

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Southbridge Associates, LLC) ASBCA No. 54628
)
Under Lease No. DACA27-5-00-385)

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OPINION BY ADMINISTRATIVE JUDGE TING
PURSUANT TO RULE 12.3

Southbridge Associates, LLC (Southbridge or SALLC) and the United States of America (the government) entered into a 20-year lease for a first-class residential training center in Southbridge, Massachusetts. The terms of the lease, as executed, excluded the provision of food and beverage that the parties agreed would be covered by a separate agreement. Because the Department of Defense decided in December 2001 that it would not send Defense Leadership and Management Program (DLAMP) students—who made up over 90 percent of the expected occupancy—to the training center, a food service contract was never consummated. In December 2003, Southbridge shut down its own food service as well as the food services facilities then operating in the building. This forced the government to cater food from time to time from third-party vendors to feed its students. Southbridge claimed without its permission to do so, the government was in violation of the lease and sought a decision from the contracting officer (CO). The CO denied the claim and this appeal followed.

FINDINGS OF FACT

1. On 30 March 2000, the government, through the Deputy Assistant Secretary of the Army (Installation and Housing)¹ entered into Lease No. DACA27-5-00-385 with Southbridge (R4, tab C at 28). Under the lease, Southbridge was to construct, at its own expense, an Executive Management Training Center in Southbridge, Massachusetts (the Southbridge Training Center or the training center),² consistent with plans and specifications attached to the lease for use by the government and others as a first-class residential training facility (R4, tab C). The term of the lease is for 20 years (R4, tab C at 6, ¶ 2).

2. The Southbridge Training Center is located in a “low income” or “blue-collar” area (tr. 1/26, 2/54). It is about an hour away from Boston’s Logan Airport and Hartford Airport. Students are normally picked up by the training center’s shuttle, and thus do not have local transportation upon arrival at the training center. (Tr. 2/55)

3. The Southbridge Training Center stemmed from a requirement by DLAMP and Defense Finance and Accounting Service (DFAS) for a residential training center for senior-level federal employees. DLAMP, established in 1997, is a professional development program for senior civilian employees within the DoD. As reflected in a 8 December 1998 narrative description of the concept of a DoD Executive Management Training Center³ (conceptual narrative), it was contemplated that both DFAS and DLAMP “would exclusively use only those lodging facilities associated with the training center.” (R4, tab C-8, Schedule J.1. at 1 of 5; ex. A-7)

¹ Because of the dollar value (\$11 million a year or approximately \$200 million over the term of the lease) and the length of the lease term (20 years), authority to sign the lease resided with the Deputy Assistant Secretary of the Army for Installation and Housing (tr. 1/184-85).

² The Southbridge Training Center is located in the former headquarters building of the American Optical Corporation in the Southbridge Business Center, Mechanic Street, Southbridge, Massachusetts, sections of which were constructed more than 100 years ago. To construct the Southbridge Training Center, the existing buildings with the exception of the clock tower building and the existing facades of the four buildings that made up the Mechanic Street frontage were demolished. The Mechanic Street facade and the clock tower were renovated. The balance of the training center was new construction. (Ex. G-5 at 17, 110)

³ The “Conceptual DoD Executive Management Training Center Narrative Description” dated 8 December 1998 was incorporated as a part of the lease as Schedule J.1. (R4, tab C-8).

4. Individuals attending courses at the training center would be required to be on-site for one to two weeks at a time (R4, tab C-8, Schedule J.1. at 3 of 5). DLAMP courses, taught by university professors, were “very, very intensive,” packing “a semester’s worth of work in two weeks.” Students were required to be in residence because “they were working a lot of times 16 to 18 hours a day.” (Tr. 2/10) DoD estimated that during a typical calendar year, it would use 47,000 nights of lodging.⁴ DLAMP estimated that it would deliver 10 two-week courses, 19 times a year with a student population of 20 per class, requiring 12 nights lodging per student. DFAS estimated that it would deliver 5-8 one-week courses 5-6 times per year with a student population of 16 per class and 5 nights lodging per student. (R4, tab C-8, Schedule J.1. at 2 of 5) Of the 40,000 annual lodging nights that eventually ended up in the signed lease, DLAMP’s share was 36,783, or over 90 percent. Thus, the Southbridge Training Center could be considered essentially a DLAMP operation. (Tr. 2/14-15)

5. The 1998 conceptual narrative subsequently incorporated as Schedule J.1. of the lease include the following with respect to on-site dining services:

OVERVIEW:

....

