropriate start date. We note that PJB took over from Nicholas on May 17, 2011, and all costs are those of PJB. Using May 17th as the start, if we allocate thirty days for negotiation of price (including the NTP), add on the time for design in the SLA and the ninety days for construction, the total time that appellant should have been anticipated for its efforts was 210 days. If we measure 210 days from mid-May 2011, that puts us into mid-December 2011.

Through much of the time leading up to December 2011, issues arose as to the FS having sufficient funds to complete what it wanted for TIs, as to costs to be allocated to the warm lit shell versus TIs, and as to changes in criteria. Negotiations were in part driven by pressure to lower the TI costs to meet the FS budget and in part by disagreements over how much went into the shell and how much was to be attributed to TIs. It is undisputed that until the design parameters were set and the pricing negotiated, appellant could not start construction. Moreover, until the property was ready for occupancy, rent payments could not begin. Nevertheless, for the period prior to occupancy, the appellant was incurring carrying costs for the property as well as design costs. The negotiations as to the TIs and the shell appeared to move with fits and starts.

For purposes of this decision, we need not go into detail as to all issues argued by the parties as to who is responsible for the carrying time. Rather, we focus on several limited milestones. The most significant are in August and December 2011, February 2012, and then the cancellation by GSA in December 2012. The parties agree that once appellant was initially able to proceed with design, it was not until August 2011 that the Government approved the final schematic design. Appellant could not prepare the initial DIDs until that was done. Work then proceeded. However, on or about December 11, 2011, GSA told appellant to stop the process, as the FS was significantly re-working the design parameters. The FS was going from a plan with offices to a more open environment. Much of the work done to that date by PJB was nullified and appellant could not proceed with the preparation of CDs (the step after approval of DIDs) and of course not proceed with construction until GSA and the FS gave it the criteria needed.

It was not until February 28, 2012, that the FS and GSA completed a re-review of the revised DIDs and worked out an alternate DID layout. That essentially reset the clock for the project. There is no evidence showing that actions of PJB unreasonably delayed the DID progress after GSA issued the December 2011 stop order. Moreover, once the DIDs were approved, that reset the start of the preparation of CDs. The change in DIDs and CDs, in turn, caused PJB to redo pricing and other work, and required it to engage architects a second time to rework the CDs. GSA, as noted later in these findings, has agreed that appellant is due $48,269 for architectural work that was properly attributed to the redesign. None of that amount has been paid.

Starting February 29, 2012 (the day after approval), appellant was free to move forward. The schedule shows that after the approval of DIDs (forty-five days), the lease contemplated that appellant had 125 days (thirty-five remaining for design and ninety for construction) to complete the property for occupancy. In addition, as noted above, appellant has conceded that ten days should be allocated to issuing the notice to proceed (for start of construction) and (although no time was set for negotiation of the TIs) thirty days would be reasonable for negotiation. That totals 145 days and reflects the amount of time that was indicated in the initial lease for completing the tasks remaining, once DIDs were approved.

It is clear that a continuing issue in 2012 was the determination and allocation of pricing for the TIs versus the warm lit shell. The parties identified and allocated costs for the TIs through the submission by appellant of TIC[1] sheets, which were documents formatted by GSA that were structured to show a cost breakdown between TI and warm lit shell for a number of general construction categories, such as HVAC, electrical, finishes, other trades, and administrative costs. The TIC sheets first appeared to be used in May 2012, and they continued to be submitted through the fall and into December 2012.

Typically, the costs for construction line items, such as HVAC and finishes, were allocated between warm lit shell and TIs. Therefore, when the dollars attributed for a particular line item to the warm lit shell increased, there was typically a decrease for the TI dollars under that category. Accordingly, it benefited the Government when a greater proportion of an item was allocated to shell, as that generally triggered an equal decrease in TI costs for that category.

In its initial TIC sheet, which appears to have been submitted in May 2012, appellant priced the warm lit shell at $80,000. Appellant has conceded that the amount was not reasonable. In appellant's next submitted TIC sheet (A-4), it showed the warm lit shell costs as $356,495.36. Prior to the final submission in December 2012, submissions for costs for the warm lit shell ranged from a low of $352,712.65 to a high of $392,076.14. TIC sheet A-6 showed $392,076.14 for the warm lit shell and TIs at $1,680,210.52. The TIC sheet just prior to the final submission, A-7, showed $356,495.36 for the warm lit shell. The costs for TIs on the various TIC sheets ranged from $1,070,109 to $1,721,447. In the final TIC sheet,

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[1] Although not addressed in the record, the initials "TIC" stand for tenant improvement costs.

submitted on December 4, 2012, PJB costed the warm lit shell at $490,463 and TIs at $1,396,784.

Not all TIC sheets included costs for all categories. For example, as pointed out by GSA, A-7 lacked a cost for doors and windows for the warm lit shell, even though the prior submitted TIC sheet, A-6, showed a cost for those items at $92,076 for the warm lit shell.

In its brief, GSA cites a statement from Mr. Bruce Ash, president of PJB, in which he stated that he was elated at the $490,463 number. While Mr. Ash did at the time express satisfaction, he clarified and qualified the matter at the hearing. He testified that he and PJB were not particularly happy with the number at the time and stated that the figure was proposed to GSA on the basis that it would free up the start of the lease. He stated that appellant had been carrying the property for almost eighteen months and was anxious to get it to a rent payment stage. He stated that the real number that appellant expected to pay for the warm lit shell was significantly lower than the December offer. He said that had the lease gone forward to completion, appellant would have been obligated to provide the items set for the warm lit shell, but could not be denied the benefit of doing the work for less cost. The record contains no written agreement as to acceptance of the $490,463. GSA took no steps in reliance upon it, and appellant had the opportunity to do the warm lit shell work cheaper, if it could. While Mr. John Culbertson, the GSA valuation expert, stated in supporting the reasonableness of the $490,463 that it met the "laugh test," he was neither a contractor nor an estimator.

Appellant contends that from February 28, 2012, until the date of cancellation, it was still not able to complete obligations as planned, asserting that GSA thwarted appellant's attempts to move ahead. GSA in contrast says that any delays were due in large part to appellant not providing competitive bids and not giving GSA adequate pricing on TIs and the warm lit shell. There is substantial correspondence in which the parties take competing positions as to what should be warm lit shell and what should be TIs. The correspondence is not conclusive as to which party is correct. Both GSA and appellant relied on outside firms to provide costing support. GSA had contracted with U.S. Costs to assist it during the project in negotiating and estimating the costs for warm lit shell and TIs. PJB used Mr. Don Parks of Parks Contracting and Consulting for setting pricing and making allocations. PJB also appeared to rely on its architect, and GSA relied to some degree on Mr. David Culp, an architect with the FS. None of these individuals was produced as a witness. Rather, GSA attempted to rely in part on Mr. Culbertson, and PJB essentially relied on the documents in the record and on Mr. Johnny Nelson, a Mississippi architect. The later had some but not full information on GSA lease requirements.

