

THE MORELAND CORPORATION

LEASE NO. 084B-001-94

VABCA-5409 & 5410

**VA OUTPATIENT CLINIC
LAS VEGAS, NEVADA**

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OPINION BY ADMINISTRATIVE JUDGE McMICHAEL

The Moreland Corporation (Moreland, Contractor or Lessor) appeals the final decisions of a contracting officer denying its claims totaling \$4,650,814 to adjust the terms of a lease with the Department of Veterans Affairs (VA or Government). The disputes arises from Lease No. 084B-001-94 (Lease) in which Moreland agreed to construct and lease to the VA, for its exclusive use, a two-story Ambulatory Care Center in Las Vegas, Nevada. The VA agreed to lease this center for a term of 15 years with an option to renew for an additional five years. The

annual rent of \$2,139,391.80 is derived from multiplying a square foot cost of \$14.43 by 148,260 net usable square feet, the maximum amount of space offered by Moreland and accepted by the Government in the Lease agreement. The actual space ultimately provided to the VA by the Lessor amounted to 184,580 gross square feet which contained 165,110 net usable square feet or about 10% more usable space than required by the Lease. Moreland seeks to be compensated for the provision of this additional usable space over the life of the Lease.

The Government has filed a MOTION FOR SUMMARY JUDGMENT maintaining that the lease is “clear and unambiguous” as to its requirements, particularly with respect to the provision that states “VA will not pay for space in excess of the maximum amount solicited”, i.e. 148,260 net usable square feet. The Lessor “knew this, and did not question or object to it.” Moreland has responded by first asserting that there are “material facts in dispute” which require a hearing before the Board. As to the merits, it first argues alternatively, that the Lease provisions authorize and indeed mandate payment for the additional space provided, or that the Government constructively changed the Lease during the design phase by requiring additional space. Moreland also advances an equitable claim for relief arguing that it was “impossible” to construct a building meeting all the Lease requirements within the maximum net usable square feet solicited by the Government. It seeks equitable relief alleging misrepresentation, superior knowledge or mutual mistake of fact.

The Record for purposes of our consideration of the MOTION initially consists of the Pleadings and the Appeal File as supplemented by Moreland. (R4, tabs 1-82; R4 Supp., tabs 500-74). The Record also includes the affidavit (Aff.) of Lawrence Hill and the declarations (Dec.) of Terry Moreland, George F. Vogt, Jr., Gregg T. Gottgtetreu, Marc Schiff, Richard Braun and Garrett Galbreath. Finally, the depositions (Dep.) of Lawrence J. Hill, Alan Tyler, Kenwood Dudley

Schadeberg and Glenn Glommen totaling 1,211 pages together with 66 attached exhibits are also part of the Record. The parties filed multiple Briefs totaling 112 pages. The facts for purposes of the MOTION FOR SUMMARY JUDGMENT are as follows.

FINDINGS OF FACT

Background

Increasing demand by veterans for health care services in the Las Vegas, Nevada area led VA officials in the Fiscal Year (FY) 1994 budget submitted in January, 1993, to request funding for the leasing of increased space for its Independent Outpatient Clinic located there. The existing clinic was situated in two separate buildings. The budget request sought authority to lease a total of 66,491 net usable square feet in a single location for up to 20 years. (R4 Supp., tab 530) Determining space requirements for VA health care facilities is a “very complex” process involving work load projections which include, *inter alia*, the number of veterans utilizing the clinic, the total number of visits by veterans and the number of “stops” at various services made by a veteran during a visit to the clinic. The process is further complicated by the increasing shift of certain activities to ambulatory care clinics that had previously been performed in a VA hospital setting. (Tyler Dep. 78-80)

Once workloads and needed services were defined, VA planning manuals set forth criteria identifying functional and space requirements for the various clinic services. (Glommen Dep. 29) Space requirements, often referred to as “program net” were set forth in “**net square feet**” (**nsf**). For example, clinic “Waiting Areas” anticipating between 100,000 and 150,000 outpatients visits a year were determined by VA standards to require 200 nsf, plus 50 nsf for an “Information Desk” and 150 nsf for an “Escort Service Room.” A “Multipurpose

Examination Room” according to VA standards was to be 100 nsf in size with the number of such rooms needed to be determined by the formula: “60% of Emergency/Admit-- clinic-stops divided by 2,000.” (R4 Supp., tab 525) When seeking space, the VA typically sets forth these program space requirements in considerable detail by types of rooms and functions. The successful contractor’s design team then works with VA officials to layout and design new space or to redesign existing space to meet the Government’s requirements. The net square footage of individual rooms might increase or decrease in size during the design development phase just “as long as everything fits into the envelope.” (Hill Dep. 127; Schadeberg Dep. 86-88)

The program net or net square feet required, however, is less than the actual space needed for a functioning clinic inasmuch as it does not take into account partitions, functional layout and adjacency requirements. Nor do program net requirements take into account the obvious need for such things as corridors and circulation space, stacks, shafts, stairwells, elevators, lobbies and mechanical rooms that typically comprise a building.

When the federal government enters into a lease, it usually acquires space in terms of “**net usable square feet**” (**nusf**) which is defined as the interior gross space occupied by the Government *after* deducting the various areas mentioned in the preceding sentence. (No deductions are made, however, for columns and projections enclosing structural elements that add to the gross square footage of the building.) The Government typically seeks proposals based on per square foot cost which is then multiplied by the total nusf to be acquired to arrive at the annual lease cost. (More recently the term “occupiable” square feet has been substituted for the term “usable” square feet. (Hill Dep. 70))

To estimate the nuse that will be required to accommodate its program space needs, VA planners routinely increase program space requirements by either 22 or 28 percent. (Hill Dep. 74-76) While unable to pinpoint the origin of this formula, Lawrence Hill, Contracting Officer (CO) for this project said that the formula had “been around” for a good period of time. (Hill Dep. 129) He recalled that “some years ago” an analysis of building leases in general concluded that the “[28%] factor represented a reasonable adjustment . . . to go from a net requirement to a net usable requirement.” (Hill Dep. 280-81) Dudley Schadeberg, a successor Project Manager for the Las Vegas clinic also talked about this “generally used formula,” adding that “to provide corridors -- access to the partitioned room[s] . . . amounts to about roughly 28 percent over program net.” (Schadeberg Dep. 76) CO Hill also said that multiplying program net square feet by a factor of 1.55 could generally predict the interior “**gross square feet**” (**gsf**) required to meet the Government’s program needs. (Hill Dep. 211) Of course, gross square feet can vary depending on “how efficiently the building is laid out” and such things as the “size of mechanical rooms and other areas that belong to the lessor.” (Hill Dep. 212-13)

It is also important to note that net usable square feet can vary even though program net space is constant because of differences in building configurations, code requirements and adjacency needs. In issuing a solicitation, CO Hill said that the VA often has “no idea of what the end product will look like in terms of the envelope.” Thus, while the formula is generally useful for projections, leases routinely provide that the lease payments are calculated by multiplying the square foot rate against the *measured* usable space actually received up to the maximum specified in the lease. (Hill Dep. 134, 213) The Lease in this appeal contained standard Federal Acquisition Regulation clause 552.270-31, MEASUREMENT FOR PAYMENT (AUG 1992), which provides:

When space is offered and accepted, the space will be mutually measured upon substantial completion. Payment will be made on the basis of actual measurement; *however, payment will not be made for substantially completed space which is in excess of the maximum square footage solicited.* The annual rent will be calculated by multiplying the annual square foot rate times square footage.

(R4, tab 37 at 263) (Emphasis added)

Based on workload projections, the Director of the Project Coordination and Budget Office in the Veterans Health Administration estimated on March 10, 1993, that the space requirements for the Las Vegas Ambulatory Care facility totaled 54,501 nsf or 66,491 nusef (increasing nsf by a 1.22 factor). (R4 Supp., tab 524) By December 1993, however, additional workload estimates had revised the space plan requirements upward from 54,501 to 119,623 nsf. (R4 Supp., tab 526) It was estimated that the 119,623 nsf required by the clinic would translate into 153,117 net usable square feet (increasing nsf by a 1.28 factor). (R4 Supp., tab 528)

On February 20, 1994, the VA placed an advertisement in the Las Vegas Review-Journal/Sun announcing that it was “interested in leasing approximately 153,117 net usable square feet” in Las Vegas for use as an ambulatory care facility. It sought a lease for up to 20 years which must be in space of “no more than 3 contiguous floors, and can be provided by new construction or modification of existing space.” The advertisement added that the Government was “limited by law . . . to pay no more than the appraised fair market rental value for space.” Interested parties were asked to contact the VA. (R4, tab 1)

Subsequently, the VA informed the Office of Management and Budget (OMB) on June 27, 1994 of its revised requirements for the Las Vegas

Ambulatory Care facility and sought support for a request to Congress to increase the scope of the project to 153,117 nsf. (R4, tab 2) Discussions ensued with OMB initially suggesting that the clinic's program net requirements be reduced from 119,623 nsf to 110,765 nsf. In late October or early November 1994, it was finally determined that the project size would be 115,565 nsf. (R4, tabs 4-5) This adjusted program net requirement of 115,565 nsf was increased by a factor of approximately 1.28 factor by Contracting Officer Hill to arrive at 148,260 nsf which he believed "would provide sufficient space to include the requirements set forth" in the forthcoming solicitation (Hill Dep. 125-27)

The Solicitation For Offers (SFO)

On December 6, 1994, the VA sent Solicitation for Offers (SFO) No. 084B-001-94 outlining the Department's requirements to the 15 firms expressing interest in the project. Included in this group was The Moreland Corporation which had been a regular bidder on most VA projects "during the 90s" and a successful offeror in both a VA ambulatory care lease project in Bakersfield, California, and a VA pharmacy research project in Albuquerque, New Mexico. (R4, tab 18; Schadeberg Dep. 59-60) The transmittal letter indicated that copies of SCHEDULE D, ARCHITECTURAL LAYOUT DRAWINGS, would be forwarded in a separate mailing on or before December 29th and that a pre-submission briefing would be held during the week of January 9, 1995, "[i]n the interest of improving the accuracy of initial offers." (R4, tab 8) Subsequently, the Pre-Submission Conference was re-scheduled for January 19, 1995. (R4, tab 37, Amendment #1)

In Section 1.1, AMOUNT AND TYPE OF SPACE, of VA's unamended SFO, announced that it was:

interested in leasing 148,260 net usable square feet,
hereinafter refereed to as "space or basic space" . . . as

described in this Solicitation for Offers. Offerors must be within the square footage range [sic], as described above, to be considered and to comply with Schedule D, Architectural Layout Drawings, showing circulation and adjacencies.