... On-site dining services would be utilized for all student meals. Limited staff use of dining facilities for breakfast is anticipated. The staff would most likely purchase their individual meals during the lunch hour.

....

Food Service/Dining – Common dining facilities for students breakfast and lunch and dinner is a typical design element of a residential training center. . . . The overall design of the dining area could be either a buffet arrangement all meals, multiple small kiosks where students select their food, or a full service seated arrangement, the design being at the discretion of the developer.

Typically in a residential training environment, breakfast, lunch and dinner meals are considered an integral part of the training environment and students are required to consume

⁴ The 47,000 lodging nights was reduced to 40,000 lodging nights in the RFP (tr. 1/141).

meals in a group environment. . . . In addition to students covered by the per diem policies, it is anticipated that 80-85 percent of the 150 person administrative staff, who are not in a TDY status, would use an on-site dining facility.

(R4, tab C-8, Schedule J.1. at 1, 4-5)

6. The concept of a residential training center is to have students “come onsite, live there, eat there” (tr. 1/235). Southbridge agreed “the provision of food services in connection with a residential training facility and conference center are within the reasonable industry practice and expectation” (tr. 1/73). We find the provision of food services along with a residential training facility or conference center is customary within the hotel/conference center industry.

7. Except for a sandwich shop across the street, and several small restaurants within a two-mile radius of the training center, there are no suitable eating facilities for government travelers at the training center (tr. 1/149, 169). Southbridge’s general manager acknowledged she does not expect conference attendees to walk to a restaurant, especially in New England winter weather, eat there, and return in time to continue with conference business (tr. 1/170).⁵

8. In establishing the occupancy costs or rent to be charged, the standard used in the conference center industry is called a “Complete Meeting Package” or CMP. The CMP represents the daily rate charged for a student and includes a single occupancy hotel room; full food service (three meals and two “break” snacks); and non-exclusive use of the training area, dining area/lounge, health club and other facility amenities. Using this approach in establishing rent, one would simply multiply the annual occupancy (*e.g.*, 40,000 lodging nights) by the agreed upon CMP rate. (Ex. A-4, 1 May 1998 ltr. at 2; tr. 1/61, 147-48, 2/113) Thus, whether DoD sends any students at all, it still pays the \$11 million a year for 20 years (tr. 1/185).

9. Negotiations on the Southbridge Training Center lease began in 1998 (tr. 1/188-89). At some point, the Corps of Engineers (Corps) with whom Southbridge was negotiating, decided to separate out the food service portion of the CMP because “food service typically falls under a service type of agreement” and not under a lease for real property (tr. 2/114). Southbridge was told that while the Corps had authority to enter into an agreement for everything else, it lacked authority to enter into a lease that “included food,” and that provision of food service would be “handled through DFAS as

⁵ The hotel shuttle operates from 4 to 10 p.m. to take attendees to the local pharmacy and grocery store, and has not been made available for lunch breaks (tr. 2/57).

the contracting agent for DLAMP”⁶ (tr. 1/45). Southbridge adjusted its CMP rate accordingly (tr. 1/69).

10. Following the separation, all negotiations regarding the provision of food services at the Southbridge Training Center took place between DFAS and Southbridge (tr. 2/15). During negotiations and up to execution of the lease on 30 March 2000, neither party contemplated that any one other than Southbridge would be the food service provider at the training center (tr. 1/88, 196, 2/121).

11. In anticipation of entering into a food service contract with the government, Southbridge conducted a national competition and selected Aramark, Inc. (Aramark), to provide food service required by the government once a food service agreement was executed between Southbridge and the government. Southbridge entered into a formal agreement with Aramark on 17 December 1999. (Compl., ¶ 17; tr. 1/75) This agreement with Aramark was entered into in advance of a food service contract between Southbridge and the government. As far as we know, the government did not approve or authorize this agreement.