Exhibit A-29 of the appeal file contains most of the documents dealing with the competing positions. The exhibit contains over 300 pages, composed of letters, meeting minutes, e-mail messages, and invoices. The documents paint a picture of ongoing problems as to a number of items. From the spring of 2012 forward, appellant could not get competitive bids on security as specified in the lease agreement, because only one firm in the area could meet GSA requirements due to unique scope and warranty requirements. Finally, in late fall, the security work was removed from the project. There were issues as to what was included and how to allocate work on the HVAC system. PJB pointed to a letter of November 6, 2012, where GSA said the cost allocation for HVAC was fair at 50/50 due to the conversion of warehouse space into office space. Prior to that time, the FS and GSA had resisted such an allocation. Further, in a letter dated November 15, 2012, appellant's architect addressed an issue regarding handicapped parking. He said the work being identified as warm lit shell was added for additional FS flexibility and access and that the work would not have been required but for FS choices. He identified the work as a TI cost and suggested it be removed from the project. He also disputed some doors and windows that were designated shell, but he thought should be TI. His rationale, however, was not detailed. These items contributed to the stretch out of appellant's work into December 2012.

Documents in September 2012 from U.S. Costs focused on four items that it identified as not yet reasonably priced by appellant, those being HVAC, security, painting, and sprinkler work. The sprinkler work had been an issue since May 2012, and the security specification, as noted above, had been an ongoing issue and was ultimately removed. In correspondence in October 2012, Mr. Culp of the FS concurred that the lessor's price was fair and reasonable, except for certain items, identifying those as access control, security, and certain elements of finishes. He questioned some of the allocation as to TI and shell, relying on U.S. Costs. He then made the following recommendations, which implicitly indicate that the FS was still attempting to reduce scope so as to reduce costs. He recommended the removal of the access and control security system at $104,000, removal of telecom and wiring at $48,000, and re-alignment of the sprinkler system. The first and third items had been at issue for some time. Another item identified by GSA was delay attributed to appellant not obtaining sufficient bidding competition so as to allow GSA and the FS to evaluate TI costs. While Mr. Eugene Wright, the GSA leasing specialist, identified that some of the delay after February 2012 was due to appellant providing inadequate price competition, he noted that probably the biggest issue was insuring that the costs were properly allocated among TIs and the shell.

On October 8, 2012, PJB's Mr. Ash sent a letter to the CO, Mr. Johnson, referencing delays that he claimed PJB had experienced since December 15, 2011, and specifically the stop work order at that time. Mr. Ash noted that on February 14, 2012, PJB participated with the FS and GSA to develop a new revised scope. He said that while PJB and its representatives were able to reduce costs of construction by $649,860, the tenant added features which increased construction costs by $282,004. He noted that PJB had recently completed reconsideration and calculation of all TI costs and had completed its review. Mr. Ash advised that PJB had incurred what he characterized as delay costs through September 30, 2012, of $162,548.79. He identified the following classes of costs: interest expenses from the lending bank, landscaping expenses, owner's association maintenance contribution, real estate taxes, return on investment, and utilities and other payments to local providers.

GSA identified December 12, 2012, as the date that the FS issued a notice to cancel the need for the space. The notice advised that the FS was no longer interested in the space. Appellant took that as a repudiation of the lease. GSA then requested that the lessor provide an offer to buy out the lease. GSA says the lessor stated it would start assembling documentation. However, according to GSA, before GSA could determine whether to offer a lump sum buyout or hold the property and begin to pay its rental obligation month to month (which GSA says was its usual practice), the lessor retook possession of the property and entered into a replacement lease with the State of Mississippi (State). The replacement lease was agreed to on August 20, 2013. Appellant says that on January 7, 2013, GSA confirmed the repudiation, when GSA sought to have appellant agree to release GSA from the contract.

Appellant filed its certified claim on April 26, 2013. At the time it had not entered into a mitigating lease. In the claim, appellant sought both what it called delay damages and costs for breach of the lease. It identified claimed delay dates running from March to August 2011, and then from December 16, 2011, to December 21, 2012. It contended it was entitled to be paid for a total of 256 work days or 372 calendar days. At that time, PJB did not claim costs from August 24 to December 15, 2011. While appellant designated the claim as delay, as we have addressed earlier in this decision, the costs were generally carrying costs caused by the actions of the FS in stretching out or delaying appellant's ability to provide the CDs and move on with construction. Until construction was completed, the FS could not take occupancy and rent payment was contingent on occupancy. There also are several costs claimed, specifically the architect and legal costs, which are more in the nature of change claims.

Appellant broke down its delay costs into several categories: carrying costs, contract administration costs, and legal costs, for a total of $27,791. The legal costs were incurred from January to October 2012. Appellant described the legal and administrative costs as needed to assist in negotiations of a price adjustment, caused by the GSA delay and redesign. Appellant provided redacted legal bills for the time period. The redacted bills do not reflect interaction by counsel with GSA officials or specific reference to negotiations. Appellant claimed additional architectural fees of $48,269. These costs were incurred as a result of the Government's decision to start the job anew in 2012.

In presenting its claim, appellant provided monthly and/or daily costs for March 2011 into December 2012. The presentation broke costs into categories, most of which were categories that GSA did not challenge. Although GSA challenged appellant's attribution of delay and stretch out time; GSA did not provide counter numbers to those of PJB or challenge the accuracy of the PJB daily or monthly rates.

The CO issued a decision on August 28, 2013, allowing $1,635,194.34 as compensation for both cancellation of the lease and delay. Of that amount, $114,815.44 was attributable to delay and the remainder to the cancellation. Of the amount identified for delay, $48,269 was allowed for added architectural costs and the remainder was attributed to categories such as real estate and management. At the time of the final decision, GSA was unaware that appellant had secured a mitigating tenant. Therefore, the CO decision does not reflect any reduction or mitigation against the repudiation number. Both parties agree that mitigation is proper and the net proceeds from the replacement lease must be deducted to reach a final amount. In reaching the proper compensation for repudiation, GSA calculated payment on an expectancy basis. That has remained its position. Appellant had submitted its claim on repudiation as a claim for breach and sought recovery on a diminution of value basis. Both parties provided experts to discuss valuation, which is detailed below.

In his final decision, the CO asserted that DIDs were to be completed by May 19, 2011, based on an agreement at the initial programing meeting, held on April 7, 2011, where both the Government and lessor agreed that DIDs would be due thirty working days later. Appellant has provided no evidence to challenge that GSA statement. The CO also stated in the decision that as of December 4, 2012, the TIs from PJB were fully compliant with the lease. GSA accepts that it was liable for delay, as of December 5 to the date of the stop order on December 21, 2012. The lease never resumed. GSA also accepted responsibility for an additional ten days associated with a May 9, 2012, submission, and an additional two days on or about May 23, 2012, attributed to GSA not reviewing submittals within the specified period. GSA allowed some relief for the following categories of carrying costs claimed by appellant: real estate taxes, management fees, landscape fees, utilities, power, and insurance. It also separately allowed contract administration costs of $32,705.97 and architectural fees of $48,269. The contract administration costs included $27,791.99 for attorney fees, running from January to October 2012, and $4913.98 for additional architectural fees identified as needed for negotiations.