The space must be adjoining and should be no more than three contiguous floors. The space may be provided by new construction or modification of existing space. Building designs of more than three contiguous floors may be considered by the Contracting Officer.

(R4, tab 37 at 110)

In Section 3.12, NET USABLE SPACE, the VA stated that “[n]et usable space is the method of measurement for the area for which the VA will pay a square foot rate.” If single tenancy space was to be provided, net usable space was to be determined by first computing the inside gross area of the structure. The section next provided that:

In all measurements, make no deductions for columns and projections enclosing the structural elements of the building and deduct the following from the gross area including tier enclosure walls:

- a. 5.5% of inside gross area for corridors and circulation
- b. Public toilets and public lounges (See paragraph 7.2)
- c. Stairwells
- d. Elevators and escalator shafts
- e. Building equipment and service areas
- f. Entrance and elevator lobbies
- g. Stacks and shafts
- h. Janitor closets (see paragraph 7.5)

(R4, tab 37 at 127)

Section 2.1, EVALUATION OF OFFERS, provided that evaluation would be “based on the following factors in order of descending importance: (1) the annual price per square foot, including any option period; (2) the building and design concept; (3) the quality of the site; and (4) the offeror’s qualifications.”

Section 2.2, PRICE EVALUATION, provided, in pertinent part:

Price is the most important factor. The base price offered will be the rate per nusef for the space offered. Refer to paragraph 3.12 of this Solicitation. This price shall be used to determine the total annual rental to be paid, adjusted for any discrepancies in the quantity of space delivered as against the amount offered and accepted, as described elsewhere in this Solicitation.

(R4, tab 37 at 117)

As for “building and design concept,” the next factor in importance, the VA listed five criteria to be used in that evaluation, the first of which was:

Ability to Accommodate the Functional Layout: This factor considers the flexibility with which VA architects can layout the interior functional requirements of the VA Ambulatory Care Center. Consideration will be given to the number and size of floors, column placement, shape of footprint, and placement of mechanical and plumbing core.

(R4, tab 37 at 119)

Schedules B and C

SCHEDULE B, SPECIAL REQUIREMENTS, of the SFO, which was “to be used in conjunction with Schedule C,” contained specifications for various equipment/fixtures to be supplied to the clinic which were to be individually priced by the offerors. (R4, tab 37 at 300) SCHEDULE B was divided into 26 functional categories with 763 separately identified rooms/areas each with a designated net square foot requirement. The Board calculates that the space

requirements identified in SCHEDULE B totals 121,828 nsf. (R4, tab 37 at. 294-743) The functional categories ranged in size from AFGE LOCAL consisting of one room of 120 nsf to SCHEDULED CLINICAL EXAM/TREATMENT MODULES containing 266 areas/rooms totaling 33,979 nsf. Not included in the total net square feet calculations for the 763 identified rooms or areas were eight toilets and ten "House Keeping Aids" rooms amounting to about 1,100 net square feet which bore the notation: "Space [to be] provided by lessor in leased facility."

SCHEDULE C, FUNCTION, SPACE AND FINISH SCHEDULE, specified floor and wall coverings for the project and was similar to SCHEDULE B in listing the 26 functional categories and the 763 separately identified rooms or areas. (R4, tab 37 at 776-831) SCHEDULE C also specified flooring and wall covering requirements for other spaces to be provided by the Lessor. These areas, which had no net square feet areas assigned to them, included: Bathrooms (in addition to the 8 previously mentioned), Mechanical Rooms, Elevators and Elevator Lobbies, Main Concourse, Main Entrance, Main Entrance Vestibule, Main Entrance Hallway and "All other Corridors."

SCHEDULE C, unlike SCHEDULE B, did provide a program net figure for the entire project which totaled 115,565 nsf (excluding the 1,100 nsf of lessor furnished toilets and house keeping closets). Although there were minor variations in a number of functional categories, the principal difference between SCHEDULE B's 121,828 nsf and SCHEDULE C's announced total of 115,565 nsf was that SCHEDULE B reflects more space requirements for both the Canteen and the Auditorium. The RECEPTION AREA/LOBBY functions, in which these two areas are included, total 11,011 nsf in SCHEDULE B and 6,256 nsf in SCHEDULE C.

Schedule D

In addition to pricing all the fixtures and equipment in SCHEDULE B, offerors were required by Section 3.7 to submit a "design concept" together with

“one-eight[h] inch full floor plans” showing both net usable and gross area calculations. (R4, tab 37 at 125) Section 1.9, UNIQUE FACTORS, provided that the “[s]pace must be able to accommodate the layout and internal adjacencies as indicated in Schedule D,” although it noted that the VA would consider variations from the 3-story building. Finally, before it was changed by Amendment #2, Section 1.9 originally provided that in the event there was a “conflict between Schedule B and Schedule D”, then “Schedule D shall have precedence and control.” (R4, tab 37 at 112) (Emphasis added)

On December 27, 1994 the VA mailed SCHEDULE D, ARCHITECTURAL LAYOUT DRAWINGS to prospective offerors. (R4, tab 9) These drawings, dated “11/8/94”, and labeled OUTPATIENT CLINIC CONCEPTUAL DESIGN, were in both 1/8 inch and 1/4 inch scale and contained no indication that they were prepared by an architect. Instead, they bore only the notation “Drawn by Glenn Glommen.” The drawings depicted a three-story clinic with the various rooms and areas listed in SCHEDULES B and C arranged on the three floors. There were no stated space representations on the drawings as to gross, program net or net usable square feet. (R4, tab 10) On January 12th, by overnight delivery, VA issued Amendment #1 to the SFO that included a revision to Section 3.23, the VA DESIGN OF INTERIOR SPACE AND REVIEW OF DRAWINGS, which, as amended, now read:

Schedule C of this Solicitation provides information on room sizes and finishes *which may or may not reflect final room sizes or arrangement of space as identified in Schedule D of this Solicitation, Architectural Layout Drawings.* Within 45 days of award, the lessor shall submit to the Contracting Officer working drawings at the 35% completion stage. Within 45 calendar days of written approval . . . drawings at the 75% stage. Within 45 days of written approval . . . working drawings at the 100%

completion stage. The lessor shall reflect compliance with all codes/ordinances . . .

(R4, tab 37 at 131) (Emphasis added)

Accompanying Amendment #1 was a copy of the SCHEDULE D architectural drawings on three Computer Aided Design (CAD) disks prepared by utilizing MicroStation™ software. After initiation of these appeals, the CAD electronic file disks were examined by Garrett Galbreath, who holds a degree in Architectural Drafting Technologies and who is a regional director of technical services for the company which developed MicroStation™ CAD software. In his Declaration, Mr. Galbreath states that the inside Gross Square Footage of the floors depicted in SCHEDULE D total 185,478 gsf (1st fl. 86,575; 2nd fl. 54,579; 3rd fl. 44,325). Applying the formula to determine net usable square feet as set forth in SFO section 3.12, he further states that the CAD drawings depict a total of 158,037 net usable square feet (1st fl. 74,778; 2nd fl. 46,260; 3rd fl. 36,998), (Galbreath Dec.)

In his Deposition, Contracting Officer Hill said that SCHEDULE D was intended to be a “conceptual drawing that showed the relative positions of various functions within the Building.” (Hill Dep. 85) Its use in the Las Vegas project was a departure from earlier projects and it originated from contractor “feedback on projects.” Contractors told CO Hill that better estimates could be obtained and money saved on leasing projects if bidders “knew what the functional adjacencies were” prior to contract award. (Hill Dep. 90-91)

Glenn Glommen, a computer specialist for the Las Vegas clinic whose principal job is to “troubleshoot PCs and work on hardware a little bit”, prepared the SCHEDULE D drawings. Glommen, who was hired by the VA in November 1993, has an AA degree in business and took some classes in blueprint reading while in the military. (Glommen Dep. 8-9) When hired, Glommen was informed

that his duties would include working on conceptual drawings for the new Las Vegas clinic. (Glommen Dep. 16) He was given a “footprint” of a proposed facility to work with that had been prepared by Zoran Jovanovic, a VA architect in Washington. His assignment was to work with various medical service chiefs to come up with the “best possible solution for our doctors . . . in adjacencies and workflow.” (Glommen Dep. 21)

The rather crude sketch of a three-story facility prepared by Jovanovic on February 8, 1994 depicted interior gross space which is stated to be 186,000 gsf. However, the gross space listed by individual floor total only 181,150 gsf (1st fl. 79,000; 2nd fl. 51,075; 3rd fl. 51,075). Jovanovic derived the interior gross space figure by increasing the 119,623 nsf program net requirement by a factor of 1.55. Jovanovic had also estimated the net usable square feet in the sketch to be 164,255 by following a formula similar, but not identical, to that set forth in SFO section 3.12. He first arbitrarily assigned space totaling 13,100 gross square feet for such lessor controlled areas as Mechanical (9,000 gsf), Elevators (1,000 gsf), Elevator Lobbies (500 gsf), Stairs (1,800 gsf) and Electrical and Telephone Closets (800 gsf). He then subtracted this lessor space from the estimated 186,000 gsf of the building to produce a subtotal of 172,900 gsf. This figure was further reduced by 5% for “corridors” to arrive at the estimate of 164,255. (R4 Supp., tab 529)