12. As executed, paragraph 1(a) of the lease, entitled “Demise; Title” leases to the government on an exclusive and non-exclusive basis certain areas of the Southbridge Training Center:

(a) The Lessor hereby leases to the Lessee . . . subject to the terms hereof, (i) on an exclusive basis, the portions of the Building . . . marked as “Office Exclusive Use” (the Office Exclusive Use Premises) . . . (ii) on an exclusive basis the portions of the Building marked as “Conference Exclusive Use” (the Conference Exclusive Use Premises), (iii) on a non-exclusive CMP Basis the portions of the Building marked as “Non-exclusive Use” (the Non-exclusive Use Premises) on the Building Plan for the Baseline Room Nights in the lodging portion of the Non-exclusive Use Premises in the conference portion of the Non-exclusive Use Premises, (iv) the non-exclusive right for use . . . of parking spaces for up to 300 automobiles (the

⁶ According to an internal DoD memorandum relating to “PROGRAM BUDGET DECISION” CHANGE, dated 17 December 1996, DFAS, in joint agreement with Civilian Personnel Management Service (CPMS) was given responsibility to provide “facilities, maintenance, furnishings, local transportation, communications, billeting, mess facilities, and all related support to the Southbridge facility” (ex. A-5 at 5; tr. 1/262-63)

Parking Premises) . . . and (v) the non-exclusive right of ingress, egress and access by the Government, its employees, conferees, agents, customers, guests and visitors to the Building and the Parking Premises over the access routes (the Access Routes) shown on the Site Plan.

(R4, tab C-1 at 4)

13. The floor plans of the Southbridge Training Center show that the hotel portion of the building with 200-plus rooms is connected to a 3-story building by a concourse. The second and third floors of the 3-story building are exclusive DLAMP and DFAS education and administration spaces. The first floor spaces include the pre-event lobby, the auditorium, several large classrooms and computer rooms, a number of breakout rooms and a lounge. Also located on the first floor are a large kitchen and cooking area. Next to the kitchen are the main dining room and an adjoining kiosk area, as well as two private dining rooms. The hotel portion, health club, main dining area and private dining areas are all Non-Exclusive Use spaces as denoted in Paragraph 1(a) of the lease. (Tr. 1/113; ex. A-1, Enclosure 2)

14. Paragraph 4, entitled “Taxes and other Charges; Compliance with Law; and Services,” provides, in part:

(d) The Lessor shall provide all services listed in Schedule H attached hereto (Maintenance and Housekeeping Standards) for the Demised Premises at its sole expense. . . . All food services for the Government may be provided by Lessor and paid for pursuant to a separate agreement between the Government and Lessor.

(R4, tab C at 8-9) The last sentence of ¶ 4(d) went through several iterations during negotiations (ex. A-2). Southbridge’s negotiator maintained that the government required use of the word “may” to indicate “they could not bind a separate agency [DFAS],” and that the parties’ intent was to “enter into that [food services] contract prior to the opening of the facility” (tr. 1/70).

15. Paragraph 7, “Use,” of the lease provides in part:

(a) The Government agrees that it will use the Demised Premises solely as a residential training, administrative and conference center space for the Government’s purposes and for no other purpose without the written consent of the Lessor. The Government may use such

lodging facilities and food services for the Government's staff, training contractors and guests.

(R4, tab C at 11) In drafting this provision, there is no indication that Southbridge intended to limit the government's use of the property as a residential training facility without food service, as an administrative facility without food service, and as a conference center without food service. To the contrary, and as indicated below, Southbridge and DFAS engaged in negotiations for the provision of food service into the late fall of 2001.

16. Paragraph 26, "Defined Terms," defines the term "CMP Basis" to mean:

[T]he use on a "complete meeting plan" basis (exclusive of food and beverage) of (i) one room for one night (on a single occupancy basis) of the hotel facilities in the Nonexclusive Use Premises, combined with (ii) one day of the conference facilities in the Nonexclusive Use Premises, without additional charge for use of the auditorium, multi-function rooms or fitness center.

Paragraph 26 defines "CMP Rate" to mean \$209 per additional CMP room night. (R4, tab C at 23) The Basic rent for each year of the Basic term subsequent to the first year is subject to a 3.5% escalation of the rent of the prior year (R4, tab C-5, Schedule E, ¶ (iv)).