The GSA position has changed since the CO decision, as to what items are payable and as to dollars that are owed. The $48,269 in architectural fees accepted in the final decision is not one of the contested items.

On August 20, 2013, just a few days prior to the CO decision, PJB executed a lease with the State of Mississippi (State) for a term of fifty-nine months. The lease was later changed to cover sixty months. The lease was to begin November 1, 2013, and obligated the State to pay monthly rent of $27,447.92 for 26,350 square feet of office space, to be used by the Department of Health, Statistics and Vital Records (DHSVR). The lease contained the provision that in the event space were to become available to the lessee in any State-owned building, the lease shall be terminated within thirty days from and after the date of written notice. The lease was being used as swing space by DHSVR while its permanent facilities were being renovated. It was a certainty that at some point the State would move out when renovations were finished. GSA has asserted, and statements from state officials support, that it was likely the State would stay the sixty-month term and possibly longer. Having said the above, the lease did not have an option as to any time beyond the first sixty months.

From the time of the CO's decision until the time of the hearing, GSA's position changed substantially as to both delay liability and the amount it owed appellant for cancellation of the lease. As to the delay segment, the current GSA position is that appellant is entitled to no more than $64,817.16. Of that, $48,269 is attributable to architectural fees. The remainder is real estate taxes of $7763.60, management fees of $3126.81, landscaping of $2604.64, utilities (water and sewage) of $275.60, utilities (power) of $154.33, and insurance of $2623.18. It appears that GSA allowed time for days that were identified by the CO during the period starting after December 2011. The CO disallowed any costs associated with claimed delays between March 2011 and December 2011. In its pre-trial brief, GSA provided no allowance for contract administration costs (which were identified by appellant as being composed of legal fees, running from January to October 2012), or for additional architectural fees of $4913.98 incurred in May and June 2012. Appellant says the legal and architectural costs were incurred to negotiate a price adjustment required as a result of the delay and redesign of the project. GSA objects to that payment, asserting that there is no authority to obligate the Government to pay for appellant's consultations with its counsel or architect to understand what the lease stated.

After the final decision, and leading up to the hearing, the parties exchanged expert reports. At the hearing, GSA relied primarily on the November 3, 2014, report of Mr. John Culbertson, a senior real estate specialist with GSA. Appellant relied upon the October 29 and November 10, 2014, reports of Mr. Robert E. Dietrich, Senior Real Estate Director for Collier International. Mr. Dietrich had extensive experience in commercial real estate appraisals. Both experts produced submissions on valuations. Both parties prepared spreadsheets which, while not identical (but similar in format), attempted to capture the net proceeds to be expected from the GSA lease, minus what should reasonably be credited as mitigation due to the current follow-on lease with the State and a likely follow-on with some other tenant. Mr. Culbertson's calculation, used during the hearing, showed appellant would have netted $2,112,256 in rent from the GSA lease. His sheet showed two scenarios for what the mitigation leases or leases might yield, those being $1,055.805 and $1,112,845 respectively.

At the close of the hearing, appellant's expert was given the opportunity to file additional information, in order to respond to unexpected testimony from a state official. GSA's expert was given the right to file a response to appellant's expert's filing. Appellant then moved to strike the GSA expert's report of November 26th for going beyond the scope of a permissible response. By order of December 16, 2014, the Board limited some aspects of the filing and allowed GSA to re-file. The spreadsheet of December 24, 2014, was submitted as that refiling. To the extent the matters involved in the motion to strike and GSA filings are still relevant to our decision, they will be addressed in the discussion.

At the hearing, appellant identified additional costs it now seeks to recover which it contends arise out of the same operative facts as before us in this claim. Those costs had not previously been presented to GSA and essentially are costs associated with the purchase of the building by PJB. In its brief, counsel for PJB asserts that significant expenses were incurred by the lessor after the execution of the lease and before the breach. It claims $236,156.51 for various expenses associated with acquiring ownership. Mr. Ash said that if there had been no cancellation of the lease, PJB would not be asking for the costs. The Board allowed testimony, but said it would take it as a proffer and later decide if it had jurisdiction to consider the costs being sought.

The costs involved in the proffer were $41,213.05 in closing costs that PJB incurred to obtain financing to construct the TIs and $70,006.46 in broker fees paid to Jones Lang LaSalle. Other costs were $2167 in personal reimbursements, $4025.62 in accounting fees, $32,392.01 in loan interest, $1666.66 in landscaping fees, and $7980 in insurance fees. There is also an additional $76,705.25, which PJB attributes to architectural fees. The architectural fee amount is the difference between $122,254.25, which is architectural fees related to GSA lease, and the $48,269 in added A/E costs. The later, which were acknowledged in the CO decision are not being challenged by GSA in this proceeding, and have been included in our award, relating to delay and carrying costs. Additionally, in its brief, appellant conceded that closing costs totaling $41,213.05 should not have been included in this part of the claim, thereby leaving $194,943.46 in issue.

In its briefing, GSA presented arguments as to a lack of a critical path analysis by appellant and asserted that any delay could only be measured starting in December 2011. Also, GSA argued that any delays in processing of CDs and other items after February 2012 were to be attributed to appellant. GSA, for example, contended that there was a thirty-day delay in providing a working set of CDs after appellant was given the go-ahead on February 28, 2012. It says PJB should have taken twenty working days from February 29 to

March 27, 2012, to provide a working set of CDs but a working set was not produced until May 8, 2012, equating that to a thirty-day lessor delay. GSA charges that on June 5, 2012, the TI bid it received from appellant was not compliant with the lease and from that date until August 23, 2012, any delay is due to the appellant.

Calculation of Damages for Termination of the Lease

Both parties provided expert reports and testimony to establish the amount due appellant because of the cancellation of the lease. Throughout the dispute, both parties presented several spreadsheets to support their valuations. Appellant took the position that compensation should be measured on the basis of diminution of value. GSA's expert contended that valuation must be based on an expectancy calculation and described expectancy as measuring and being based upon the loss of income. He identified expectancy as the method regularly used by GSA, when measuring damages for leases that are prematurely ended. Diminution, as presented by appellant, measures loss of value to the property due to the breach of the lease, comparing the value of the property to a purchaser, with and without the GSA lease in place. Nothing in the lease addressed a guarantee of value of the property, be that at the start, the middle, or the end of the lease. The lease covered what the Government would pay for the use of the space.