In consulting with various service chiefs to prepare the drawings, Glommen said that he had to work within the gross (186,000) and net square feet (119,623) limitations provided in Jovanovic’s sketch. (Glommen Dep. 35-36) Glommen would send various drawings either to Washington headquarters or to VA’s Western Region for comments and revisions. (R4 Supp., tabs 534-35). Mr. Jovanovic retired from the VA prior to Glommen completing SCHEDULE D. (Glommen Dep. 43)

Osman Burleigh an architect who had been temporarily hired in September 1994 by Las Vegas VA officials for “architectural feedback,” also briefly reviewed a draft SFO including Glommen’s drawings. (Tyler Dep. 93) In a memorandum to Alan Tyler, Administrative Assistant to the Director of the Las Vegas VA Medical Center, Burleigh said that a “ cursory review” indicated, among other things, that the interior gross space depicted was 191,615 gsf and the areas to be deducted pursuant to SFO section 3.12 amounted to only 24,200 gsf. This resulted in 167,415 net usable square feet, or some “12,500 SF greater than the maximum of 155,000 [sic] allowed in the basic solicitation document.” He said it would be necessary to determine where the “plan [drawings] exceeds the programmed area within Schedule C.” (R4 Supp. tab 537) As an example, he pointed out that Radiology was listed at 4,415 nsf in SCHEDULE C, but totaled approximately 8,700 net square feet on the drawings. A handwritten notation on this page made by Alan Tyler states “[t]hese areas were reviewed by the VA Architect and he did not indicate problems with these.” In his Deposition, Tyler recalled that there was “a lot of discussion between architects on how to calculate net usable [space].” (Tyler Dep. 96,98-99, 109; R4 Supp., tab 541)

Pre-Submission Briefing

Contracting Officer Lawrence Hill conducted the pre-submission briefing in Las Vegas on January 19, 1995. He was assisted by Tangela Cooper who was designated as the Contracting Officer’s Technical Representative (COTR) and Project Manager. (R4, tabs 12-13) Terry Moreland and representatives of 50 other firms attended the briefing. (Hill Aff.; R4, tab 34) The Contracting Officer initially noted, that as a result of negotiations with OMB, the VA had “lost some square footage primarily in our auditorium and our canteen service “ and that “[y]ou won’t see that reflected in your drawings.” (R4, tab 12 at 3)

In addressing the “salient features” of the Solicitation, Hill said:

First off, I think the most important thing is the amount of space this [solicitation] requires. I think we all know now that the VA is seeking to lease up to 148,000 square feet. Now let me tell you a little bit about that number. That number represents a maximum. We are not going to exceed that amount.

(R4, tab12 at 3)

The Contracting Officer noted that SCHEDULE D was a departure from the normal VA procurement and that the layout depicted there was “the preferred functional alignment for the clinic activities” and if followed would result in a “100%” score for that portion of the evaluation process. He added that forthcoming amendments to the Solicitation would eliminate single story proposals but would allow a contractor to offer alternative proposals of two or more stories. Should alternative proposals be submitted, Hill said the VA would “expect to see the functional adjacencies of all the rooms that are outlined in SCHEDULE C on your layout.” (R4, tab 12 at 5)

Noting that there were a “number of players in this procurement” including the facility Director Mr. Reevey and his Executive Assistant, Alan Tyler who was to act as Reevey’s “field liaison,” Contracting Officer Hill said:

I am going to take this opportunity to make sure that everyone understands who you can rely on and who can bind the government in the case of this procurement. There is only one person that is me. Anything that’s said here is well intended and it may be accurate, but you cannot rely on any representation made by anyone other than myself [and Tangela Cooper, the COTR and Project Manager].

* * * * *

We alert you to the fact that oral representations are non-binding. Our statements must be confirmed in

writing. If we make oral representations we will follow up with written confirmation.

(R4, tab 13 at 10; Hill Dep. 118-19) Section 10.1, NOTICE TO OFFERORS, further instructs offerors to read all parts of the solicitation and cautions that “[o]ral instructions are not binding.” (R4, tab 37 at 161)

After clarifying that the 148,000 figure related to net usable square feet, Hill was asked:

ED KITRELL, KITRELL, GARLICK & ASSOCIATES: Can we assume that that 148 was made up of many different functions, knowing and going through the plan we know that some of the layouts don’t comply with code as interpreted here locally and will require wider corridors or other exits to constitute a larger area to that space. Since we can’t exceed the total, then if one space has to get bigger to meet the codes, can another space go down so we can get that same net [usable square feet] or do you see the question? Because we’re putting so many pieces of pie in the code if one piece of the pie has to get bigger, where do we pick up the space to accommodate that code interpretation?

LAWRENCE HILL: Okay. Your SCHEDULE C indicates that the room requirements, the space requirements of each of the specialized areas here. Those are absolutely requirements. They have to be met. When you calculate your net usable square footage we apply a factor 5.5% to the gross square footage to allow for corridors and circulation space. In my view there is not means for making that adjustment here. You’re just going to have to get larger. Your gross is going to have to grow to accommodate all the functional areas outlined plus the necessary circulation requirements that are imposed by this locality.

MILTON SCHWARTZ, SAMSON ENTERPRISES: So if I understand what you said it can go over 148,000 [nusef]

feet, you're just are not going to pay for it if it has to be more than 148,000 feet. That's your answer.

LAWRENCE HILL: That's my answer.

(R4, tab 12 at 29-30)

Shortly thereafter, he was asked:

ERIC CARLSON, HAMSTRA GROUP: Taking the plan as is and the instructions that way, will that then give you 148,000 net?

LAWRENCE HILL: It will give us 148,000. [Turning to Tangela Cooper] What was the number you came up with?

TANGELA COOPER: I came up with 148,09[0].

LAWRENCE HILL: *148,090 [pause] is what that yields, real close.*

(R4, tab 12 at 31; tab 13) (Emphasis added)

In his deposition, the Contracting Officer said that he believed the 148,000 figure was derived by increasing the 115,565 nsf of SCHEDULE C program requirements by a factor of 1.28. His understanding was that the 148,260 nsf solicited would "provide sufficient space to include the requirements as set forth in Schedule C." (Hill Dep. 127)

Responding to concerns that there was little time prior to the offer date to "analyze the plan . . . and anticipate what the size of the building may grow to," CO Hill stated that the VA was not going to award the contract based upon initial offers, and that there would be an "opportunity for negotiations and refinement." (R4, tab 12 at 30) He added:

As I understand it we've got some conflicting information in this solicitation. We've failed to change or modify the initial submission requirements to tailor them to the particular situation in Las Vegas where we have detailed layout prepared; therefore you may make an initial submission predicated on the block plan set forth in the SFO, however we will require a detailed submission prior to award of this lease. I'll give you a date for that as we go along . . . from the short list. I'll want to have that to evaluate that at the time of best and final offer.

(R4, tab 12 at 32)

Solicitation Amendment # 2

Twelve days after the pre-submission briefing the VA issued Amendment #2 to the Solicitation. Although no transcript or minutes of the briefing was provided, included in the Amendment were 23 written "Answers in Response to Questions Submitted During the Pre-Bid Conference." (R4, tab 14) In response to Question #1 concerning whether building designs of two floors would be considered, VA stated:

Designs with their configurations may be considered, but three floors are desirable. Of primary interest to the facility are adjacencies. The current drawings of footage and design of each floor accurately reflects these requirements. For example, the following areas must be adjacent:

Prosthetics, Eye Clinic, Dental, Rehabilitation
Medicine, Audiology/Speech Pathology
Rehabilitation Medicine and Environmental
Care Services
Chaplain and Voluntary Service
Ambulatory Surgery to SPD to Warehouse to
Service Elevators
Auditorium and Canteen
Nuclear Medicine, Radiology, and CAT pad

It is also important to maintain some distances. For example, Neurology should be as far away from elevators as possible.

(R4, tab 11)

In response to Question #16 asking if there were a “contract person for each specialty area,” the VA answered that “[a]ll communication should go through Tangela Cooper [the COTR].” And, in the only response concerning the amount of space to be leased, the VA stated that the 148,000 square foot figure was net usable square feet and not gross square feet.