17. In January 2000, DFAS's Director of its Acquisition Support Organization (ASO) notified Southbridge that "DFAS intends to enter into a contract with Southbridge Associates to provide meals for the Government students attending training classes at the Southbridge facility," and that the government would structure the contract to require Southbridge to select a food services subcontractor through a competitive process in accordance with the Federal Acquisition Regulation, and Southbridge must obtain consent from the ASO prior to entering into any subcontract for food services. Southbridge was told "[t]he acquisition process needs to begin no later than 6 months prior to the opening of the Southbridge training facility." (Ex. A-3)

18. In the spring of 2001, DLAMP urged DFAS to finalize a food service contract with Southbridge. At that time, DLAMP was expecting to begin its first class in December 2001 with 80 to 100 students. DLAMP also expected to increase its use of the training center in February and March of 2002. (Tr. 1/74)

19. On 13 July 2001, DFAS issued RFP No. MDA210-01-R-0002. The RFP was issued to Southbridge only. (Ex. A-6; tr. 1/75) It told Southbridge that 1 October 2001

was the target date for occupancy of the training center by DoD, and “DoD is seeking a contractor to provide food and beverage service for the DoD employees during their stay at the Southbridge training center.” (Ex. A-6 at 6 of 61) Paragraph C.1.1 of the RFP told Southbridge:

The DoD will occupy the facility 40,000 lodging nights annually. Training will be conducted during the 17-19 two-week timeframes in which there are no federal holidays. Training will be conducted from October of one calendar year through September of the next calendar year. An estimated 180 students will be in attendance during any two-week period. Students will require three meals per day Monday – Friday and weekend[s] falling within the two-week period. Unless reflected on the schedule, the first meal will be dinner on the day of arrival, generally Sunday evening, and will end with lunch on the day of departure. For the instructional days, Monday-Friday, there will be two scheduled breaks and continuous beverage.

(Ex. A-6 at 6 of 61) The RFP did not seek provision of food service for the entire remainder of the lease term. Rather, it contemplated an initial base contract period of 12 months (§ F.4) with options so long as the total duration of the contract did not exceed 5 years (Clause 1.6). (Ex. A-6 at 15 and 27 of 61) Southbridge submitted a food service proposal in August 2001 (tr. 1/74).

20. Construction of the Southbridge Training Center was completed in December 2001. The government actually began occupying its exclusive spaces two months earlier, in October 2001. It did not begin occupying the housing portion of the training center until January 2002. (Tr. 2/42)

21. In 2001, independent of the events occurring at Southbridge, the Under Secretary of Defense (Personnel & Readiness) conducted a review of DLAMP. The review culminated in the issuance of a memorandum dated 21 December 2001 entitled “Refocusing the Defense Leadership and Management Program.” The memorandum was issued to refocus and redefine the DLAMP “in line with the Department’s new strategic direction for civilian human resources management.” Among the changes directed by the memorandum was that graduate education be provided by civilian academic institutions predominately located in the participant’s local community area, instead of a central DoD facility. (Ex. A-7) Until this directive was issued, not even the director of DLAMP knew in advance about the change (tr. 2/23-24). Since DLAMP was expected to fill the lion’s share of the 40,000 lodging nights, this directive caused the expected occupancy rate at

the Southbridge Training Center and thus the number of meals to be served to drop precipitously.⁷

22. As a result of the directive, DFAS was told to suspend ongoing negotiations with Southbridge, and DLAMP cancelled the classes already scheduled to commence in January 2002 (tr. 2/24). Thereafter, the Under Secretary of Defense put out a letter making the training center space available to other DoD agencies that required training, conference, or off-site working space until “an alternate use” of the space could be found (tr. 2/43-44). Through this effort, occupancy improved from 24 percent initially to 42 percent in 2003 (tr. 2/44).

23. In the meantime, even without a food services contract with the government, Southbridge nonetheless provided food service for two years, from the time the training center opened until the end of 2003 (tr. 1/76). During the first half of 2002, Southbridge felt obligated to keep its food service open because many people had been hired on a one-year basis. Southbridge also held out hope that the government would find a replacement for DLAMP. It became clear by the second half of 2002 that the occupancy levels were not going to come close to the 40,000 room nights originally projected. (Tr. 1/76-77) According to Southbridge, including utilities, its losses averaged between \$30,000 and \$50,000 each month during 2002 and 2003 (tr. 1/83, 160). Southbridge acknowledged, however, “a portion of those losses was reimbursed by the Government pursuant to a Settlement Agreement entered into between the parties on March 28, 2003” (compl., ¶ 27).