Mr. Dietrich, appellant's expert, testified that expectancy is not a common method of valuation; instead, the common commercial valuation method is diminution of value. He provided some back-up for how he arrived at his damage number of $3,030,000, but the back-up was not detailed. Essentially, he set out $5,230,000 as the fair value of the property with the GSA lease in place, deducted expenses for the warm lit shell and TIs, and set the adjusted value at $4,205,540. He then deducted from that what he designated as the fair market value of the building with the State lease. He set that fair market value at $1,730,000, and after deducting TIs, he arrived at a value of $1,181,000. His written and verbal explanations, as to his valuations and as to why it was superior to or more accurate than the GSA approach, was largely conclusory and lacking detail. It also was largely based upon property valuation, a speculative element. In contrast, the valuation regarding the use of expectancy, albeit also using estimates, was better developed. Although there was conflicting testimony from Mr. Dietrich and Mr. Culbertson as to the use of expectancy and assignment of dollars to the mitigation leases, one could use their testimony to come to a damage figure that appeared both fair and reasonable and which relied less on speculation than the diminution approach.

The calculations of the parties as to expectancy were similar in many respects as to format and content. However, they differed on some key points. In general, the spreadsheets as to expectancy took the calculated income from the lease if performed, deducted from that the expenses that were anticipated to be incurred in order to earn the rent, and then deducted the income from the State lease as mitigation. Some figures were hard numbers, while others were estimates.

Mr. Culbertson, GSA's expert, provided five different spreadsheets (those of November 26 and December 24, 2014, being very similar), each coming up with different totals. Each of Mr. Culbertson's calculations used an expectancy approach. Both experts calculated their final numbers for present value (PV). PV adjusts dollars to account for the fact that PJB will receive payment now for money and expenses it would have been paid or incurred over a several-year period. Both experts made it clear that coming up with the present value was an art, not a science, and part of arriving at a number included estimates and questions of risk assessment. The results, when adjusted for PV, ranged from damages for the cancellation of $800,000 to $1,101,000.

Mr. Culbertson's spreadsheets used a ten-year period for calculations, which was based on the fact that GSA only agreed to a ten-year period. Anything beyond that was deemed to be at appellant's risk. Mr. Dietrich used a fifteen-year period (with some adjustment), contending that historically, there is at least a 90% chance that GSA completes a lease, and therefore, fifteen years was more reflective of what was to be expected. The use of fifteen years (by Mr. Dietrich) results in significant dollar difference from the ten-year term.

The Culbertson spreadsheet, ultimately relied on by GSA, was prepared in December 2014. It followed the same format as the prior Culbertson spreadsheets and was generally consistent with the format used by Mr. Dietrich. It accumulated the fixed lease payments on the GSA lease, less expenses, and then deducted from that a mitigation figure for the State lease. The parties appear to agree as to the basic framework of deducting expenses and agree on a number of the costs associated with establishing what would have been netted had the FS lease run its course. Two major differences are the expense to provide GSA with a warm lit shell and the cost for TIs on a replacement lease, should the State vacate prior to ten years.

To determine what is owed appellant, we use the format of the December 2014 sheet prepared by Mr. Culbertson. We identify where his and Mr. Dietrich's numbers line up. There is no material disagreement as to yearly rent. Since we find that ten years is the correct basis for calculations, the rate is multiplied by ten. On his spreadsheet, Mr. Culbertson calculated ten years of lease payment at $548,207 per year, for a total of $5,482,070. For purposes of our calculations, we do not separately adjust for PV, but rather use the numbers as set out on the source documents.

Mr. Culbertson deducted expenses for each year of rental. Most of the expenses he identified either conformed on a yearly basis with those of Mr. Dietrich or were close. A primary exception is the cost for the warm lit shell work, which GSA priced at $490,463.61. GSA used that figure primarily because appellant proposed that figure in its TIC sheet of December 4, 2012. Appellant showed TI costs of $1,396,784 on that same sheet. According to Mr. Culbertson, $490,463.61 passed the "laugh test," implying that the cost provided was low. GSA also claimed that in answers in a November 26, 2012, letter regarding the warm lit shell costs, appellant expressed no material disagreement, thereby confirming that it and GSA were on the same page as to warm lit shell costing. GSA also contended that all TIC sheets provided by appellant prior to December 4 sheet omitted key items. A compilation of alleged missing items was prepared by Mr. Culbertson and provided in his post-hearing submission of November 26, 2014. While the numbers he cited in his filing were in the record, his commentary moved the matter beyond a simple compilation. We agree with appellant that the late submission deprived appellant of a fair opportunity to cross-examine, clarify, or provide rebuttal. Accordingly, we have given no weight to his commentary on this item.

Several calculations, used by both parties, established the value of the GSA lease, the State lease, and any follow-on to the State lease. For purposes of this decision, we have selected as our starting point the December 24, 2014 spreadsheet calculations presented by Mr. Culbertson, which are generally consistent with the earlier calculations of both Mr. Culbertson and Mr. Dietrich. We also chose the December format because it contained more of the accepted (agreed to) dollars than did other sheets. That allowed for our changes and calculations to be easier and more readily followed.

We now turn to our calculation of what is owed appellant due to the cancellation. We start with the rent of $548,207 per year for each year of the ten-year period that totals $5,482,070. For purposes of determining what appellant would net after expenses, Mr. Culbertson set out the following numbers. He deducted for year one of the lease the cost of warm lit shell at $490,463; the estimated cost of TIs at $826,255; twice the first year of broker commission of $72,363, or $144,723; operating costs of $126,725; real estate taxes of $32,960; and other costs, such as reserves and insurance, at $31,152. He then applied a first year negative net rent figure of $1,104,074. The first year rent is not subject to adjustment for PV. Adjustments are applied for years two through ten. Mr. Culbertson then addressed each of the following nine years, starting with each year's rent at $548,207 and then deducting for each year, yearly operating expenses at an even $126,725 per year, taxes at $32,960 and reserves at $31,152. That yielded, for each of years two through ten, a net rent to lessor of $357,370 per year for a total of $3,216,330. That total was then combined with the negative rent for year one, leaving the net rent after expenses at $2,112,256.

To achieve a final total, Mr. Culbertson applied a PV calculation at 4.25 % for each year. For purposes of this decision (because we change many numbers) we will not calculate PV on each year, but will leave that to the parties. Ultimately, in order to come up with the final recovery due to the breach, a PV calculation for each year must be made. By performing a PV calculation, the total dollar recovery for each year is decreased, to reflect the present value of being paid now for income that would have occurred in the future (that is, the later year dollars). Mr. Culbertson's total, using that PV, was $1,523,078 before taking into account the State lease mitigation.

Mr. Culbertson then calculated a mitigation amount for the State lease based on the assumption that the State would leave after five years and there would be a six-month vacancy before appellant secured a replacement lease. He used an estimated market rate of $14.71 per square foot (psf) for the time after the State left. His calculation additionally escalated the rent for each replacement year (years six through ten) by 2.5% per year (noting that such was consistent with Mr. Dietrich's appraisal in October 29, 2014). The Dietrich appraisal he cited, however, used a number of different parameters and is not fully comparable. The Culbertson calculation provided for rent from the State of $361,000 for the first year and $329,375 for years two through five. Appellant has not challenged the amount allotted for the actual State lease. Thereafter, for the remaining years (the time after the State lease would potentially expire), Mr. Culbertson estimated the follow-on lease at a rate of $14.71 psf, with that being escalated by 2.5% each year. His total for gross rent mitigation before deductions and the application of PV was $3,852,428. To account for the six-month vacancy in his calculation, Mr. Culbertson choose to show half of a year's rent as an expense, rather than reduce the rent directly.

As was the case with the GSA lease, appellant would have incurred expenses in order to secure the mitigating rent. Mr. Culbertson made deductions to the State lease and follow-on that were consistent with the GSA lease deductions. Certain costs in his calculation were deducted for year one and do not carry over to follow-on years. Year one shows a full service rent of $361,000. From that he deducted operating costs of $168,957, tenant improvements for the State of $460,000, and a broker commission of $80,000, leaving a negative net rent for year one of $347,957. Because year six was to be a transition year and the year where there would be a six month vacancy (for bringing on a new tenant), he made several adjusted deductions at year six. Those were deductions of $139,907 for operating costs; $206,792 for the six-month loss of rent, $280,000 for re-tenanting improvements and concessions, and $124,000 in broker commission. Those deductions yielded a negative rent of $229,435 for year six, as expenses exceeded income and positive rent for the remaining time. We choose not to go into further detail, but note that the end result was a gross of $3,852,428, less deductions of $2,954,188, for a net of $898,240 to be deducted as mitigation. That final figure does not reflect PV, which is separately applied to each year.

Had the GSA lease been performed, Mr. Culbertson calculated that the result would have been a net rent to the lessor of $2,112,256 for the GSA lease and a net rent for the mitigating lease or leases of $898,240. PV calculations would have to be applied to the raw numbers. GSA has sought to add an additional $40,000 deduction to account for saved janitorial costs. The record shows that the lease payments began in November 2013 and that as of May 2014, the State had not moved in. Accordingly, we see saved costs for seven months which at a rate of $2500 a month, for a total of $17,500.

A number of the figures used by Mr. Culbertson in his mitigation calculation bear comment. He assumed operating expenses would increase 2% annually for any follow-on tenant. That position was not presented by GSA until Mr. Culbertson submitted his post-hearing response. It introduced a new element that went beyond what was to be covered in his response. There was no evidence addressing the basis on which escalation of operating expenses was assumed. While the lease would have permitted an increase, GSA provided no evidence to show operating costs would escalate in the Jackson market. While there was a time, years ago, when increases for both would have been almost certain, and therefore assumed, we take judicial notice that such is not the case in recent years.

Mr. Culbertson also assumed that the rental rate for the follow-on lease would be greater than that of the lease with the State. He justified using a higher rent for the follow-on tenant on the basis that the State was likely to renew another five years, and if it did so, then appellant could get a favorable rate from the State. He acknowledged that there was no escalation clause for rent in the State lease and provided no evidence to support his prediction of a higher rate.

In addition to using a higher rent, Mr. Culbertson proposed using a 2.5% escalation to be applied to rent. He cited as his basis the fact that Mr. Dietrich had used a 2.5% escalation in one of Mr. Dietrich's earlier calculations. The Dietrich calculation, however, had different numbers and different durations. Mr. Culbertson did not use an escalation for rent in any of his spreadsheets prior to December 2014.

In his December 24 spreadsheet, Mr. Culbertson assumed a vacancy period of six months between the State lease and start of a new tenant. In another calculation, he had used eighteen months. In a third, he showed the State renewing.

A final issue was janitorial costs. In answers to interrogatories, appellant identified the janitorial costs as $30,000 a year. Per answer to an interrogatories, appellant did not incur janitorial costs for the State lease until at least May 2014. Rent was to start in November 2013. Therefore, there were no janitorial expenses for the first seven months of the State lease.

Because GSA was insisting that expectancy was the basis for measuring payment to PJB, Mr. Dietrich, at the request of PJB counsel, initially provided a ten-year analysis based on expectancy. Later, however, he provided a fifteen-year calculation. He acknowledged that GSA had a right to terminate after the tenth year of an otherwise fifteen-year term, but pointed out that GSA has historically not terminated earlier than the expiration of the full term in the vast majority of cases. GSA did not contest that point, as to history, but relied upon the lease clause giving it the right to end the lease at ten years. Based on past history Mr. Dietrich calculated that there was a 90% likelihood that GSA would remain for the full fifteen years. He weighed the percentage possibility in his valuation as to PV. By running his calculation over fifteen years, he increased the amount due to the lessor under the calculations for the total recovery.

The parties differed as to the cost for making improvements for a follow-on tenant to the State (assuming the State left after five years). It was agreed that if the State left, added costs would be needed to prepare the space for a new tenant. Mr. Dietrich identified $592,858 as the costs to make those improvements. It was not clear if his costs were based on past experience or on client information and there was minimal detail. Mr. Culbertson contended that Mr. Dietrich used an exorbitant figure for improvements on a second replacement lease and supported that point by noting that the building had already been converted from warehouse to office space and the TIs from the State lease would only be five years old. He noted that the total spent on construction for State was about $392,000 (PJB actually spent $466,171.96 to secure the State lease and prepare for occupancy; however, of that $392,000 was for construction). Mr. Culbertson used $280,000 as an estimated cost. His costs were not detailed and the source of his information was not clear.

Both parties adjusted the lease calculations for PV. Present value involves discounting future dollars to reach a sum which reflects what later-paid money would have been worth at an earlier time. Much of reaching a rate is market and risk driven. The process of coming up with a discount rate for present value is part science and part art. In Mr. Culbertson's final filing, he applied 4.25% to the GSA lease and 8% to the State lease. Those are the same numbers he used in his earlier November 3, 2014, report and spreadsheet. Mr. Dietrich used a slightly higher rate of 4.75% for the GSA lease in his fifteen-year calculation, and he used 6.79% in his final calculation as to the State lease and follow-on. The higher the PV rate the lower the value of the dollars.

Discussion

We do not fully adopt either party's position as to what is owed for what the parties have identified as additional days that were required (beyond those contemplated in the lease) to perform the pre-occupancy design and costing tasks called for in the lease. For purposes of this decision, we refer to the additional days as delay. Both parties have attempted to segregate out delays to work during both 2011 and 2012, and then have calculated and applied dollars to those segments of delay. Appellant in its briefing asserts that it is entitled to compensation based upon a nineteen-month delay, which essentially runs from award in March 2011 until the cancellation in December 2012. In its final decision, GSA accepts limited responsibility for some time segments in 2011 and in 2012. However, in its final presentation to the Board and in briefing, GSA has significantly reduced what it accepts as responsibility for the stretch out costs and concludes that, at best, the total due appellant is $64,817.

We find the identification as to delay to be less complex than how it has been framed by the parties. Accordingly, we will not analyze the approaches that have been presented, but instead will identify where we find the delay or liability and why. Where appellant is due compensation, we address how the dollars are to be calculated.

Extra carrying charges covered two distinct periods. The first was from the agreed planned approval date for DIDs to the actual date of approval of the revised DIDs in February 2012 by GSA. GSA has conceded that the approval for DIDs was not given until February 28, 2012, because of the change in design. GSA acknowledges that such date effectively was a restart for the project. Because appellant should have been able to complete the DID process and proceed with CDs considerably earlier, but could not do so until February 28, 2012, we find appellant is entitled to compensation for costs due to the Government-caused delay through February 28, 2012. It was only at that point that GSA approval of the DIDs allowed for appellant to proceed with CDs.

The only remaining issue as to this period is to determine from what date we measure the delay. PJB should have expected to incur carrying charges for the period prior to occupancy, as it needed to perform design and construction. The time allotted for that (as well as adjustment for notice to proceed and negotiations) is 210 days. GSA asserts that if there was a delay, the delay could not start until at least May 19, 2011, based on an agreement by the parties that moved the initial date for providing DIDs to May 19th. Both the Government and appellant agreed at an initial program meeting in April 2011 that DIDs would be due on May 19, 2011. We find no evidence to suggest that this was not voluntary or that appellant raised objections. The date also coincides closely with when PJB took over the contract.

May 19, 2011, was the due date for the lessor to provide GSA with DIDs. Thereafter, the lease schedule allowed for ten days for GSA to approve the DIDs after receiving them from the lessor. Since the February 28th date was the approval date for DIDs, we have to account for the 10 day review period and therefore add ten days to May 19th. That results in measuring any delay as to carrying costs from May 29, 2011. There are 276 days from May 29, 2011, to February 28, 2012. While we recognize that there was some work being done in 2011, and there were interim delays in that work during 2011, any interim delays are not material to our decision, as the DIDs were not approved until February 28, 2012, and the start of CDs could not proceed until that approval.

Starting on February 29, 2012, the project progressed, albeit sometimes in fits and starts, until the cancellation on December 21, 2012. There are 297 calendar days in the period of February 29 to December 21, 2012. Appellant seeks daily or monthly costs for that entire period. That is not reasonable. First, under any analysis, a substantial segment of the 297 days was required to do the work. Since appellant is seeking compensation to recover what it would have earned had the lease been completed, the 297 days must be reduced to reflect the time needed for it to do base work required for occupancy. That base time included designated design tasks, negotiation of the TIs and warm lit shell costs, and actual construction. As set out in our findings of fact, we have added together the time to accomplish the various activities in the lease, including time for negotiation and notice to proceed. We calculated that total to be 210 days. Had the lease not been canceled, that time would have had to have been expended by appellant in order for the appellant to have earned the rent. The appellant cannot be paid extra for those days.

For purposes of assessing appellant's claim, we note that the lease provides thirty days for submission of the DIDs and ten days for approval. Those forty days were in fact completed as of February 28th. Accordingly, we deduct those forty days from the 210 needed to complete the work. Counting from February 28th, that leaves 170 days needed for work completion. When we deduct those 170 days from the 297 days identified above, we are left with 127 days that are not accounted for. Those are the remaining days in dispute during what we designate the second period.

Appellant, in its claim, has identified various GSA actions that impeded its ability to proceed. The principal items identified were HVAC, sprinkler, security, and handicapped access to parking. GSA similarly identified items that it claims were caused by appellant not complying with the contract or not providing GSA with required information. Among issues identified by GSA were the pricing of the warm lit shell, lack of competition, the scope of responsibility for HVAC, and the pricing of finishes. In its briefing, GSA asserts that its actions caused no added stretch out or delay from February 28th forward.

We find neither party to be entirely correct in allocating the remaining 127 days in dispute. In the CO decision, GSA conceded responsibility for a delay of sixteen days, from December 5 to December 21, 2012, while GSA was deciding on the stop work order. Appellant has not provided a basis for rejecting that figure. We therefore allot sixteen days. In addition, the final decision identified a three-day and a separate six-day period as compensable, noting that GSA reviews took longer than set out in the lease. Neither party provided testimony to support this as a delay, and we simply do not find that a few day delay in a review, even if caused by GSA, automatically qualifies for reimbursement. The record does not demonstrate that the lessor's progress was materially impeded by those short periods or that it should have expected perfect turn-around. Accordingly, we do not add in those days, which leaves 111 days unaccounted for. Those are the potential delay days remaining in dispute for the period of February 29 and December 21, 2012.

For the remaining 111 days of delay, each party has identified contested issues, but neither has conclusively established who was to blame. Documentary evidence revealed a substantial shared responsibility as to delays after February 29, 2012. Witnesses were generally not helpful in sorting out or refining a shared liability. On the whole, the record does not demonstrate which party is responsible for any particular period of delay or demonstrate liability for a given issue.

Still, there are several items that can be attributed to one or the other party. We find that GSA was responsible for some delays attributable to the HVAC, security specifications, handicapped access, sprinklers, and unrealistic TI costs. Similarly, there were items attributable to appellant. For example, appellant at times failed to approach the warm lit shell costs in a reasonable manner, did not fully comply with securing competitive pricing, and was partially responsible for some of the HVAC and finish issues.

The claim for time and money in this matter is appellant's claim. Therefore, it carries the burden of proof. Taking that into account, we find on a jury verdict basis that of the remaining 111 days in dispute, the record establishes that GSA is responsible for 30% of the time and the remainder either falls on appellant or is not attributable to either party. That calculates to an additional thirty-three days of delay, or thirty-three days of additional carrying costs.

We find appellant had to carry the property beyond what was reasonable for 325 days. That is composed of 276 days up to February 28, 2012; sixteen days from December 5 to December 21, 2012; and thirty-three days for the remainder. Counting 325 days back on the calendar from December 21, 2012 (the date of cancellation) puts us into January 2012. We find that appellant should have been able to proceed with occupancy no later than some point in January 2012, but instead was held up on the project, without any compensation for carrying costs, until December 2012.

Appellant has provided dollars in its certified claim for almost the full time period during 2011 and 2012. We find that we can calculate either a monthly or daily figure from appellant's submission. GSA has not provided competing calculations. Accordingly, we use appellant's dollars as a basis. Appellant has identified the following categories of time-related costs: real estate taxes, management fees, landscaping fees, utilities, and insurance. The CO, in the final decision, accepted each of these categories of costs as compensable. To calculate compensation for time-related costs, we take the rate used in appellant's certified claim for the period running from January 2012 forward, and then multiply that rate by the days of delay. The calculations are as follows:

Real estate taxes	\$80.21 x 325 days	\$26,068
Management fee	\$32.26 x 325 days	\$10,485
Insurance		\$ 9,309
Landscaping	\$26.87 x 325 days	\$ 8,733
Utilities	Water	\$ 1,985
	Sewer	\$ 4,356

The above totals \$60,836.

In addition to the time-related costs noted above, appellant claims \$27,791.99 in legal fees and \$4913.98 for architectural costs, the latter incurred in May and June 2012 for what appellant contends was to assist in negotiating a price adjustment. The two items total \$32,705.97. GSA allowed both in the final decision but now says neither is payable, characterizing them as administrative costs that are to be borne by a contractor. Appellant put on minimal evidence to connect the legal costs to negotiations or to show that such costs were outside the realm of general legal costs that would normally be included in overhead. Similarly, there was no specific evidence, but for billing, to support the additional \$4913.98 sought for added architectural fees to assist in negotiations. Appellant has the burden of recovering the fees. That the CO allowed the costs is not relevant, as the Board considers the claim *de novo*. Based on a lack of evidence, we deny these claims.

Having found entitlement as noted above, we briefly comment on defenses raised by GSA asserting defects in appellant's proof as to delays. We find no merit in GSA's contention that, because there is no critical path analysis, we cannot determine delay. First, the contract does not call for appellant to provide any critical path analysis. Second, the bulk of the delay is at the front end and is obvious. As to the delay in 2012, we agree it is not tied into specific dates and therefore benchmarks would have been helpful. However, lack of the benchmarks is not fatal if delay is clear. In this case, we have assessed the time after February 28, 2012, and have allocated delay based upon the record. Because the burden of proving delay was appellant's, we gave GSA the benefit of the doubt in our calculation of compensable carrying time. Costs associated with added architectural work are independent of the number of delay days.

In summary we find $60,796 due for the delay and added carrying time as well as $48,269 for the architectural fees that have been acknowledged in the CO decision and not challenged in this proceeding.

Expectancy Versus Diminution and Length of Term

The initial question before we calculate dollars for the cancellation is whether to use the expectancy approach, as presented by GSA, or the diminution in value theory, as presented by appellant.

Appellant's diminution theory is predicated on measuring damages based on the loss of value of the property for a future sale. It arrives at its number by comparing the value of the property at the time of breach with the GSA lease in place and the value of the property on that same date with a lesser tenant in place. It contends that its approach is commonly used in commercial practices and asserts that measuring damages in that manner was foreseeable.

GSA seeks to pay on the basis of expectancy. There, it takes the full value of the lease, as if performed, which involves deducting from the gross rent, the expenses that were needed to perform the lease. GSA then mitigates those costs by what appellant will recover through the current State lease and an anticipated follow-on lease. The result puts appellant in the same position it would have been had the lease been completed. It does not take into account how, if at all, the cancellation of the lease affected the sale value of the property at some future date. GSA says appellant should not be placed in a better position dollar-wise than if GSA had completed the lease. GSA points out that it entered into an agreement with appellant to pay rent and not to guarantee the value of the sale value of property.

We have considered the evidence of the respective parties and find that the expectancy approach is appropriate. We find the presentation on diminution to lack detail, specifically as to its application to the property at hand. Moreover, the expectancy approach is in our view less speculative, more subject to analysis, and we find that it allows us to determine a fair result. Further, while diminution may be the standard in the commercial market between private parties, it is not the standard as to GSA leases. GSA uniformly applies an expectancy approach when valuing uncompleted lease damages. Appellant purported a familiarity with GSA leases. Therefore, any expectation of another valuation method was not warranted.

The second matter to resolve before we calculate damages is determining the appropriate term for the lease. The evidence is clear that ten years is the appropriate term. The contract clearly gives GSA the right to end the lease after ten years. While appellant asserts that such a walk-away from the lease was unlikely, that does not change the fact that the lease clearly gave GSA that option. For us to use fifteen years would ignore the lease provisions.

Having determined that we will use expectancy over a ten-year period, we now turn to calculating the recovery. The parties presented a number of expectancy scenarios to the Board. In some, the dollars were similar. However, there was significant disagreement as to some figures. We point out that each expert acknowledged that valuation is not an exact science. We are dealing with educated estimates and assumptions. We do not chastise the experts for the multiple choices, but instead, simply recognize that they were attempting to fashion what they consider a fair remedy.

In calculating the proper expectancy damages, we use the spreadsheet of December 24, 2014, for format and as a starting point. We find that neither party provided us a calculation which we could accept in full. Therefore, at times, we modify various cost elements to conform with what we find to be fair and to be consistent with the evidence. The primary adjustments are for: (1) the cost for appellant to complete the warm lit shell, and (2) the mitigation value of the State and potential follow-on lease. To the extent we find other issues material, those are separately addressed.

Both parties agree that the cost for preparing the warm lit shell was to be deducted from whatever gross rental the appellant would have received. GSA contends the warm lit shell should be valued at $490,463, relying on the fact that appellant proposed the number to GSA in December 2012. It also relies on the opinion of Mr. Culbertson, who described it as passing the laugh test. GSA also cites in support a statement by Mr. Ash as to his being pleased with the number. Appellant, in contrast, states it could have completed the warm lit shell work for $198,000. It, however, provides very limited support for that figure. Appellant mostly relies on testimony from the architect that PJB used for work on the State lease. We found the architect's testimony to be unconvincing. He did not appear to have full knowledge of what was actually required for the warm lit shell in the GSA lease. We find that $198,000 understates the cost.

We find also, however, that $490,463 overstates the amount reasonably needed to prepare the warm lit shell. We conclude from the testimony of Mr. Ash that the proposed

$490,463 was not an arms-length offer or proposal. His testimony convinces us that appellant offered the $490,463 because appellant needed to get the job moving. At the time, it had been carrying the project for well over a year-and-a half with no compensation, but was nevertheless incurring carrying costs on a daily basis. Absent getting GSA to agree to a price to be allocated to the warm lit shell and TI price (the two working in tandem), no occupancy date was in sight. Appellant proposed the figure under those terms. Further, appellant was not locked into that number. It was entitled to do the work cheaper, if it could.

We find the most likely cost for the warm lit shell to be $392,071, which is the cost submitted by appellant on TIC sheet A-6. There is no evidence that A-6 was not an arm's-length proposal. While A-6 was not submitted immediately prior to the proposal for $490,463 (A-7, at $369,051, being the last sheet submitted), we find A-6 (which is higher) to be more accurate. A-6 more fully includes costs for doors, windows, and some other items that were not reflected in A-7. Accordingly we use $392,071 for the warm lit shell costs.

Once we substitute $392,071 for the warm lit shell number used by Mr. Culbertson, we adopt the remainder of his December spreadsheet as to the expenses necessary for appellant to complete the GSA lease. The gross rent total of $5,482,070 for the ten-year period is not contested and there are no disputes as to the TI allowance, commissions, operating expenses, and real estate taxes, nor as to the monthly figure of $31,152 designated for other items. The net rent, after expenses, was shown by Mr. Culbertson as $2,112,256. His total, however, reflected $490,463 for the warm lit shell expense. When we change the warm lit shell cost to $392,07 (our adjusted figure), the net rent to be recovered is $2,013,864. That figure is before adjusting for PV, which is discussed separately below.

The parties agree that PJB's income from the State lease and any follow-on lease must be deducted as mitigation. The parties disagree as to the values to be placed on those leases.

Mr. Culbertson provided several alternative calculations for valuing the State lease and follow-on lease. The alternatives were set out on five separate spreadsheets, ranging in dates from August 29, 2014, through the final spreadsheet of December 24, 2014. Among the alternatives he listed were the State renewing and staying for ten years; the State leaving after five years and then being followed six months later by a follow-on tenant; and finally, the State leaving after five years but the vacancy lasting eighteen months. Each spreadsheet used somewhat different figures for the rent per month and for operating expenses.

Clearly, there is no certainty as to whether the State will stay or leave, or certainty as to how difficult it would be to find a new tenant and at what rate. We, however, must come up with a selection, based on our best judgment, without being overly optimistic or pessimistic. Our best judgment is to adopt the Culbertson scenario that would have the State leave after five years, with a six-month vacancy.

The calculation that follows incorporates the above adjustments. However, before finalizing, we need to address several other items. An agreed element in the follow-on lease (assuming that State leaves after five years) would be the cost of improvements for a follow-on tenant. Appellant uses $520,000 as the anticipated cost and GSA uses $280,000. Neither presented testimony on its estimated figure from a construction professional, but instead provided at best layman opinion and observation. We find neither number to be properly supported and find there is other evidence in the record that leads us to a different result. Prior to the State taking occupancy, the appellant paid $392,228.20 in tenant improvements beyond the warm lit shell, to satisfy the State. While a follow-on tenant to the State would likely require different improvements from those provided to the State, we find it would be unlikely that the costs for a new tenant would exceed those that appellant expended for the State. In part, that is because we expect that some of the initial tenant improvements for the State would be useful to a follow-on tenant. Therefore, we set $392,000 (what appellant spent on the State) as a ceiling. Because the needs of a follow-on tenant may differ from that of the State, any number we choose will be judgmental. Predicting, as best we can, we take a jury verdict approach and allow $336,000 for follow-on tenant improvements. That is the average between the $280,000 proposed by GSA and the ceiling figure we set of $392,000 (paid for the State improvements).

The parties disagree as to the rental rate to use for years five through ten of the extended State or follow-on lease. Mr. Culbertson calculated at least three scenarios. One used the State rental rate for ten years, assuming that the State renewed. Two calculations used higher rates for the five-year follow-on, one being $13.25 per sq. ft. and the other (in December 2014) using $14.71 per sq ft. We recognize that each calculation is coupled with different vacancy combinations. However, it is clear that Mr. Culbertson saw the potential of multiple choices. No convincing testimony was provided to pick one number over the other or to support the contention that rents would increase. Rental increase is not automatic and has not been so for several years. Accordingly, the use of multiple rates by Mr. Culbertson gives us pause. Of the numbers provided, the only non-estimate number is that paid by the State. All others are predictions. In selecting the rate, we choose to rely on an actual number, rather than speculate with unexplained estimates. We therefore apply the State rental rate for the entire mitigation period. In our result, we are comfortable taking judicial notice of the fact that rents in many markets have remained flat for a number of years. While that may change, we find that fairness dictates that we not assume a higher rent will be paid, when there is no evidence to support it.

GSA proposes escalating rent by 2.5% per year and escalating expenses by 2% a year. The proposal to include the escalation for rent was first presented by GSA in the December 2014 spreadsheet and thus was absent on the prior four. The escalation of operating expenses was noted at the hearing and is part of the contract when dictated by a CPI change. Regardless, we find no evidence to show that rent or expenses would likely increase. We decline to use escalation when no evidence supports it.

Finally, we adopt Mr. Culbertson's use of a six-month vacancy before a follow-on tenant. Again, we are dealing with a prediction. On one sheet, Mr. Culbertson had the State staying for ten years, in another he had a six-month vacancy and in another an eighteen-month vacancy. He identified the six-month vacancy as most likely. While the State might extend beyond the initial lease, it has no such obligation. Just as we gave weight to GSA's right to opt out, we equally recognize the State's.

With the above parameters set, the mitigation calculations are as follows. We start with the full ten-year rent at the State's rate of $3,325,375. To account for a six-month vacancy, we deduct $164,687 in year six, which is half of the rental ($329,375) for year six. With that deduction, we have a gross rent of $3,160,688. We then deduct expenses. Ten years of operating expenses, at a level rate, is $1,689,570. On his spreadsheets, Mr. Culbertson deducted 50% of expenses for a six-month vacancy. We deduct those costs to account for that six months, adjusting the operating expenses to $1,605,100. We then deduct tenant improvements actually spent on the State lease of $460,000, an additional $336,000 for estimated improvements to satisfy a follow-on tenant, and $204,000 in broker commissions. As to the janitorial costs, we find savings of $17,500.

The numbers set out above are net numbers and are not subject to a PV calculation. We recognize that the application of PV is applied to each year (but for year one) and uses a formula based upon the PV rate to be applied. For purposes of this decision, we have provided net numbers and have set the rates to be used. We leave the application of and calculation for PV to the parties.

The last three Culbertson spreadsheets showed a consistent PV of 4.25% for the GSA lease and an 8% for the State lease. However, in its brief, GSA argues that the best appellant should get is 4.75% and 6.75%, citing that those figures were used by Mr. Dietrich in his calculations in exhibit A-12. In his revised calculations submitted in A-12, Mr. Dietrich used 4.77% for the GSA lease discount rate (PV) and 6.49% for the State lease. That, however, was based on fifteen years. When Mr. Dietrich performed a ten-year calculation, he used 12% rate to calculate PV. Both parties agreed that PV is a function of variables. The final PV value we use must be based on our best judgement. We have assessed the information presented and find that a factor of 8% is to be applied to the State and follow-on leases and 4.25% to the canceled GSA lease.

Other Costs, Certification Issue

Appellant claimed additional costs at the hearing. While the costs arise out of the same operative facts, the cancellation of the lease, appellant has offered an entirely new set of numbers for a different cost category. The central test for deciding if a claim is separate and thus needs certification is whether the CO's right to adjudicate is undermined by circumventing the CO statutory role to receive and pass judgment on claims. This is not a case where an the appellant is adding a theory to sustain the same recovery that has been sought. Rather, these are new dollars involving a different facet of the costing. It opens an entirely new legal analysis. Accordingly, the claim can only move forward after certification. Absent that, we do not have jurisdiction over this item.

Decision

The appeal is **GRANTED IN PART**. Appellant is granted $109,105 associated with the delay and extra design work. Appellant is entitled to recovery for the cancellation of the lease in accordance with the guidance set out in this decision. Interest is to run from the date on which the contracting officer received the certified claim.

HOWARD A. POLLACK
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

JOSEPH A. VERGILIO
Board Judge