Solicitation Section 1.1 AMOUNT AND TYPE OF SPACE, which originally stated in the first sentence that the VA was interested in leasing “148,260 net usable square feet” was now amended to provide some “flexibility” given the “difficulty in hitting an exact number.” (Hill Dep. 258) This section now read:

The Department of Veterans Affairs (VA) is interested in leasing *a minimum of 148,000 to a maximum of 148,260* net usable square feet (nusf),, [sic] hereinafter referred to as “space or basic space.” *VA will not pay for more space in excess of the maximum amount solicited.*

The second paragraph was revised to read:

The space must be adjoining and should be on three contiguous floors. Space may be provided by new construction or modification of existing space. Building designs *consisting of two or more floors* will be considered by the Contracting Officer *as long as adjacencies identified in Schedule D, Architectural Layout Drawings, are met.*

(R4, tab 11) (Additions indicated in bold italic)

An amendment was also made to Section 1.9, UNIQUE FACTORS. As stated in the second paragraph of the initial Solicitation, the layout drawings in SCHEDULE D were to have “precedence and control” in the event of any “conflict between Schedule B and Schedule D.” As revised by Amendment # 2, the paragraph now provided that “[t]he Solicitation for Offers *and Schedule B shall have precedence* and control over any conflict in Schedule D.” (Emphasis added) In his deposition, Glenn Glommen, who had prepared the drawings, said that he had asked VA officials to provide that SCHEDULE D *not* take precedence because he was neither an architect nor an engineer and he was sure he had missed some items. (Glommen Dep. 41-43) Finally, Amendment #2 also made a number of other changes including increasing the required number of elevators from three to five. (R4, tab 37 at 150)

The Initial Offer

On February 8, 1995, Moreland submitted an initial offer that included a three-story design as well as an alternate two-story design. (R4, tabs 15-16) It argued that the two-story design would result in a “more functional and efficient plan” as well as allow a “more economical construction” due to different code requirements for buildings not exceeding two floors. Presenting its two-story plan in block form, Moreland said that the “summary of relationships” organized into this plan resulted from a combination of:

- Designated relationship contained within the SFO Documents
- Adjacencies reflected in the 3 story design issued and
- Previous design experience in the field of outpatient medical facilities

(R4 Supp., tab 500)

The VA wrote to Moreland on March 17, 1995 asking for “more comprehensive information” to facilitate evaluation. With respect to the two-

story alternate, the VA said it needed floor plans with sufficient information to judge the appropriateness of the [functional] adjacencies.” (R4, tab 19)

Thereafter, the VA and Moreland conducted negotiations on April 19, 1995. (R4 tab 20) Included in the VA team were CO Hill, COTR Cooper and Executive Assistant Tyler. Moreland’s representatives included Terry Moreland, President, and Marc Schiff an architect who was a principal in the firm of Design Collaborative Southwest, Inc. (DCSW), of Albuquerque, New Mexico. The Contracting Officer began the meeting by going over the material elements of the Solicitation, as amended, and asking that the parties bring to his attention “any ambiguity in the SFO.” Following a detailed review of the material elements of the SFO by Hill, Terry Moreland said he had no questions. (R4, tab 20 at 5)

Mr. Schiff made the presentation of the layout and design concept. He noted that Moreland had yet to present a rendering on its two-story proposal, but indicated that it would “probably follow [the] scheme for [the] three-story building.” The VA memorandum summarizing this negotiation session further notes:

The 2-story design will require additional work to assure appropriate layout and adjacencies. Moreland thinks it would be in VA’s best interest to consider the 2-story building, and could make his architect available to work with Service Chiefs to assure appropriate adjacencies. Pharmacy and prosthetics will not work as shown on plans. Same comments on 3-story design applies. If Moreland received an award on the 2-story design, VA could factor in time to work out details of interior layout. It would not be beneficial at this time.

* ~* * * *

Moreland indicated that a 2-story building would cut construction costs dramatically.

* * * * *

Moreland indicated it would be more efficient to design a 2-story building. *There would be more usable square footage.* VA will need to see net/gross ratios [sic, ratios?] for both [2 and 3-story] schemes.

(R4, tab 20 at 5-6) (Emphasis added)

In his declaration, Terry Moreland says that at this April 19, 1995 meeting, he informed VA officials that the nusef for the two-story building “would be comparable to the nusef of the 3-story plan and explained the process Moreland had gone through to develop the 2-story design.” He added that he “made it clear to VA participants that the nusef would be determined in part by the collaboration between Moreland and the VA in completing the design.” He made “substantially the same comments” in his video presentation discussed *infra*. (Moreland Dec. at 3)

Amendment #3 to the Solicitation was issued on June 5th and included a new drawing for SCHEDULE D reflecting a modification of the Pharmacy equipment drawing. The first paragraph of Section 3.7, PLANS: SUBMISSION WITH OFFER, was revised to read as follows:

- a. One-eight[h] inch scale full floor plans of the space offered. These floor plans and the building sections shall clearly and accurately convey the floor layout with room adjacencies as identified in Schedule D, Architectural Layout Drawings. Show net usable (refer to paragraph 3.12 for definition) and gross areas calculations on the plans. *If the preferred layout as indicated in Schedule D is not offered, a floor layout showing room adjacencies, departments, sizes, and their adjacencies shall be provided.* Upon award detailed space planning will be provided by the successful offeror, at no additional cost to the Government.

(R4, tab 22) (Emphasis added) The amendment further clarified SCHEDULE B to provide that the “Typical Housekeeping Aid Closets (HAC) are to be provided

by the lessor and not included in the net usable square footage calculations. Do not provide a price for these rooms.”

On June 20th, Moreland submitted one-eighth scale plans for both a three-story and two-story building together with a 27-minute videotape presentation concerning the two options. (R4, tabs 23-25) Moreland opened its presentation by noting that it was an “experienced developer of VA facilities.” (R4, tab 25) It said that Option I, a three-story facility, “accurately and precisely follows the drawings provided by the VA.” The drawings submitted by Moreland state that the three-story building contains 186,000 gross square feet. Neither the gross or net usable square feet totals are represented for the first floor. Drawings for the second floor show 55,000 gsf and 43,075 nusef while the third floor indicates 45,000 gsf/35,567 nusef. (R4, tab 23)

Option II, the alternative two-story proposal, was represented as a “slightly more contemporary approach . . . a more horizontal work plan with more windows and less institutional feel.” Moreland said it had developed a “new floor plan,” but noted that “all of the Department’s spaces, features, equipment and materials which are specified in the SFO for Option I will be included in the Option II building.” The proposed structure was a “combination of two large rectangles offset in the center to form a discrete and compact entry and security zone in the middle of the building.” A different and distinctive feature of the proposed two-story building was an interior atrium with skylights above it. The videotape added that the accompanying drawings submitted:

are suggested primarily as scaling elements and suggestions for the ways space could be organized. Moreland Corporation and DCSW Architects will commit to working with the [VA], user groups and administrative staff to custom design and finalize interior floor layouts for the building. Moreland Corporation is confident that in working with local VA

staff their architects can quickly and efficiently arrive at a design which satisfies the needs of function and service without any need for extending the deadline for completion.

* * * * *

There have been indications that certain departments need to be re-arranged in order for more efficient workflow. Moreland Corporation is committed to making the adjustments on the interior of the plan to maximize the user satisfaction with this concept.

The drawings for the two-story facility indicate that it totals 198,000 gross square feet but no figures for net usable square feet are represented. The drawings also contain the note: "Prosthetics and Dental areas on the second floor may be revised to accommodate the proper adjacencies to the Pharmacy." (R4 tab 24) In concluding its video presentation, Moreland said that, in addition to being more "contemporary and appealing," a two-story building would be "less expensive to construct" and consequently might present the lessor with the "opportunity to offer the [VA] a lower lease rate."

An internal VA review of the two options presented concluded that the three-story submittal was "186,000 gross square feet as compared to 198,000 for this [two-story] submittal to obtain the same net usable square footage. This additional 12,000 square feet will be a cost impact in operating the building." (R4, tab 26 at K-1)

Best and Final Offer

On August 8, 1995, Moreland, as part of its best and final offer (BAFO), presented an extended and revised 36 minute videotape together with revised drawings. (R4, tabs 29-30) Again it presented two options. Option I was the "three-story concept based on the design provided by the VA," while Option II was an "alternate two-story building concept that incorporates the plan

elements, equipment and requirements of the three-story building in a two-floor scheme.” (R4, tab 30) Moreland said its preliminary plan revisions were based on July 14th comments by the VA. Moreland again reaffirmed that all of the SCHEDULE B elements in Option I would be included in the Option II. Moreland’s revised drawings indicated that the interior space of the proposed two-story building was 198,000 gsf (1st fl. 110,000; 2nd fl. 88,000) and that the usable space being offered was **149,643** nusef which was listed as **80,763** nusef for the first floor and **68,880** nusef for the second floor. (R4, tab 29)

Architect Marc Schiff of DCSW, whose role in assisting Moreland bid on the VA project was to “develop conceptual drawings for an alternate [two-story] building plan” obtained the SCHEDULE D three-story drawings in electronic file format. He states:

In developing designs for the alternate two-story facility, and to assure compliance with the area and room adjacencies required by the Solicitation, the information on the three-story drawings was transferred electronically to the template created for the two-story alternate. In my opinion, drawings for the resultant two-story design designated effectively the same room square footage *and net useable square footage* as the Department’s three-story structure. (Emphasis added)

Since the Schedule D drawings prepared by the Department were detailed in many respects, including placement of fixtures, number and placement of electrical outlets, number and location of nurse call stations, swing of doors, etc., the Department’s drawings were more than “conceptual”. Consequently, when the Department of Veterans Affairs indicated in their Solicitation that they were seeking 148,260 net usable square feet for the Clinic, I *assumed* that the Department’s Architect or representatives had accurately measured the net usable square footage of

the facility represented in the Schedule D drawings to arrive at the value published. I saw no need to verify the net usable square footage value represented by the Department.

(Schiff Dec.) (Emphasis added)

Schiff added that because the “drawings for the two-story alternate were developed from the same electronic data as the plans for the three-story design, I *presumed* the net usable square footage for the two-story design to be nearly identical as for the three-story facility, approximately 148,260.” (Emphasis added) Schiff also states that his “assumptions . . . were confirmed” when he was:

provided with the Department of Veterans Affairs Addendum [sic, Amendment] # 2 containing the *minutes* of the January 19, 1995 presubmission briefing. Within the minutes, the Department offered *comments* that led me to understand that the requirements listed within the Solicitation could be achieved by constructing the facility described on the drawings of Schedule D. In other words, I understood that the structure shown on the drawings of Schedule D represented a building with approximately 148,260 net usable square feet of space.

(Schiff Dec.) (Emphasis added)

On August 31, 1995 Moreland submitted its BAFO for a three-story and a two-story new construction building on GSA Form 1364. In Box 6A asking for the “Net Usable Square Feet in Entire Building” against which the per square foot bid would be multiplied, Moreland listed 148,260 for both the two-story and the three-story building. (R4, tabs 32-33) The Price Negotiation Memorandum prepared by VA noted that of the 7 offers containing 13 building designs, Moreland’s two-story proposal received the “highest overall rating and is the lowest overall price.” (R4, tab 34) VA’s price “objective” had been to receive a

rental rate in the range of \$16 to \$17 per square foot *including* SCHEDULE B and \$14 to \$15.50 per square foot *excluding* SCHEDULE B costs. Moreland had bid \$15.96 (excluding SCHEDULE B) for a 3-story proposal and \$14.43 (again excluding SCHEDULE B) for its two-story proposal. The next lowest bid for a three-story proposal was \$17.30 while the next lowest two-story proposal was \$20.82. (R4 Supp., tab 550) The Price Negotiation Memorandum concluded:

Moreland Corporation's proposal for a two-story building consisting of 148,260 net usable square feet of space at an annual rental of \$2,139,392 (\$14.43 per s.f.) is considered fair and reasonable based on the appraised fair annual rental rate of \$2.10 per month or \$25.20 per year. The annual rent for the renewal option would be \$498,154. It is recommended that a fifteen-year lease, with one five-year renewal option be awarded to the Moreland Corporation. The commencement date for the lease would be March 1, 1997.

(R4, tab 34 at 21)

Lease Award

On September 19, 1995 the VA entered into a Lease No. 084B-001-94 by executing GSA STANDARD FORM 2 with Moreland Corporation in which it leased to the Government:

A two-story building containing approximately 148,260 net usable square feet of space plus 801 parking spaces to be constructed in accordance with specifications set forth in Solicitation for Offers No. 084B-001-94 and addenda thereto, on approximately 14.9 acres of land at the corner of Martin Luther King Boulevard and Las Vegas Drive, Las Vegas, NV to be used for VA Ambulatory Care Center.

(R4, tab 37 at ¶1)

The term of the Lease was for fifteen years with a five-year renewal option obligating the Government to pay Moreland “annual rent of \$2,139,391.80 (\$14.43 s.f.).” (R4, tab 37 at ¶¶2-3) In “Additional Provisions” attached to Standard Form 2, Moreland agreed to “promptly commence construction of the offered space in accordance with the contract “established by Lessor’s offer and the acceptance thereof by the Government . . . to ensure completion of the premises five hundred eighty (580) days after lease award or March 1, 1997, whichever is later.” (R4, tab 37)

Other additional provisions of the Lease provided:

12. Annual rental payments under this lease shall be computed by multiplying the net usable square feet (nurf) contained in the leased premises, as mutually measured by the Government and the Lessor by \$14.43, the per nurf cost contained in the Lessor’s offer. In the event that the nurf provided by the Lessor and accepted by the Government is other than 148,260 nurf, such nurf figure shall be multiplied by \$14.43 to arrive as the annual rental rate; *however, payment will not be made for delivered space which is in excess of 148,260 nurf.* Should the rental then vary from that stated in Article 3 of the lease, the revised rental rate will be established by amendment to the lease. (Emphasis in original)

13. The Contracting Officer or his designee, on behalf of the Government, shall have the right during the existence of this lease, or any extensions thereof, to request in writing the lessor to make alterations, attach fixtures . . . The Government shall reimburse the Lessor for the cost of these alterations, attached fixtures . . . at a price negotiated in advance of any work performed and agreed upon and accepted by the Government. Payment will be due within 30 calendar days after date of acceptance of its work.

14. The Government shall reimburse the Lessor the amount of \$6,956,000 for those items specified in Schedule B, Special Requirements, and Schedule F, Telecommunication Specifications . . .

(R4, tab 37 at 3-4) (Emphasis in original)

Paragraph 15 stated that Moreland would “provide detailed space planning to incorporate Schedule D, Architectural Layout drawings at no additional cost to the Government.” Section 3.10, DESIGN DEVELOPMENT AFTER AWARD, provides in pertinent part that:

Design development after award will not only be in accordance with the specific Solicitation requirements, *but will also be a direct extension of the submitted design concept.* The design development shall retain all the functional and basic physical characteristics of that concept.

* * * * *

Nonetheless, the offeror may propose for the Contracting Officer’s acceptance, or the Contracting Officer may propose for the offeror’s acceptance, evolutionary adaptations or changes to the concept which improve the design. Neither party will unreasonably withhold such acceptance of demonstrated beneficial adaptations of the concept which would not measurably increase the costs of construction, operation or occupancy of the space or building and which would not decrease the utility of the space or building to either party . . .

(R4, tab 37 at 126) (Emphasis added)

Thirty-five percent working drawings were required under Paragraph 16 within 45 days with 75% and 100% drawings each due 45 days following VA approval of a previous submittal. The Lessor was to “reflect compliance with all

codes/ordinances” and “[s]hould the final working drawing approved by the VA conflict with other provisions of the lease, the final working drawings approved by the VA shall have precedence and control.”

Post Award Design Process

Richard Braun, an architect who became a principal in DCSW in September 1995, began collaborating with Las Vegas VA representatives that month, particularly Executive Assistant Tyler and draftsman Glenn Glommen to develop a floor plan that met “their specific desires, and to comply with the provisions of the VA’s Solicitation for Offers.” (Braun Dec.) Design information was sent to and received from Glommen in electronic drawing format on September 18th and 20th. Braun said he received “direction from the Las Vegas VA to change certain room sizes.” In his declaration, Terry Moreland states that on October 17th “for the first time . . . I became aware . . . that the nusef of Moreland’s exceeded the 148,260 nusef set out in the SFO.” This information, he said, was based on a conversation between Alan Tyler and Richard Braun that Braun subsequently relayed to Moreland. (Moreland Dec. at 4) In an October 17th Electronic Mail (E-mail) message, Tyler notified Glenn Glommen that he had just spoken with Richard Braun who informed him that he, Terry Moreland and Marc Schiff would be in Las Vegas on October 25th to “discuss the current status of space/room layout.” Tyler continued:

Richard has noticed that we have a couple of extra rooms in the plan and that a number of our rooms are over the net square footage. I told him that the nusef that Moreland gave us was in excess of what was called for so we were working out rooms into the footprint of the building. This increased some of the rooms . . . He seemed okay with our adjustments to the nusef of the rooms, but felt we would need to talk about the additional rooms. We’ll probably end up cutting a deal on these, I hope.

(R4 Supp., tab 552) Ultimately no “deal” was ever made, Tyler said, due to Moreland’s subsequent design changes reducing the building size. (Tyler 180-81)

In looking at Moreland’s drawing submitted as part of its BAFO, Tyler recalled he “thought it was a big building. It looked huge.” (Tyler Dep. 159) His view was that the 198,000 gsf of space was available for VA’s use. The VA had been “given this footprint by DCSW to put the rooms that we needed in that space.” (Tyler Dep. 174) Following Lease award, Glommen had sent Braun “some sketches” for additional rooms. However, at the October 25th meeting Moreland also indicated it’s intention to eliminate approximately 9,000 net square feet of space. (Tyler Dep. 134) About 5,600 square feet was attributable to mechanical rooms, the reduction of which would be accomplished by going from a central plant concept to roof units. The remaining space reductions would be in lobby, hallway and room space. Moreland officials also “discussed ‘testing’ the ‘feel of the space’ by shrinking the footprint by 2% to 4% by reducing the column grid [from 28 feet] to 27.5 or 27 feet.” (R4, tab 41) Both Tyler and Glommen were unhappy with proposals to reduce the building size. Tyler called Lawrence Hill the Contracting Officer complaining:

“Look, they’re shrinking the building that they gave us.” And [Hill] said “That’s their right to do that.” And so at the end count, I understood from Glenn [Glommen] they had gotten it down to 148,260. And so we worked from that footprint that they gave us.

(Tyler Dep. 158)

CO Hill recalled discussions about the gross square footage” of the building during the design process and that he had informed Moreland that “the only obligation on the part of the lessor was to provide 148,260 [nusr] and that the lessor had the right to shrink the building if he so desired.” (Tr. 194)

DCSW proceeded to reduce the column line spacing from 28 feet to 27 feet, 2 inches. Prior to submitting the 35% drawings there were six additional exchanges of information with VA in electronic drawing format. (Braun Dec.) During this period Braun said he received “direction from the Las Vegas VA to change certain room sizes” which added at least 2,005 nsf to the plans. Braun had “several telephonic conversations” with Tyler and Glommen during this period in which “the size of the building was discussed, particularly that the facility contained more net square feet of space than called out [for] in the VA’s Solicitation.”

Braun “requested permission of the VA to reduce the size of the facility further” prior to the 35% submittals. But, he said, “[n]either of the VA’s representatives, Mr. Tyler nor Mr. Glommen, would allow any further reductions in the size of the facility or in room sizes.” (Braun Dec. at 2) Tyler was not asked in his deposition if he had refused any request for further reductions in the building size. However, he did say in another context that Moreland was an experienced federal contractor and that Moreland understood that CO Hill was “the authority to make decisions.” (Tyler Dep. 40) For his part, Hill said that he also met with Moreland sometime in December 1995. Acknowledging that Moreland may have told him that Las Vegas design team people were “resisting” efforts to change the size of the building, the Contracting Officer said he “affirmed” Moreland’s “right to reduce the size of the building so long as he provided the amount which was shown on this offer,” i.e., 148,260 nusf. (Hill Dep. 350)

On December 5, 1995 Moreland presented partial 35% submittal drawings to VA prepared by DCSW. (R4, tab 43). The size of the facility had been reduced by 11,033 gsf (5.6%) from the 198,000 gsf contained in Moreland’s BAFO drawings to 186,967 gsf. (R4, tabs 43, 48) On December 15, 1995, American

National Insurance Company issued loan commitment papers to Moreland reflecting that Terry Moreland had manually amended the gross square footage of the building from 198,000 to 186,967. The commitment papers also reflected that the Government would be the sole tenant occupying "Net Square Footage" of 148,260 for 15 years at an annual rental of \$2,139,391. Moreland forwarded evidence of this loan commitment to VA on January 18, 1996. (R4, tab 48)

During this period, architect Braun of DCSW also submitted to COTR Tangela Cooper, a copy of "SCHEDULE C WITH SQ. FT COMPARISONS" which was apparently provided to demonstrate that the proposed building would meet SCHEDULE C values. (Hill Dep. 251) (R4 Supp., tab 501) Braun's SCHEDULE C showed a revised total of 124,364 nsf compared to the 115,565 nsf shown in SFO SCHEDULE C (and the 121,828 nsf contained in SFO SCHEDULE B). It did not, however, show net usable square feet.

During the fall of 1995, Terry Moreland said he had "numerous conversations" with VA:

concerning the nuf of the building. The VA unilaterally made some changes to the SFO that increased the nuf. Through its architects, Moreland tried to limit the nuf of the building to 148,260 but the VA insisted upon a design that exceeded the nuf of 148,260 . . . During at least one conversation I had with Alan Tyler during this period of time, *Mr. Tyler told me that any increase in the nuf would be dealt with at the project completion in an audit.* This was the normal procedure followed on the two prior facilities that Moreland built and leased to the VA. Alan Tyler and Glen Glommen handled most of the negotiations regarding the drawings prior to actual construction commencement. It was always my understanding that an audit would be done at the end of the project to take in account all of the additional nuf, as allowed by the SFO.

(Moreland Dec. at 5) (Emphasis added)

According to CO Hill, Terry Moreland never informed him of any such “understanding” about an “audit.” And, “[a]t no time during the design phase of the subject space did The Moreland Corporation request additional compensation due to an increase in the net usable square feet of the building.” (Hill Aff.) Of course, the Lease contained the standard provisions concerning actual measurement of space occupied by the Government as part of the “final inspection” process. But in light of Lease provisions stating that VA would not pay for more than 148,260 nuf, the purpose of the final inspection, according to the Contracting Officer, was to determine if the Contractor had met its minimum contractual obligations. (Hill Dep. 340-41)

On December 15, 1995 CO Hill wrote to Terry Moreland noting that the 35% submission was incomplete and consequently VA was “only providing comments on the partial submission.” (R4, tab 46) Hill wrote that he understood Moreland was developing changes based on conversations with the Las Vegas VAMC staff which were noted on CAD disks they had sent to the Contractor. Those changes were “considered approved.” Additional VA comments would be forthcoming, but Hill reminded Moreland that it was “still responsible for all errors and omissions.” The Contracting Officer concluded, “[n]one of these review comments should affect either price or delivery schedule as originally established by the lease.” Extensions were later granted for completion of the 35% submittals as well as the date for 75% submittal. (R4, tab 50)

On March 4, 1996, Moreland submitted its 75% submittal drawings again showing 186,967 gsf (1st fl. 98,016; 2nd fl. 88,951). (R4, tab 51) The Contracting Officer responded to the submission on April 2nd by noting that the 75% working drawings were a “partial and not a complete submission” and thus the

submission was not approved. After listing various deficiencies Hill again cautioned that:

cursory review does not relieve you of your professional responsibility to produce a complete, correct and fully coordinated set of contract documents. None of these review comments should affect either price or delivery schedule as originally established by the lease.

(R4, tab 53)

Clinic Construction/Moreland Claim

The 75% drawings were re-submitted on May 14, 1996. VA noted that Moreland had commenced construction of the facility absent approval of 100% working drawings and as such was “proceeding . . . at your own risk.” (R4, tab 54) After listing several pages of comments, CO Hill added that if “any of these comments affect price or delivery, you must so advise and provide a proposal for adjustment.” Moreland submitted 100% working drawings in stages on June 7th, 18th and 19th. Ambulatory Care Center space was again shown to be 186,744 gsf, although net usable square feet was not represented here as it had not been in the 35% submittals. (R4, tab 55) Terry Moreland states that “[p]rior to completing the final design of the building, incorporating all changes, it was impossible to determine the added amount of nusef over and above 148,260.” (Moreland Dec. at 5)

The 100% submittals were approved on September 9, 1996, subject to extensive comments and subject further to the familiar caution that Moreland was “still responsible for all errors and omissions.” (R4, tab 57) CO Hill further noted his authority pursuant to section 3.14, CHANGES, which provides, in pertinent part:

At any time the Contracting Officer may make changes within the scope of the lease, by a written order pursuant to the Changes clause set forth in paragraph 17 of GSA Form 3517, attached hereto and made a part hereof. Such changes include correcting problems arising from on site conditions, and/or better definition of requirements. If a change causes an increase or decrease in the cost of or the time required for work performance, an equitable adjustment shall be made by lump sum payment, change in the rental rate, or revision of the delivery schedule.

(R4, tab 37 at 127)

The Contractor was directed to forward any completed cost proposals to Mr. Dee Heyborn, Resident Engineer, whom Hill had just delegated authority to approve individual changes up to \$100,000. (Hill Dep. 303) At about the same time, Dudley Schadeberg replaced COTR Cooper as Project Manager. (Schadeberg Dep. 59) For the remainder of 1996 and for the first six months of 1997, numerous Field Change Orders (FCOs) were issued by Heyborn which were later translated into 206 bilateral supplemental lease agreements in which VA paid Moreland an additional \$1.6 million for change orders and granted time extensions totaling 71 days. These agreements involved various architectural, electrical and material changes (fixtures and equipment). None of these change orders involved adding space to the building. (R4, tab 57; Gov't Ans. ¶ 13) Terry Moreland declares that it was his "understanding that Mr. Hill was authorizing the changes in nusef by signing the [100%] plans which depict a 165,110 nusef." (Moreland Dec. at 5) As previously noted, the amount of usable square feet were not explicitly stated on the submittal drawings.

On February 24, 1997, Moreland wrote to the Contracting Officer to inform him that the Ambulatory Care Center would be "acceptable for beneficial occupancy on March 14, 1997." (R4, tab 61) (A dispute about final acceptance is

the subject of another pending appeal.) Thereafter, on March 3rd, DCSW's Rich Braun wrote to Moreland setting forth a tabulation of net usable space in the ambulatory clinic. According to his calculations, the building contained some 184,580 gsf (1st fl. 96,782; 2nd fl. 87,798) as compared to the 186,967 shown on the 100% drawings. The net usable square feet was listed, for the first time, as 164,958. (1st fl 86,217; 2nd fl. 78,741) Moreland, in turn, forwarded the letter to Project Manager Schadeberg indicating that it would like to "begin discussions" concerning the 164,958 nuf furnished which "far exceeds the 148,260." (R4 Sup, tab 556) This came as a "shock" to Project Manager Schadeberg who said it "came out of the blue . . . there was no discussion that I was aware of, about anything to do with this." (Schadeberg Dep. 132-33; R4 Supp., tab 557) Contracting Officer Hill states that he did not learn until February 1997 that the "building was larger than the maximum of 148,260 net usable square feet solicited." (Hill Aff.)

Terry Moreland states that he "did not learn of VA's refusal to compensate Moreland for the extra nuf in the building until a meeting occurred in February, 1997." (Moreland Dec. at 5) Architect Marc Schiff of Moreland's A/E firm added it was not until *March 1997* that he learned that the three-story building represented in SCHEDULE D contained more than 162,000 nuf "when others with the DCSW firm calculated the net usable square feet." (Schiff Dec. at 2)

In an April 2nd letter to the Contracting Officer, Moreland requested that the Lease be "amended to include the additional 16,698 square feet." (R4 Supp., tab 561) Thereafter, the parties agreed to attempt to resolve this matter through alternate dispute resolution (ADR) proceedings conducted in August 1997. ADR proved to be unsuccessful, and on August 14, 1997, final decisions denying Moreland's claims on this and other matters were timely appealed to this Board.

The parties have stipulated that the Las Vegas Ambulatory Care facility contains 165,110 net usable square feet. (Vogt Dec., Attach.) In seeking to persuade VA officials that the Contractor should receive additional compensation for the space provided, Terry Moreland argued in a December 9, 1997 letter that the “VA had knowledge prior to the bid in August 1995 that it was bidding out more than 148,260 nuf.” That is, the Government knew, *inter alia*, that:

The average VA clinic has about 10% deducted from the gsf to arrive at nuf. This is the case for Bakersfield VA clinic, the Albuquerque VA, the Eugene VA (all built by Moreland) . . . The method to determine the deductions from gsf to arrive at the nuf has been consistent in previous projects by the VA. A simple calculation of the Las Vegas VA deducting 10% from 186,794 gsf would result in approximately 168,000 nuf. Moreland’s final nuf measured by the VA is 167,833 [sic] . . . In order to arrive at 148,260 nuf a deduction exceeding 20% of gsf is required. That alone would raise a red flag to the VA . . .

(R4 Supp., tab 523)

In Moreland’s Complaint seeking payment for the additional 16,698 net usable square feet it furnished to VA above the 148,260 maximum specified in the Lease, Moreland alleged that it had “anticipated and expected” to be paid for the additional footage pursuant to General Clause 552.270-31, MEASUREMENT FOR PAYMENT (AUG 1992) and pursuant to the CHANGES clause. Among the averments in its Complaint, Moreland said that the Contracting Officer has represented at the pre-bid meeting that SCHEDULE D “contained only 148,260 nuf” and that the Project requirements could be built within that space. In his declaration, Terry Moreland states that he does “not now believe it possible to

create a building incorporating the Schedule D requirements and the Schedule C requirements in a space containing 148,260 nuf or less.” (Moreland Dec. at 4)

The Complaint further alleged (which the Government denied) that:

During the course of construction, Moreland, through its architects, on numerous occasions attempted to reduce the nuf of the contract drawings but such requests were denied by the *Contracting Officer and the VA*.

(Complaint at 4) (Emphasis Added)

DISCUSSION

Our Board rules provide that we may “entertain and rule upon appropriate motions.” In so doing, we often look for guidance of the Federal Rules of Civil Procedure (FRCP). *Dawson Construction Company Inc.* VABCA No. 1867, 85-2 BCA ¶18,290. FRCP 56 (c) provides that summary judgment shall be granted if “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” Summary judgment is “properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” *Saturn Construction Company*, VABCA No. 3229, 91-3 BCA ¶ 24,151, (Citations omitted) *aff’d per curiam* 991 F.2d 810 (Fed. Cir. 1993). See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In addressing a motion for summary judgment, the Federal Circuit noted in *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987) that:

The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962); *SRI International v. Matsushita Electric Corp.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985). However, the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient. *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984).

Thus, in seeking summary judgment, the moving party has the burden to establish both that there is no genuine issue of material fact, and that it is entitled to

judgment as a matter of law. All inferences as to the existence of a genuine issue of material fact will be drawn in favor of the non-moving party, and any doubt as to the existence of genuine issues of material fact must be resolved in favor of the non-moving party. *United States v. Diebold*, 369 U.S. 654 (1962); *D.L. Auld Company v. Chroma Graphics Corp.*, 714 F.2d 1144 (Fed. Cir. 1983). As the party seeking summary judgment, the Government has the initial burden of demonstrating that “there is no genuine issue as to any material fact.” (FRCP 56(c))

In the fairly extensive record before us, there are certainly some disputed facts, but none of which we find to be material to disposition of the MOTION. For purposes of our decision we have incorporated the declarations provided by Appellant subject, however, to the criteria that to be material the “facts stated be set forth in detail . . . by a knowledgeable affiant” and that they be more than “mere denials or conclusory statements.” *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835-36 (Fed. Cir. 1984). Much of what Appellant characterizes as material facts in dispute are really disputes about the construction and interpretation of various Lease provisions, all of which are questions of law to be resolved by the Board. Other declarations relied upon by Appellant, as discussed hereafter, are either not material to our decision or the assertions therein are insufficiently detailed or qualified to rise to the level of a disputed material fact.

In its MOTION FOR SUMMARY JUDGMENT, the Government articulates what it regards as a simple and straightforward issue. That is, the Government sought to lease a building for an ambulatory care facility which the Lessor would design and build to incorporate the VA’s requirements for an amount based on the per square foot price multiplied by no more than the 148,260, the maximum space solicited. The Moreland Company offered to meet the solicitation requirements with a two-story building of its own design that Appellant represented would

contain 148,260 nuf. The Government asserts the agreement the parties entered into was “clear and unambiguous” and that VA would “not pay for space in excess of the maximum amount solicited.” Accordingly, Appellant’s claim for equitable adjustment of the Lease price due to the 16,698 additional nuf actually delivered should be summarily rejected under the terms of the Lease.

Appellant presents a variety of arguments against the MOTION, which can be reduced to contract interpretation and administration issues or to a claim for equitable reformation based on impossibility of performance. As to the Lease interpretation and administration claims, Appellant maintains that the Lease provisions are ambiguous, notwithstanding the explicit language relied upon by the Government. It asserts that the Lease provides that the Lessor will be paid for whatever amount of space it delivers. Appellant also argues that an adjustment under the Changes clause is warranted because the Government constructively changed the terms of the lease by requiring that additional space be provided. That is, the Lease payments should be adjusted because Las Vegas officials ordered additional space and refused proper requests by Moreland’s architects to reduce space during the design phase. It is further argued that the Government constructively modified the lease when it approved Moreland’s 100% submittals containing more usable space than required by the Lease.

The essence of Moreland’s claim for equitable reformation is that it “could not design the required structure for 148,260 nuf noted on the form lease.”

Appellant argues in its brief that:

To construct a facility with the 115,565 [net] square feet listed in Schedule C and meet the requirements of Schedule D, Moreland designed a [two-story] facility that exceeded the 148,260 [nuf] described in the SFO. *Moreland did not know this would occur because it relied upon the representations made by the Contracting Officer*

during the pre-bid conference stating that Schedule D represented a building of 148,090 nuf.

(App. Resp. at 2) (Emphasis added)

Moreland avers that, because of the “requirements that offerors maintain the layout and adjacencies of Schedule D, and the room sizes of Schedule C, a design that was within the contractual bounds for the nuf was *impossible*.” (App. Resp. at 38) (Emphasis added) According to the Appellant, the Government knew about this impossibility and either misrepresented facts or failed to disclose its superior knowledge. Alternatively, Moreland suggests that the parties were mutually “mistaken” about the amount of usable square feet needed to meet the Solicitation’s requirements. In any event, Moreland asserts it was entitled to rely, and did in fact rely to its detriment, on the Contracting Officer’s oral representations that the three-story building depicted in SCHEDULE D contained 148,090 nuf. Equitable relief is warranted because the “cost to build a 165,110 nuf building which VA received is much more than the cost to build a 148,260 nuf building.” (App. Resp. to Gov’t Reply Br. at 18)

Turning first to issues of contract interpretation, Appellant asserts that, notwithstanding the maximum space payment limitations, the Lease “also has provisions which override this provision . . . [a]t the very least, the contract is ambiguous over what amount Moreland should be paid for and how that amount is to be determined.” (App. Resp. at 35) Moreland first focuses attention on paragraph 12 of the Lease which, provides:

12. Annual rental payments under this lease shall be computed by multiplying the net usable square feet (nuf) contained in the leased premises, as mutually measured by the Government and the Lessor by \$14.43, the per nuf cost contained in the Lessor’s offer. In the event that the nuf provided by the Lessor and accepted by the Government is other than 148,260 nuf, such nuf

figure shall be multiplied by \$14.43 to arrive as the annual rental rate; *however, payment will not be made for delivered space which is in excess of 148,260 nusf.* Should the rental then vary from that stated in Article 3 of the lease, the revised rental rate will be established by amendment to the lease.

(Emphasis in original) Moreland maintains that the last sentence of the paragraph “modifies that previous sentence to indicate that the rental rate should change if more than 148,260 nusf is delivered.” (App. Resp. at 36)

Appellant also points to SFO Section 2.2, PRICE EVALUATION, which provides, in pertinent part:

Price is the most important factor. The base price offered will be the rate per nusf for the space offered. Refer to paragraph 3.12 of this Solicitation. This price shall be used to determine the total annual rental to be paid, adjusted for any discrepancies in the quantity of space delivered as against the amount offered and accepted, as described elsewhere in this Solicitation.

Moreland believes that “these paragraphs created an ambiguity regarding payment” and “[r]ead as they are intended, and considered against the VA as the drafter of the SFO/lease, they establish an agreement that the VA would pay rent on the nusf that it receives from Moreland.” (App. Resp. at 37)

We begin our analysis by observing that this provision has been construed before. In *Sonland Enterprises*, AGBCA No. 84-339-3, 85-2 BCA ¶ 17,953, the Agricultural Board in construing a similar lease clause found that the Government’s payment liability was limited to the maximum space solicited notwithstanding the fact that more space was provided by the lessor.

It is a well settled principle of federal contract law, articulated in *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965), that:

[A]n interpretation which gives reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous; nor should any provision be construed in conflict with another unless no other reasonable interpretation is possible.

Applying this principle to the Lease provisions before us, it is evident that the construction urged upon us by Appellant would have the effect of totally nullifying the very explicit provision, repeated elsewhere in the Lease, that “payment will not be made for delivered space which is in excess of 148,260 nuf.” With this express and unambiguous provision, rental rate adjustments mentioned in the last sentence clearly refers to circumstances where the Lessor actually delivers less space than promised in the Lease. Such an interpretation gives meaning to all provisions of the Lease and is consistent with fundamental principles of contract interpretation. Appellant’s proffered construction, on the other hand, is unreasonable and at best gives rise to a patent ambiguity about which Moreland would have had a duty to inquire prior to entering into the Lease. *Jamco Constructors, Inc.*, VABCA No. 3271, 94-1 BCA ¶ 26,405 citing *George F. Newsom v. United States*, 676 F.2d 647, 649 (Ct. Cl. 1982). It should be added that the claim that the ambiguity is *latent* would also fail because there are no facts or even assertions that Moreland’s bid was based on the interpretation now being advanced. *Maintenance Engineers, Inc.*, VABCA Nos. 5350, 5457, 1999 WL 554576, 99-2 BCA ¶_____, citing *Fruin-Colnon Construction Corporation v. United States*, 912 F.2d 1526 (Fed. Cir. 1990). Accordingly, we find that the Lease provides that the mere provision of additional nuf does not entitle the Lessor to an adjustment in the annual Lease payments.

Apart from Lease interpretation issues, Moreland also advances the argument that “[d]uring the course of the project numerous changes were made in the design that increased the nusef” and that, pursuant to the CHANGES clause the “Contracting Officer must equitably adjust the rental rate.” Appellant contends that Contracting Officer Hill constructively ratified these changes when he “signed off on the 100% complete drawings with all the changes.” Moreland adds that it was “led to believe that these changes would result in a change order at the end of the project.” (App. Resp. at 38).

The foundations for adjustment pursuant to the CHANGES clause are first, Terry Moreland’s Declaration that sometime after Lease Award in September 1995 and prior to the submission of the 35% drawings in early December 1995, he had a conversation “on at least one occasion” with the Las Vegas Medical Center’s Executive Assistant Alan Tyler. Tyler told him that “any increase in the nusef would be dealt with at the project completion in an audit.” Second, DCSW architect Richard Braun states that he “requested permission of the VA to reduce the size of the facility further” prior to the 35% submittals but “[n]either of the VA’s representatives Mr. Tyler nor Mr. Glommen, would allow any further reductions in the size of the facility or in room sizes.”

While, for purposes of this MOTION, we accept these statements for what they are worth, there is a paucity of detail concerning those discussions and considerable vagueness as to *when* they took place. The Record is clear that upon seeing the 198,000 gsf building Moreland had proposed for the VA’s exclusive use, local Las Vegas officials were pleased about the possibilities for additional space. Executive Assistant Tyler was speculating in mid-October about “cutting a deal” concerning “additional rooms” following initial discussions with Moreland’s architects. The Record further discloses that Tyler and Glommen were hostile to Moreland’s subsequent suggestion that the building be reduced

in size. However, these matters became immaterial once Contracting Officer Hill was brought into the picture. As the person with authority to make relevant decisions, CO Hill made it clear to Tyler, Glommen and Moreland that the Lessor had every right to reduce the size of the building and that Appellant's obligation was only to deliver the 148,260 nulf as required by the Lease.

Thereafter, following these discussions, Moreland did indeed reduce the size of the proposed building from an originally projected 198,000 gsf to 186,967 gsf in its 35% submittals and ultimately to 184,580 gsf in the building it finally constructed. There is neither evidence nor allegation that there were any *further* discussions about space reductions with CO Hill. Moreland does not challenge or rebut Hill's affidavit that "[a]t no time during the design phase of the subject space did The Moreland Corporation request additional compensation due to an increase in the net usable square feet of the building." Following initial problems with Tyler and Glommen, there should have been no confusion on Moreland's part about its responsibilities or who at VA had the authority to alter them.

Appellant suggests that in *approving* submittals containing additional usable square feet, CO Hill was constructively changing the Lease and agreeing to compensate the Lessor for that additional space. Approving a submittal depicting space in excess of the maximum specified does not obligate the Government to pay for it, particularly where the Lease provisions are clear as to the maximum space for which the VA will pay. *Sonland Enterprises*, AGBCA No. 84-339-3, 85-2 BCA ¶ 17,953. We reject Appellant's argument that the Contracting Officer constructively changed the Lease in approving Moreland's proffered submittals. In doing so, we note that 1) the submittals never contained a representation of the nulf contained therein; 2) no claim was asserted by Moreland at the time of submittals; 3) that the Contracting Officer's approvals were routinely accompanied by the statement that "[n]one of these review

comments should affect either price or delivery schedule as originally established by the lease;" and 4) construction commenced prior to approval of the 100% submittals.

We next address Appellant's contention that it was "impossible to maintain the layout and adjacencies of Schedule D and the room sizes of Schedule C" with the 148,260 nuf maximum set by the Government. We find that to the extent any claim of impossibility is based on perceived *conflict* concerning the requirements of the various schedules, that issue is resolved by the Lease provision that state "SCHEDULE B shall have precedence and control over any conflict in SCHEDULE D." To the extent that Appellant argues that the schedules do not necessarily conflict but are simply incapable of performance within 148,260 nuf, it is significant that this assertion was *first* raised by Appellant following the Government's MOTION FOR SUMMARY JUDGMENT. The impossibility claim is grounded on Terry Moreland's declaration that "I *do not now believe* it possible to create a building incorporating the Schedule D requirements and the Schedule C requirements in a space containing 148,260 nuf." (Emphasis added)

Neither Terry Moreland's qualifications to render such a judgment nor the facts upon which he relied to arrive at this conclusion are set forth in the Record. We find this unsupported "belief" to be a mere conclusory statement that does not provide sufficient detail to establish a material fact in dispute. As the court noted in *Barmag, Banner Maschienfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835-36 (Fed. Cir. 1984):

With respect to whether there is a genuine issue the court may not simply accept a party's statement that a fact is challenged. *Union Carbide Corp. v. American Can Co.*, 724 F.2d at 1571. The party opposing the motion must point to an evidentiary conflict created on the record at least by counter statement of fact or facts set forth in detail in a affidavit by a knowledgeable

affiant. Mere denials or conclusory statement are insufficient.

We find it significant that no assertion of “impossibility” has been made by the architects for Moreland who actually designed the building. If, in fact, it was impossible to design a building within 148,260 nsf that met the Government’s requirements that impossibility should have become readily apparent to Moreland’s architects during the design phase. DCSW architect Marc Schiff says that he “assumed” that the three-story Schedule D “Conceptual Drawings” prepared by non-architect Glommen contained 148,260 nsf, although there is no such representation in the drawings. There is no evidence or assertion that Terry Moreland conveyed CO Hill’s somewhat ambiguous pre-submission remarks about the usable space contained in the Government’s plans to his architects, nor was there any representation about Schedule D net usable square feet in Amendment #1, as Schiff apparently suggests in his declaration. In preparing a two-story proposal of its own design with a different “footprint,” Schiff simply “presumed” that the net usable square footage in the new building would be the same because it “was developed from the same electronic data as the plans for the three-story design.” Schiff does not state whether his assumptions and presumptions accord with the standards of his profession. In any event, we do not find them material to deciding the MOTION before us.

It is apparent that estimating nsf requirements based on “program net” (nsf) and functional adjacency needs is a difficult and frequently confusing task. The Record certainly reflects a degree of confusion and varying levels of competence among VA officials concerning net usable square feet. What is not in dispute, however, is that Moreland proposed its own two-story 198,000 gsf building, with a different footprint from the three-story 185,478 gsf building depicted in VA’s “conceptual drawings.” This, of necessity, required various adjustments to comply

with the functional adjacencies set forth in SCHEDULE D. In its BAFO submission, Moreland presented drawings for a building prepared by its own architects which stated it contained 149,643 nuf, (1,383 nuf over the maximum) of which 80,763 nuf were specifically identified as being on the first floor, and 68,880 nuf were represented as being on the second floor. Appellant is silent on how it was possible to translate the adjacencies of a three-story building into adjacencies for a two-story building of a different design and to calculate the precise allocation of nuf for each floor *without actually measuring* usable space in accordance with Solicitation Section 3.12. If such measurement had been made, any questions of “impossibility,” about which Appellant now complains would have been clearly evident.

Questions concerning the inability to comply with both Government space and functional adjacency requirements would of necessity also have arisen and been readily apparent following Lease award when the detailed responsibility of completing a building design *of its own choice* rested heavily on Moreland’s shoulders. *Austin Company v. United States*, 314 F.2d 518 (Ct. Cl. 1963) *cert. denied* 375 U.S. 830 (1963). Shortly after award and prior to tendering the 35% submittals, Terry Moreland, by his own admission, knew that his own BAFO proposed design “exceeded the 148,260 nuf set out in the SFO.” Given the initial resistance of Las Vegas officials to reducing the building size, the Contracting Officer’s subsequent assurance that Moreland was not obligated to deliver more than 148,260 nuf, and the apparent disparity in the ratio of gross to net usable square feet compared to Moreland’s previous VA projects, any question of “impossibility” could not have been avoided. If it were impossible to meet the Government’s requirements within 148,260 nuf, this impossibility would have been discovered during the design phase rather than after the building was constructed as is suggested by Appellant. That the issue was only raised after the Government’s MOTION and then by an

unsupported and self-serving conclusory statement simply does not raise the assertion of “impossibility” to the status of a material fact in dispute.

Even assuming *arguendo* that Government requirements could *not* be met within 148,260 nusef, equitable principles require prompt notification by Moreland of the impossibility of adhering to the Lease requirements in order to prevent prejudice to the Government. As designer of the building, Moreland was in the best position to know whether it was impossible to comply with the Lease requirements. Notification during the design process prior to construction would have allowed VA to consider its options, including rescission, modification of its requirements, or amendment of the Lease to acquire more space. We find the Contracting Officer’s oral representations at the pre-submission briefing to be irrelevant to Appellant’s design and notice responsibilities under the Lease. These representations were neither relied upon by Moreland’s architects, nor of major consequence in the context of the entire Lease acquisition process, especially since Moreland had offered an alternate building proposal. *Suffolk Environmental Magnetics, Inc.*, ASBCA No. 17,593, 74-2 BCA ¶ 10,771; *Dynalectron Corporation (Pacific Division) v. United States*, 518 F.2d 594, 596 (Ct. Cl. 1975).

Finally, a brief observation would appear to be in order concerning Moreland’s claim that “fairness” requires that the Lease should be reformed because the “cost to build a 165,110 nusef building which the VA received is much more than the cost to build a 148,260 nusef building.” In its final negotiations with the Government, Moreland proposed to meet the Government’s requirements with a 198,000 gross square feet building for an annual rent of \$2,139,391.80. What it actually provided to the Government, after receiving \$1.6 million in change orders during construction, was a building containing 184,580 gross square feet for which it is receiving annual rental payments of \$2,139,391.80.

DECISION

For the foregoing reasons, the Government's MOTION FOR SUMMARY JUDGMENT is Granted and the Appeals of The Moreland Corporation in VABCA-5409 & 5410 are Denied.

DATE: **November 3, 1999**

GUY H. MCMICHAEL III
Chief Administrative Judge
Panel Chairman

We Concur:

MORRIS PULLARA, JR.
Administrative Judge

RICHARD W. KREMPASKY
Administrative Judge