24. Even though the 28 March 2003 Settlement Agreement related to another case (ASBCA No. 53718), it also settled the issue relating to DoD’s decision not to enter into a food service contract with Southbridge up to that point. The Settlement Agreement provided, in part:

1. Subject to the availability of funds, the Department of Defense will pay Southbridge the sum of Eight Hundred Thousand Dollars (\$800,000.00) (the Settlement Amount)⁸. . . . This payment will operate as a FULL ACCORD AND SATISFACTION of all claims, known or

⁷ Appellant counsel represented to the Board in his opening statement that the government used 9,750 lodging nights in 2002, and 14,115 in 2003. About 11,000 lodging nights were used through November 2004. (Tr. 1/12) The government has not disputed these numbers.

⁸ Southbridge acknowledged that roughly \$250,000 of the settlement amount was to cover the losses in providing food service through the end of September 2003 (tr. 1/78).

unknown, submitted or unsubmitted, of any nature whatsoever, that arise out of the above-referenced Lease which occurred or may have occurred at any time up to the date of execution of this Agreement, including but not limited to claims relating to ASBCA No. 53718, issues associated with the Department of Defense's decision not to enter into a food service contract, food service start up costs and any lost profits, interest under any statute, and any attorneys fees that could be due. This Agreement does not cover any future food service contract. Southbridge acknowledges that the Department of Defense is under no obligation to enter into a food service contract in the future. The parties also recognize and agree that Southbridge has no obligation under the Lease to provide food service to the Department of Defense. This does not, however, preclude the parties from entering into a food service contract in the future. And, the Department of Defense will provide, without endorsement, scheduled users (defined as DoD components or other Federal agencies) with whatever information Southbridge submits to the Department of Defense concerning any availability of a food service contract. The Department of Defense will make it clear to users that they may contract directly with Southbridge for specific food service.

(R4, tab D) The agreement is silent and does not preclude the government from entering into a food service contract with third-party vendors.

25. At a meeting with DoD Civilian Personnel Management Service (CPMS) in August 2003, Southbridge asked what impact it would have if it were to close down its money-losing food service still operating in the building. DoD acknowledged it might be slightly harder to fill room nights, but it expected "users would eat in town and would not see this as a significant problem." DoD advised that there was no large and established user on the horizon that would be willing to enter into the type of food service contract Southbridge was envisioning inasmuch as each of the numerous DoD agencies replacing DLAMP had its own funding authorities. (Ex. A-8 at 2) Southbridge has not been willing to provide food services on an as-needed basis because of the high cost of constantly starting up and closing down (tr. 1/248).

26. By letter dated 23 October 2003, Southbridge notified the government that due to the government's under utilization of the training center and its reluctance to enter into a food services agreement, losses continued to accumulate. The letter stated that in

order to meet its obligations to its bondholders, Southbridge would suspend, indefinitely, the operation of the Food Services Facilities,⁹ effective 20 December 2003. (R4, tab B-1) According to Southbridge, the operation of the kitchen and dining area required a certain amount of fixed costs that were not supported by the government’s utilization (tr. 1/80).

27. Subsequent to the termination of food services in December 2003, Southbridge closed off the dining and lounge areas. These areas are now inaccessible to government users. (Tr. 1/243) Southbridge still retained a chef, however, and would open the food service facilities to fulfill a specific third-party contract, such as a wedding.¹⁰

28. As it now stands, students at the training center “couldn’t even get a cup of coffee in the morning . . . [and] would have to leave the building for every bit of food they receive[d]” (tr. 2/66). According to the DoD (CPMS) on-site representative, terminating the food services and closing down the dining facilities left the government in “dire straits” because “[n]obody in their right mind is going to want to come to this facility” (tr. 2/67). He testified the occupancy rate of the training center dropped to 36 percent, and it had become a “dysfunctional operation” despite the fact it is a beautiful and well-maintained facility (tr. 2/81). For its part, Southbridge had stopped marketing the facility and had laid-off its marketing personnel (tr. 1/113). It concedes that, without a food and beverage operation, the training center is not marketable to potential users (tr. 1/112, 153).

29. After Southbridge stopped providing food services and closed down the food services facilities, the government had provided self-catering (coffee and doughnuts) to smaller groups (tr. 2/69). It had also ordered food from third-party caterers. The third-party caterers would prepare the food off-site, have it delivered, and clean up afterwards (tr. 1/241, 296). The government has not had occasion to use the training center kitchen. Its witness testified that he did not envision using the kitchen because of the potential liabilities associated with such use. (Tr. 1/241-42) Without access to the dining area, the government was forced to use the ballroom as its primary location for catering (tr. 2/83). Since March 2004, using third-party food vendors to deliver food to the training center has become increasingly confrontational (tr. 2/77-80). According to Southbridge, allowing third-party food vendors into the training center is not only “highly unusual in the industry” but poses risks associated with security, public relations,

⁹ Southbridge’s 23 October 2003 letter defined “Food Services Facilities” to include the “kitchen/cooking areas, private dining rooms, a main dining room, a food kiosk and a bar area” (R4, tab B-1).

¹⁰ The evidence shows that through August 2004, Southbridge provided roughly \$62,000 worth of food services to third parties (ex. G-1).

and presents “logistical conflicts that would arise from having two separate food operators in and around the facility” (tr. 1/87-88).

30. By letter dated 5 November 2003 Southbridge advised the government:

Any serving of food and beverages within the Non-Exclusive and Exclusive use areas is in direct violation of paragraph 7(a) of the Lease and no third party caterers or other food service provider is authorized to make entry to the site for such purposes.

(R4, tab B-2 at 2) The government views Southbridge’s decision to stop providing food services, to shut down the food services facilities, and not to allow it to bring food into the building through third-party food vendors as an attempt “to starve” the government into entering into a food services contract on Southbridge’s terms (tr. 1/38).

31. The government’s 3 December 2003 response made the point that “while the lease allows for the possibility of a food service contract, it does not require one.” The letter stated that “While SALLC may choose to provide food and beverages at the facility, there is nothing in the lease that precludes the Government from making alternate arrangements for food services if food is not available on the premises.” The letter stated further:

The Southbridge facility was set up to be used as a “first class residential training center.” It is the custom and practice within the conference facility industry to provide some form of food and beverages at such a facility. The lease clearly contemplates that Government employees and other users would consume food on the premises. The lease does not, however, specify the source of the food services. The Lessor owned/operated dining facility is one source, but not the sole source available to guests.

Citing Paragraph 1(a)(v) of the lease which prohibits the lessor from restricting the entry of government employees or agents, the government warned that “[a]ny attempt by the Lessor (SALLC) to prevent the Government from providing any food and beverages to government users of the Southbridge facility would violate the lease” and “could result in termination of the lease.” (R4, tab B-3 at 1, 2)

32. According to appellant, since Southbridge stopped food services and shut down the food services facilities in the building, the government has taken exploratory measures towards securing the provision of food services. In February 2004, DFAS

issued a Request for Information. This was followed by the issuance of a Sources Sought Notice for food and beverage for the training center in April 2004. (Tr. 1/274-75)

33. Southbridge's 18 December 2003 letter to the CO maintained that "The DOD's right to use the facility under the Lease is only on a 'CMP Basis' (Section 1(a), page 4), where the definition of 'CMP Basis' expressly excludes food and beverage (Section 26, page 23)." Southbridge pointed out that under Section 4(d) of the lease, "all" food services are to be "pursuant to separate agreement between the Government and Lessor," and Section 7(a) of the lease prohibited DOD "from adding new uses (such as its own substitute food service operation) without the written consent of the Lessor." The letter stated "the catering, or servicing of food, anywhere in the facility, is a prohibited use under the Lease." (R4, tab B-4)

34. In his 27 February 2004 letter, the CO maintained that "the Government has the right to make any arrangements it deems necessary to provide food and beverage service to its users at the facility." The letter told Southbridge to pursue the disputes process (§ 24 of the lease as set out in General Provisions, § 22), and that "Any attempt to interfere with the Government's full utilization of the facility, including the provision of food services, would be a violation of the lease." (R4, tab B-5)

35. By letter dated 29 March 2004, Southbridge submitted to the CO a certified claim seeking the interpretation of the lease terms with respect to the question: "*Does the provision of food service by third party vendors within the Southbridge Hotel and Conference Center, without the permission of SALLC, violate the terms of the Lease?*" (R4, tab B-6). Southbridge has indicated that should the Board interpret the lease to require the government to obtain approval for third-party food vendors to provide food services within the Southbridge Training Center, it would be unlikely that such permission would be given (tr. 1/88-89).

36. The CO issued his final decision by letter dated 9 April 2004. He took the position that:

[T]he Lease does not prohibit the Government from arranging for food services at the Center by sources other than Southbridge Associates, LLC ("SALLC") and it does not require the Government to obtain SALLC's permission to do so.

(R4, tab B at 1) In reaching this decision, the CO relied on §§ 1(a), 4(d) and 7(a) of the lease. With respect to § 1(a), the government contends that the lease allows it access to the training center for use within the scope of the lease, and since the provision of food services on the premises was within the contemplation of the parties, "the availability of

food services at the Center is an authorized and proper use of the Center under the Lease.” The government also argues that ¶ 4(d) and the parties’ 28 March 2003 Settlement Agreement imposed no obligation on it to obtain food services from Southbridge and this “allow[s] the Government to obtain food services from Lessor or anyone else it chooses.” Finally, citing ¶ 7(a), the CO argues that the parties contemplated the provision of food services on the premises in a residential training facility and conference center, and “The question is not *if* food services are an authorized use, but from whom the Government may choose to obtain such services.” (R4, tab B at 5)

37. Southbridge filed a timely notice of appeal by letter dated 25 May 2004. The notice stated that Southbridge disagreed with the CO’s interpretation of the lease and contended that “the Lease *does* bar the Government from providing food service at the Center without SALLC’s permission.” The notice also asserted “This appeal is based on interpretation of certain terms of the Lease. Accordingly, there is no monetary amount in dispute at this time.” On 13 July 2004, Southbridge elected to proceed under Rule 12.2, the Board’s SMALL CLAIMS (EXPEDITED) Procedure. At a conference call held on 21 July 2004 with the parties, the Board advised that under its Rule 12.2 election, Southbridge’s recovery in the event it prevails would be limited to \$50,000. Counsel for Southbridge advised that in that case, its client might wish to elect Rule 12.3 instead. Thereafter, on 23 July 2004, counsel for Southbridge faxed to the Board its “AMENDED NOTICE OF ELECTION.” This notice withdrew its prior 12.2. election, and elected to proceed under Rule 12.3, the Board’s ACCELERATED procedure. The Board initially scheduled a hearing to take place on 27 September 2004. Thereafter, the hearing was rescheduled several times at the parties’ requests for settlement discussions. Those discussions failed to lead to settlement. Accordingly, the Board proceeded with the hearing on 2-3 December 2004.

DECISION

The sole issue presented to us for resolution is this: Does the provision of food service by third-party vendors within the Southbridge Hotel and Conference Center, without the permission of SALLC, violate the terms of the Lease?

In pressing for a decision in its favor on this question, Southbridge relies on ¶¶ 1(a), 7(a) and 26 of the lease. Under ¶ 1(a), the government leases, on an exclusive and non-exclusive basis, certain areas of the building. The non-exclusive space, including the dining areas, is leased on a “non-exclusive CMP Basis” (findings 12, 13). Paragraph 7(a) of the lease entitled “Use,” binds the government to use the “Demised Premises solely as a residential training, administrative and conference center space for the Government’s purposes and for no other purpose without the written consent of the Lessor” (finding 15). Southbridge argues that to give meaning and effect to each of the

provisions, “the only reasonable interpretation of the Sect. 7(a) provision is that it permits the Government to use the Center (i) as a residential training facility without food service, (ii) as an administrative facility without food service, and as a (iii) conference center without food service.” “All other uses, including food service,” it argues, “require the written consent of Southbridge, otherwise the specific exclusion of food service in Sect. 26 would be rendered meaningless.” (App. br. at 5-6)

Southbridge uses the term “provision of food service.” Provision of food service in our minds relates to providing meals and is distinct from the use of leased space. Paragraph 7(a) on which Southbridge relies relates to the use of the leased space. In interpreting ¶ 7(a), we look first to what constitutes a “residential” training center. Evidence of trade practice and custom plays an important role in contract interpretation. Such evidence is a part of the initial assessment of contract meaning. “It illuminates the contemporaneous circumstances of the time of contracting, giving life to the intentions of the parties. It helps pinpoint the bargain the parties struck and the reasonableness of their subsequent interpretations of that bargain.” *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999). In this case, there is no disagreement between the parties, and we have found, that the availability of food service on the premises of a residential training center is a customary practice in the hotel/conference center industry (finding 6). This being the case, we cannot agree that the reference in Paragraph 7(a) of the lease to the government’s use of the demised premises as a residential training and conference center can be interpreted to preclude use of the leased space for serving food.

Furthermore, “the key to interpretation of an agreement is ascertainment of the intent of the parties.” *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978). When resolving a question of contract interpretation, our primary purpose is to ascertain the intention of the contracting parties, *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1185 (Fed. Cir. 1988), as the parties’ intention controls a contract’s interpretation. *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971). The evidence shows that a 1998 conceptual narrative of the Southbridge Training Center, subsequently incorporated as a part of the lease, provided that “On-site dining services would be utilized for all student meals,” and “in a residential training environment, breakfast, lunch and dinner meals are considered an integral part of the training environment and students are required to consume meals in a group environment” (finding 5). As built, the Southbridge Training Center included a large kitchen and various dining areas, as well as training, administrative and lodging spaces (finding 13). We conclude that the Southbridge Training Center was conceived, designed and built as a residential training center, and using the designated spaces for preparing and serving meals (*i.e.*, the kitchen and dining rooms) is an integral part of the uses the parties contemplated at the time the lease was executed.

Southbridge contends that the definition of “CMP Basis” in ¶ 26 of the lease specifically excluded food and beverage. In the hotel/conference center industry, CMP represents the daily rate charged for a student and includes a single occupancy hotel room; full food service (three meals and two “break” snacks); and non-exclusive use of the training area, dining area/lounge, health club and other facility amenities (finding 8). Notwithstanding this definition, Paragraph 26 of the instant lease defines “CMP Basis” to exclude “food and beverage” (finding 16). The facts show the parties modified the standard industry definition of CMP that would have included full food service (finding 8) because the government wanted food service to be covered by a separate agreement to be negotiated by DFAS (findings 9, 10). The exclusion of food and beverage from ¶ 26 was not because the government did not want to use the lease space for serving food. Paragraph 26 did not exclude the use of the dining areas from the standard industry definition of CMP.

While the landlord is generally free to impose restrictions on the tenant’s use of the property, the Federal Circuit has expressed the view that absent a valid restriction, “a tenant may put the leased premises to whatever lawful purpose it so desires consistent with the design and construction of the property.” *Forman v. United States*, 767 F.2d 875, 880 (Fed. Cir. 1985), *citing* R. Schoshinski, AMERICAN LAW OF LANDLORD TENANT, § 5:6 (1980). In *Forman*, the court stated “absent a clear and specific indication that the landlord intended to limit the tenant’s use of the property,” a lease provision setting forth the use of the property “is generally permissive and not restrictive.” *Forman*, 767 F.2d at 880. Here, given the meaning to be attached to a residential training and conference center in the hotel/conference center industry, and given the parties’ intention to use the leased space not only for training and administration but also for cooking and dining purposes, we cannot conclude that ¶ 7(a), as written, limited the government’s use of the leased space to training, administration and conferencing only.

Given our conclusion that using designated areas (dining rooms) of the training center for serving food constitutes a permissible use under the lease, it remains for us to decide if food and beverage could be provided by third-party vendors. Throughout negotiation of the lease and thereafter, both parties considered Southbridge as the exclusive provider of food service at the training center (findings 10, 19). The 28 March 2003 Settlement Agreement provided that the parties could enter into a food service contract in the future if they so wished. The Settlement Agreement, however, is silent and does not preclude the government from entering into a food service contract with third-party vendors. (Finding 24) Since the Southbridge Training Center is still being, and will continue to be, used as a “residential” training center, there is a continuing need for on-site food service so that the building may be used for its intended purpose. If Southbridge is not obligated to enter into a food service contract with the government as provided in the Settlement Agreement, it follows that the government is not precluded

from entering into a food service contract with third-party vendors so that the training center may be used as intended.

CONCLUSION

Because the Southbridge Training Center was conceived, designed, and built as a “residential” training center, and using the designated spaces for serving meals was an integral part of the uses the parties contemplated when they signed the lease, because there is no clear and specific restriction in the lease on the use of the leased space for serving food, and because the government by the terms of the 28 March 2003 Settlement Agreement is not obligated to enter into a food service contract with Southbridge, we hold provision of food service (catering) within the training center by third-party vendors is a permissible use under ¶ 7(a) the lease and does not require Southbridge’s permission.

For the foregoing reasons, this appeal is denied.

Dated: 10 January 2005

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54628, Appeal of Southbridge Associates, LLC, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals