ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
SPACEHAB, Inc.	)	ASBCA No. 54880
	)	
Under Contract No. NAS9-97199	)	

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OPINION BY ADMINISTRATIVE JUDGE DICUS
ON NASA'S MOTION FOR SUMMARY JUDGMENT

This appeal is taken from a contracting officer's decision denying appellant SPACEHAB's $87,712,927 claim for hardware lost in the 1 February 2003 Space Shuttle Columbia, or STS-107, accident. NASA has filed a motion for summary judgment, asserting that relief is not available under the undisputed facts material to any of the theories advanced by SPACEHAB. The contract at issue was between NASA's Johnson Space Center (JSC or NASA/JSC) and SPACEHAB for the lease of certain modules used in space shuttle flights. The parties agreed to limit discovery at this stage to that which will suffice to address the motion. We deny the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION ONLY

1. Since 1990, NASA and SPACEHAB have executed three contracts. The parties negotiated each of these contracts on a firm-fixed-price basis. (NASA mot., ¶ 1; app. resp., tab 2, ¶ 1)

2. The initial contract was NAS9-18371, the Commercial Middeck Augmentation Module (CMAM) contract, dated 30 November 1990. This was followed by NAS9-19250, the SPACEHAB Phase One Contract (SPOC), initiated by a letter contract dated 17 November 1994 and definitized on 14 July 1995. Contract No. NAS9-97199, the Research and Logistics Mission Support (ReALMS) contract, under which this dispute arose, was dated 18 December 1997. (NASA mot., ¶ 2; app. resp., tab 2, ¶ 2)

3. The CMAM contract involved the lease of 200 Middeck Locker Volume Equivalents (MLVEs) to support research activities on a series of Shuttle flights (R4, tabs 6, 7; compl., ¶¶ 6, 17). To meet this requirement, SPACEHAB made arrangements for the construction of two single flight modules and one test unit (R4, tab 1, ex. 3; compl., ¶ 10). The cost of commercial insurance, including Space Flight Insurance, was negotiated as part of the fixed price (R4, tabs 5, 6; compl., ¶ 19).

4. The second in the series of contracts, NAS9-19250, involved the lease of single and double modules for the logistical resupply of the Mir Space Station on a firm-fixed-price basis (compl., ¶¶ 20, 21). These logistics modules were modified versions of the research modules used under the CMAM contract (R4, tab 1, ex. 7, tab 14; compl., ¶ 12).

5. During negotiations leading to the definitization of this contract, SPACEHAB informed the contracting officer that it was seeking indemnification coverage. In a 2 March 1995 letter SPACEHAB "respectfully request[ed] that [NASA] indemnify [SPACEHAB] against potential claims by third parties arising out of activities carried on in connection with the launch, operation, or recovery of the Space Shuttle in connection with the NASA/MIR program pursuant either to 42 U.S.C. §2458b or Public Law 85-804." The letter made no mention of indemnification of SPACEHAB for loss of its property. It also stated "it is more economical for NASA to indemnify SPACEHAB than for SPACEHAB to obtain private insurance and to assess the cost of such insurance to NASA in the form of higher contract prices." (NASA mot., ¶ 5; app. resp., tab 2, ¶ 5; R4, tab 10)

6. SPACEHAB's 2 March 1995 letter included an attached memo stating that SPACEHAB carried insurance with Lloyd's of London against property damage to its modules in which the "maximum availability is $55 [million] but usage is approximately $8 [million] per launch" (R4, tab 10). In prior flights SPACEHAB insured modules for $40 million (1993) and $8 million (1995) (R4, tabs 77, 94).

7. According to the declaration of Margaret E. Grayson, SPACEHAB's former Vice President and Chief Financial Officer, lenders agreed to permit SPACEHAB to reduce its insurance from coverage of $40 million to $8 million because of the belief that

if a module were lost, it could be replaced by modifying SPACEHAB's structural test unit, and this would cost $8 to $10 million (app. resp., tab 4, ¶ 9). However, according to Ms. Nelda Wilbanks, in performance of Contract No. NAS9-19250, SPACEHAB combined its structural test unit with a single module to form a double module. Once the structural test unit was unavailable, the replacement cost was raised to near $40 million for a single module. (App. resp., tab 3, ¶ 24) Ms. Grayson participated in negotiations for Contract No. NAS9-19250 and she states that during negotiations there was no discussion as to the maximum value of a module in case of loss. Further, she believed that the parties' intent was that the actual amount of indemnification would only be determined if and when a Space Shuttle was lost. (App. resp., tab 4, ¶ 18)

8. Contract No. NAS9-19250 was signed by the contracting officer on 17 November 1994 (R4, tab 8). Modification No. 6 definitizing the contract was signed on 14 July 1995 (R4, tab 93). This firm-fixed-price contract contained Article H.12, Agreement Concerning Equitable Adjustment Price Reduction for Indemnification. This clause expressed the agreement of the parties to subsequently reduce the price of the contract by $2.4 million upon insertion of an indemnification clause responsive to SPACEHAB's 2 March 1995 request. (R4, tab 1, ex. 7)

9. By letter of 11 December 1995 SPACEHAB informed NASA that the wording of the proposed indemnification provision was unacceptable. SPACEHAB asserted that the agreed upon price reduction of $2.4 million represented "<u>both the unplanned cost for insurance covering third party claims ($1.4M) and the planned cost for property insurance ($2.4M)</u>." (R4, tab 32) SPACEHAB had excluded the cost of third party liability insurance from its initial price (R4, tab 10).

10. On 24 May 1995 SPACEHAB provided information concerning insurance coverage that showed that the historical premiums for property coverage, per launch, were based upon an "insured value of $8,000,000." The proposed premium was represented by SPACEHAB to assume an insured value of $10 million. (R4, tab 19)

11. In order to save $2.4 million in the price of Contract No. NAS9-19250 and to more accurately "reflect the negotiated intent of the parties," JSC sought and received from NASA Headquarters approval to assume a contingent liability of up to $8 million for property loss or damage (R4, tab 34). The 1 February 1996 approval document was signed by Malcolm Peterson, NASA Comptroller. The document stated the value of the SPACEHAB modules to be flown as $30 million for a single and $45 million for a double, yet the contingent liability was only $8 million. The latter figure was characterized as "the amount of insurance coverage Spacehab could obtain." (R4, tab 34) Mr. Peterson testified that "there was an obvious disconnect" with the numbers and he discussed it within NASA. He concluded that NASA/JSC personnel "had not accurately

represented [the] agreement [with SPACEHAB]." As Comptroller, Mr. Peterson's responsibilities included assuring that appropriations were administered properly. (R4, tab 131 at 13-16, 53) Originally, NASA/JSC did not present an amount certain in its request to NASA Headquarters. In essence, NASA/JSC personnel "had understood poorly" NASA policy and the relevant authorities and had treated indemnification of third-party liability as covering SPACEHAB equipment. (*Id.* at 124-27) Mr. Peterson informed NASA/JSC personnel that he could only agree to specific contingent liability for SPACEHAB property. In signing the 1 February 1996 document, he understood the replacement value of the SPACEHAB property, and thus NASA's specific liability, to be $8 million. If he had been told the replacement value was higher, he still would have approved – "If they had said $30 million, [I] wouldn't have cared. Okay. I would have reserved $30 million." (*Id.* at 127-29) However, Mr. Peterson at the time believed the $8 million to be the replacement value of the SPACEHAB hardware, and that the $30 million and $45 million figures included nonrecurring development, design and engineering (*id.* at 120-21). According to SPACEHAB, however, the replacement value for a single module was at the time "much nearer to $40 million" (app. resp., tab 3, ¶ 24).

12. Mr. Peterson had discussions with SPACEHAB personnel in which they discussed SPACEHAB's contract with an Italian manufacturer for modules using the same design that was used on the Space Station. He reasoned that use of the same design would reduce cost and made a range of $8 to $10 million plausible for SPACEHAB's recurring cost. (R4, tab 131 at 122-23) Two of the SPACEHAB vice-presidents who spoke frequently with NASA Headquarters personnel, Chet Lee and David Rossi, are deceased (app. resp., tab 3, ¶¶ 23, 33).

13. Modification No. 17 to the SPOC, NAS9-19250, was signed in February 1996, adding Article H.12 "AGREEMENT CONCERNING EQUITABLE PRICE REDUCTION FOR INDEMINIFICATION CONCERNING CONTRACTOR PROPERTY." Article H.12 stated:

> As consideration for the $2,400,000 reduction in the firm-fixed price of this contract pursuant to contract modification No. 9, the Government agrees to pay the Contractor for any loss of or damage to the Contractor's flight hardware that may occur during the Flight Risk Period, up to a maximum limit of $8,000,000. This obligation does not apply to the extent that the loss or damage is compensated for by insurance or otherwise, or when the loss or damage is caused by willful misconduct, lack of good faith, or negligence on the part of the Contractor. The NASA Comptroller will verify that appropriate funds will be

> available in this amount through the flight risk period, in order to cover this contingent liability.
>
> The Flight Risk Period begins upon Shuttle rollout to the launch pad or with installation of a Spacehab module into the Shuttle, whichever occurs later; and ends prior to launch of the Shuttle upon removal of a Spacehab module or upon Shuttle rollback, whichever occurs first, or after launch, when the Orbiter or the Shuttle Carrier Aircraft (SCA) with the Orbiter attached lands at the Kennedy Space Center.

(NASA mot., ¶ 11; app. resp., tab 2, ¶ 11)

14. The estimated construction cost of two single research modules and a structural test article for the CMAM contract was approximately $92.2 million based on SPACEHAB's 1990 contract with McDonnell Douglas Corporation (R4, tab 1, ex. 3; compl., ¶ 10).[1] For insurance purposes under the initial CMAM contract, a single module was assigned a value of approximately $40 million (R4, tab 94 at 3).

15. For SPOC, a double module consisted of a single module attached to a Structural Test Article (compl., answer, ¶¶ 21).

16. Contract No. NAS9-19250 recognized that NASA may have requirements for three additional missions beyond the four covered in the schedule. In anticipation of supporting these three flights, SPACEHAB sent a 25 June 1997 letter seeking assurance that NASA would retain the third party indemnification and property liability coverage that was already in Contract No. NAS9-19250 for these new flights. SPACEHAB's letter stated that "[t]he basis of SPACEHAB's request is that, because of actuarial risk involved, it is more economical for NASA to indemnify SPACEHAB than for SPACEHAB to obtain private insurance and to assess the cost of such insurance to NASA in the form of higher contract prices." (NASA mot., ¶ 14; app. resp., tab 2, ¶ 14)

17. On 1 July 1997 SPACEHAB faxed to NASA a letter from insurance broker Willis Corroon Inspace stating in part:

> The insurance rate to cover all risk physical damage to the SPACEHAB Module (single or double) from launch, through space flight re-entry, and up to and including touch down at KSC (This would include a piggyback flight aboard the 747

[1] According to SPACEHAB, the actual cost was $82,564,169 (app. resp., tab 2, ¶ 12).

> to KSC if an alternate landing site were required.) would be between 4% and 4.5% of the insured value, e.g. insured value $8,000,000 @ 4% = $320,000 premium for each mission.

(R4, tab 39; app. resp. tab 3, ¶ 34)

18. In response to a request from NASA, SPACEHAB, on 30 September 1997, submitted a proposal leading to the anticipated award of the parties' third contract for the lease of modules, the ReALMS contract, NAS9-97199. This proposal was based on SPACEHAB's Price Catalogue, which listed prices for both research and logistics modules and both single and double modules of each type. (NASA mot., ¶ 16; app. resp., tab 2, ¶ 16)

19. This follow-on acquisition was conducted noncompetitively with SPACEHAB as the sole source (R4, tab 1, ex. 22; compl., ¶ 39). NASA treated it as a commercial acquisition and applied procedures under FAR Part 12 (R4, tab 42).

20. SPACEHAB's 30 September 1997 proposal includes "Ground rule" number 12 to its Price Catalogue which reads as follows:

> All prices assume government indemnification for third party liability and for any loss of, or damage to, SPACEHAB's flight hardware consistent with that provided to SPACEHAB under NAS9-19250.

(NASA mot., ¶ 18; app. resp., tab 2, ¶ 18)

21. On 9 October 1997, SPACHAB sent a letter to NASA addressing third party indemnification and property liability for the anticipated third contract that would become NAS9-97199 (compl., ¶ 45). The letter listed as the subject "Request for Indemnification Pursuant to the Requirement of Clauses H.12 and H.13 of Contract No. NAS 9-19250" (R4, tab 43).

22. SPACEHAB's 9 October 1997 letter stated "[t]he basis of SPACEHAB's request is that, because of actuarial risk involved, it is more economical for NASA to indemnify SPACEHAB than for SPACEHAB to obtain private insurance and to assess the cost of such insurance to NASA in the form of higher contract prices" (NASA mot., ¶ 20; app. resp., tab 2, ¶ 20).

23. SPACEHAB issued a Confidential Offering Circular to potential investors dated 15 October 1997 (R4, tab 1, ex. 21 at 14). SPACEHAB's Confidential Offering Circular reads in part as follows:

> **Limited Insurance**
>
> Although the SPACEHAB Modules are insured at all times, the amount of insurance carried by the Company to cover SPACEHAB Modules during launch and flight of the Space Shuttle is significantly less than the replacement value of a SPACEHAB Module. . . .
>
> . . . .
>
> **Insurance**
>
> . . . NASA indemnifies the Company against the loss of, damage to, or loss of use of Single Modules and SPACEHAB Double Modules during the launch and flight of Space Shuttle missions carrying SPACEHAB Modules pursuant to the *Mir* Contract. SPACEHAB also maintains customary and appropriate property and general liability insurance. See "Risk Factors – Limited Insurance."

(R4, tab 1, ex. 21 at 14, 44)

24. Christine Mack was the NASA negotiator for Contract No. NAS9-97199. Relevant points of her deposition testimony are herein set forth. The time for negotiation and award of Contract No. NAS9-97199 was compressed (R4, tab 140 at 70). There was no discussion of the amount of insurance beyond the request made by SPACEHAB, which was for $8 million. Ms. Mack was solely interested in keeping the contract price low. (*Id.* at 91-92) She construed the $8 million to be tied to insurance and not asset value (*id.* at 116). To her knowledge, the $8 million dollar figure came from SPACEHAB and she thought it represented either the amount of commercially available insurance or the amount for which SPACEHAB chose to insure the property (*id.* at 168-69). According to Ms. Mack, NASA may not have accepted property liability of $30 million and may have terminated contract negotiations if insurance costs were too high (*id.* at 111-13).

25. In the price negotiation memorandum, Ms. Mack included the following:

> J. Third Party Indemnification/Contingent Property Liability: A request for third party indemnification will be made to NASA Headquarters, Code H and a request to maintain contingent liability for property coverage will be made to JSC Code LA.

(R4, tab 142 at 6)

26. On 18 December 1997, SPACEHAB and NASA signed the basic ReALMS contract, Contract No. NAS9-97199, covering the lease of both research and logistics single and double modules. The research double module (RDM) that was destroyed in the STS-107 tragedy was leased under this contract. (NASA mot., ¶ 23; app. resp., tab 2, ¶ 23)

27. Contract No. NAS9-97199 was a firm-fixed-price contract (NASA mot., ¶ 24; app. resp., tab 2, ¶ 24).

28. Contract No. NAS9-97199 contained a placeholder clause addressing a future modification that would add permanent coverage with regard to third party and property indemnification:

> H.10 AGREEMENT CONCERNING THIRD PARTY INDEMNIFICATION AND CONTINGENT PROPERTY LIABILITY The parties agree that the firm-fixed-price of the contract assumes a unilateral contract modification by no later than 90 days prior to launch of the first mission under the contract authorizing third party indemnification and contingent liability for contractor property damage substantially in conformance with that received under NASA contract NAS9-19250 [SPOC] excepting any SPACEHAB commercial payload liability. . . .

(NASA mot., ¶ 25; app. resp., tab 2, ¶ 25)

29. In a 15 January 1998 email exchange Ms. Mack was told that JSC could approve contingent liability (R4, tab 48). Ms. Mack sent an email to Connie Poole, the Shuttle Procurement Office Manager, on 19 February 1998, as follows:

> This morning [we] met with [personnel] from the [JSC] Comptroller's organization and decided not to send a letter to either [JSC Comptroller] Wayne Draper or [NASA Comptroller] Mal Peterson regarding maintaining reserves for contingent property liability. Since the Government does not set aside funds for other events, such as termination and future change orders, funds do not need to be set aside for property insurance. In the event the property is damaged, the Government self insures and will find money to cover damages as it did under past unfortunate circumstances. We determined to write a modification using a clause substantially the same as that used under SPOC and have Draper and [JSC procurement official] Gish concur as well as Ken Lassman (following coordination with the appropriate organizations). The cap of the liability will be $8 [million].

(R4, tabs 51, 140 at 28, tabs 136, 139; NASA mot., ¶ 26; app. resp., tab 2, ¶ 26) Based on the emails and finding 25, we find for purposes of the motion that JSC did not seek approval from the NASA Headquarters Comptroller and consequently NASA did not set funds aside to cover contingent liability for Contract No. NAS9-97199.

30. On 10 March 1998 approval for third party indemnification was granted (R4, tab 123). Thereafter, a revision was suggested and approved on 9 June 1998 (R4, tab 126).

31. On 22 September 1998, Modification No. 10 of Contract No. NAS9-97199 removed the placeholder Article H.10 "AGREEMENT CONCERNING THIRD PARTY INDEMNIFICATION AND CONTINGENT PROPERTY LIABILITY" and replaced it with Article H.10, Third Party Indemnification and Article H.11, Contingent Property Liability. Specifically, Article H.11, stated:

> H.11 CONTINGENT PROPERTY LIABILITY The Government agrees to pay the Contractor for any loss of or damage to the Contractor's flight hardware that may occur during the Flight Risk Period, up to a maximum limit of $8,000,000. This obligation does not apply to the extent that the loss or damage is compensated for by insurance or otherwise, or when the loss or damage is caused by willful misconduct, lack of good faith, or negligence on the part of the Contractor.

> The Flight Risk Period begins upon Shuttle rollout to the launch pad or with installation of a Spacehab module into the Shuttle, whichever occurs later; and ends prior to launch of the Shuttle upon removal of a Spacehab module or upon Shuttle rollback, whichever occurs first, or after launch, when the orbiter or the Shuttle Carrier Aircraft with the Orbiter attached lands at the Kennedy Space Center.

(NASA mot., ¶ 28; app. resp., tab 2, ¶ 28)

32. Between 18 and 21 September 1998 Ms. Mack and Nelda Wilbanks, SPACEHAB's Contract Administrator, exchanged a series of emails concerning the proposed Modification No. 10 of Contract No. NAS9-97199, which contained Article H.11, the Contingent Property Liability clause. They specifically addressed the "covered value of SPACEHAB hardware" in the email exchange. Pertinent parts of the email exchange are as follows:

> September 18, 1998, Ms. Wilbanks' response to the JSC submission of Modification 10: "The modification as presented is acceptable to SPACEHAB, Inc., with the understanding that we may in the future, as circumstances change, want to address the covered value of SPACEHAB hardware. I look forward to receiving the executed modification."
>
> September 21, 1998, Ms. Mack responds back to Ms. Wilbanks: "Thanks for the note, Nelda. I'm not sure what you mean by addressing the covered value of the SPACEHAB hardware. Once these two clauses are in we do not intend to modify them. What are your specific concerns with the property clause?"
>
> September 21, 1998, Ms. Wilbanks replies: "Christine, there are no specific concerns with the property clause. As I stated, SPACEHAB accepts the modification as presented. We understand that the Government does not intend to modify these clauses during the period of the contract, but if the nature of the covered hardware changes during that period, we might request changes to the coverage."

(NASA mot., ¶ 27; app. resp., tab 2, ¶ 27)

33. Ms. Wilbanks had participated in negotiations for contract NAS9-97199 to a limited extent and believed that the indemnification provision "accurately reflected the parties' agreement under Contract No. NAS9-19250." She does "not recall much discussion of the issue of indemnification." She explains the email exchange as "not attempting to re-negotiate the parties' agreement." While she admits she "should have realized that the modules would change," she states she was not at that time aware of future changes. However, SPACEHAB had proposed to design and build, and did design and build, a research double module for Contract No. NAS9-97199. The maiden voyage for the equipment was on the ill-fated STS-107. (App. resp., tab 3, ¶¶ 28, 30-32)

34. Appellant alleges and NASA admits the following:

> STS-107, the Space Shuttle Columbia carrying SPACEHAB's RDM and related equipment, was launched on January 16, 2003. . . .
>
> . . . On the Shuttle's re-entry into the earth's atmosphere on February 1, 2003, super-heated air entered through the breach [in the Thermal Protection System] to penetrate the leading-edge insulation and progressively melt the aluminum structure of the left wing resulting in a weakening of the structure until aerodynamic forces caused a loss of control and the breakup of the Shuttle resulting in the tragic death of the crew and the loss of the Shuttle along with SPACEHAB's RDM and related equipment.

(Compl., answer, ¶¶ 55, 56)

35. On 12 January 2004 SPACEHAB filed certified claims (which contained identical facts) seeking payment for the RDM and other flight hardware destroyed in the 1 February 2003 tragedy (NASA mot., ¶ 33; app. resp., tab 2, ¶ 33).

36. The Defense Contract Audit Agency (DCAA) audit, conducted to examine SPACEHAB's claim, indicates that SPACEHAB had two insurance policies, CG6882 and CG6883, for the RDM on STS-107 (NASA mot., ¶ 29; app. resp., tab 2, ¶ 29). SPACEHAB's two insurance policies allowed for payment of $17,666,667 in case of destruction of the RDM (NASA mot., ¶ 30; app. resp., tab 2, ¶ 30).

37. Paragraph 2 entitled "Insurance" of Appendix 2 of the DCAA audit report states in reference to SPACEHAB's insurance policies CG6882 and CG6883:

> The insurance policies on pages 4 and 12 reference special contract provision H.11 (See results of Audit Section). The policy reads as follows:
>
> > NASA INDEMNITY: It is understood and agreed that this insurance operates on an excess basis, it is a condition that any indemnity payable hereon is subject to clause H.11 of Contract NAS 9-97199, Modification 10 between SPACEHAB and the Government and to full payment under the clause having been made or agreed by the Government, in accordance with same.

(NASA mot., ¶ 31; app. resp., tab 2, ¶ 31)

38. SPACEHAB received an insurance payment of $17,666,667 on 12 February 2003 for the destruction of the RDM during STS-107 (R4, tab 62 at 11, app. 2, ¶ 2).

39. SPACEHAB issued Voucher 1141 dated 6 October 2004, for $8 million "Per Article H.11 Payment for loss of SPACEHAB hardware on STS-107" (NASA mot., ¶ 34; app. resp., tab 2, ¶ 23). In response to the Contracting Officer's Final Decision and in accordance with SPACEHAB's Voucher 1141 dated 6 October 2004, the parties signed Modification No. 118 under Contract No. NAS9-97199 for $8,243,836, which included interest (NASA mot., ¶ 35; app. resp., tab 2, ¶ 35; R4, tab 67).

40. For purposes of the motion only, NASA admits negligence. NASA 's admission is "purely to focus [SPACEHAB's] arguments and limited discovery as it relates to the May 6, 2005 Motion and in no way is to be construed as either a true statement or a valid admission of negligence for any purpose including but not limited to this or any other case or claim." (R4, tab 103 at 3)

DECISION

Summary Judgment Principles

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment.

Hughes Aircraft Co., ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851.

More than mere assertions of counsel are necessary to counter a motion for summary judgment. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). The nonmovant may not rest on its conclusory pleadings, but must set out, in affidavit or otherwise, what specific evidence could be offered at trial. Failing to do so may result in the motion being granted. Mere conclusory assertions do not raise a genuine issue of fact. *Id.* The party with the burden of proof must support its position with "more than a scintilla of evidence." *Walker v. American Motorists Insurance Co.*, 529 F.2d 1163, 1165 (5th Cir. 1976).

Evidence sufficient to establish the existence of a genuine material factual issue need not be admissible at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 324 (1986). Even so, a hearsay affidavit is not a substitute for the personal knowledge of a party. *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988). Indeed, Rule 56(e) requires affidavits to be "made on personal knowledge [and] set forth such facts as would be admissible in evidence . . . ." Thus, statements inadmissible under FED. R. EVID. 408 were inadequate to defeat a motion for summary judgment. *Scott Aviation,* ASBCA No. 40776, 91-3 BCA ¶ 24,123. Moreover, while summary judgment need not be denied merely to satisfy the speculative hope that discovery will result in the uncovering of evidence to support a complaint, *Pure Gold, supra,* 739 F.2d at 627, an adequate opportunity for discovery must usually precede summary judgment. *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574 (Fed. Cir. 1993). Finally, summary judgment may be denied if "there is reason to believe that the better course would be to proceed to a full trial." *Anderson, supra,* 477 U.S. at 255.

The Merits of the Motion

SPACEHAB has set forth three bases for recovery – mutual mistake, the FAR Part 31 provisions on the allowability of insurance costs, and NASA's alleged liability as a bailee. NASA argues that there was no mistake and, in the alternative, the mistake alleged was not material. It further contends that FAR Part 31 does not offer relief and that common law bailment principles take a back seat to the contingent liability provisions in the contract. Finally, removal of the $8 million dollar limitation would, according to NASA, violate the Anti-Deficiency Act, 50 U.S.C. §§ 1431 *et seq.*

Mutual Mistake

NASA asserts, without disagreement from SPACEHAB, that a party seeking reformation due to alleged mutual mistake must prove:

1. The parties to the contract were mistaken in their belief regarding a fact;

2. The mistaken belief constituted a basic assumption underlying the contract;

3. The mistake was material to the bargain; and

4. The contract did not put the risk for the mistake on the party seeking reformation.

(NASA mot. at 18-19, *citing*, *inter alia*, *Atlas Corp. v. United States*, 895 F.2d 745, 750 (Fed. Cir. 1990)). To this list we add the additional proposition "that the party against whom reformation is sought would have agreed to the reformation, had it known the correct facts from the outset." *Roseburg Lumber Co. v. Madigan,* 978 F.2d 660, 668-69 (Fed. Cir. 1992).

The undisputed facts establish that in negotiating Contract No. NAS9-19250, NASA wanted to reduce the contract price by $2.4 million, representing a portion of SPACEHAB's insurance costs (finding 8). JSC and SPACEHAB discovered, after signing the contract, that they had interpreted the indemnification provisions of the contract differently (findings 9, 11). When this came to light, JSC set out to rectify the situation and submitted to the NASA Comptroller, Mr. Peterson, a document seeking approval to set aside $8 million for contingent liability. That document also described the replacement value of the equipment involved as $30 to $45 million. Mr. Peterson signed the document. (Finding 11) The parties thereafter executed a modification definitizing the $2.4 million dollar price reduction and setting NASA's maximum liability for loss or damage to SPACEHAB property at $8 million (finding 13). A subsequent contract, NAS9-97199, was negotiated with significant indemnification provisions of Contract No. NAS9-19250 carried forward (findings 20, 31). SPACEHAB's property was lost during STS-107 under Contract No. NAS9-97199 (findings 33, 34). For purposes of this motion, NASA concedes negligence (finding 40).

NASA contends there was no mistake made and, indeed, the $8 million contingent liability provision of the contract seems clear. However, the document sent to Mr. Peterson showed asset value as $30-$45 million (finding 11). For purposes of the

motion, we must find that the fact at the heart of the mistake alleged by SPACEHAB—a replacement value of the modules of more than $8 million—was an existing fact prior to execution of Modification No. 17 of Contract No. NAS9-19250, as required before relief for a mutual mistake can be forthcoming. *Dairyland Power Cooperative v. United States*, 16 F.3d 1197, 1202-03 (Fed. Cir. 1994). Certainly, the McDonnell Douglas contract is evidence of a value exceeding $40 million per single research module as of 1990 (finding 14). Additionally, SPACEHAB has adduced evidence that, drawing inferences for SPACEHAB as we must, prior to Contract No. NAS9-19250, the hardware could have been replaced for $8 to $10 million by using the structural test unit. Performance under that contract resulted in use of the structural test unit in constructing a double module so that it was no longer available for replacement of lost or damaged modules. Replacement thereafter was in the $40 million range. (Finding 7) One of the SPACEHAB negotiators for Contract No. NAS9-19250, Ms. Grayson, believed that the actual amount of indemnification would be determined if and when a Space Shuttle was lost (finding 7). Again, drawing inferences in SPACEHAB's favor, it has also adduced evidence that Mr. Peterson would have reserved whatever amount represented replacement value in approving contingent liability (finding 11). It has also presented evidence that it was the parties' intent to carry forward into NAS9-97199 the same indemnification negotiated in NAS9-19250, and that the matter received little attention (findings 20, 24, 33).

Based on the foregoing, and drawing reasonable inferences in SPACEHAB's favor, *Hughes Aircraft Co., supra,* we hold there is a dispute of fact as to whether the parties held erroneous beliefs regarding an existing fact – the replacement value of the property being indemnified. This arises principally from the McDonnell Douglas contract, the affidavits of Ms. Grayson and Ms. Wilbanks on SPACEHAB's side, and from Mr. Peterson's deposition testimony on NASA's side. There is evidence therein that both sides were in error in negotiations leading to Modification No. 17 to NAS9-19250 insofar as they believed the replacement value of the SPACEHAB modules was $8 million (findings 7, 11, 14). In Mr. Peterson's case, he testified that his view on asset value was affected in part by the belief that certain nonrecurring costs affected asset value, and by comparison with the product of an Italian manufacturer with whom SPACEHAB had contracted (findings 11, 12). There is also evidence that both sides believed replacement value was being indemnified, and there is evidence replacement value was much higher (findings 7, 11, 14). As to NASA's contract negotiator, Ms. Mack's deposition testimony can be read as tying the $8 million indemnification to insurance and not asset value (finding 24). The mistake is material inasmuch as it goes to the heart of the indemnification provision for SPACEHAB property. Moreover, the backdrop here is one in which there appears to be no dispute that JSC erred in its original contractual treatment of indemnification and was attempting to rectify the situation with the indemnification provision included in Contract No. NAS9-19250 through

Modification No. 17 (findings 9, 11). Indeed, Mr. Peterson characterized JSC as having a poor understanding of NASA policy on the subject (finding 11). The inconsistency of JSC's actions in not seeking Mr. Peterson's approval for contingent liability under Contract No. NAS9-97199 or setting aside funds to cover contingent liability lends support to his expression of concern as to the extent of JSC's understanding. SPACEHAB's employees, Ms. Grayson and Ms. Wilbanks, assert they participated in negotiations and misapprehended the value of the modules being indemnified. Ms. Wilbanks admits she should have, but did not, realize the modules would change. (Findings 7, 33) Credibility issues which cannot be resolved here are raised by the foregoing.

Regarding the second element, we must evaluate the record to determine if SPACEHAB has presented sufficient evidence to raise a genuine issue as to whether the alleged mistaken belief about indemnification coverage constitutes a basic assumption underlying the contract. SPACEHAB promptly raised an objection when it became apparent that JSC was proposing an unacceptable indemnification provision (finding 9). JSC then set about taking the action necessary to correct the situation (finding 11). JSC can be seen as motivated to do so because it wanted the $2.4 million price reduction (findings 8, 11). The parties' actions in promptly proceeding to correct the misunderstanding about indemnification imply that the provision was significant. Moreover, Ms. Mack testified in conjunction with Contract No. NAS9-97199 that the viability of the contract was affected by the size of the indemnification or, alternatively, by insurance costs in the event agreement could not be reached on indemnification (finding 24).

NASA argues that, even assuming there was a mistake, it was not material since a basic assumption was not involved. According to NASA, this is because it was SPACEHAB's policy to under-insure (NASA mot. at 24-25). It bases this on the "Limited Insurance" section of its Offering Circular (finding 23). However, SPACEHAB points out that elsewhere in its Offering Circular it informed readers that NASA indemnified it against damage or loss of its modules (*id.*). A reasonable inference to be drawn from the Offering Circular is that the indemnification by NASA made it unnecessary for SPACEHAB to fully insure. We think that NASA's argument falls short, and we conclude that SPACEHAB has presented sufficient evidence to raise a genuine issue on the second element.

We recognize in our holding here that Mr. Peterson's testimony is pivotal. NASA argues strenuously that we should not place much emphasis on that testimony because, among other things, Mr. Peterson was not a contracting officer and that "[h]is function was purely ministerial" (NASA reply at 28). However, we are here under summary judgment procedures, and a reasonable inference to be drawn from NASA's actions in

seeking Mr. Peterson's approval is that his approval was necessary. As we understand his testimony, his role as Comptroller included assuring that appropriations were administered properly (finding 11). We cannot conclude that his role was "ministerial" based on that testimony. Moreover, his testimony bespeaks of concern about the extent of JSC's understanding of NASA policies and relevant authorities (finding 11). There is no evidence presented that he had contracting officer's authority, but we are not prepared to hold on this record that he did not have authority regarding appropriations that could have directly affected the amount of contingent liability. Indeed, he testified that JSC "had not accurately represented [the] agreement" as originally presented to him, and it may be inferred that he was at least in part responsible for changing it to assure it set forth specific contingent liability. (*Id.*) This is indicative of an authority that could alter the substantive content of the agreement. We cannot, therefore, hold that a mistake on his part would have been immaterial.

NASA does not offer arguments as to elements 3 and 4. We said, *supra*, the mistake was material "inasmuch as it goes to the heart of the indemnification provision for SPACEHAB property" (element 3) and, on the record before us, we do not find that the contract put the risk of the mistake on SPACEHAB (element 4). Further, SPACEHAB has presented evidence (Mr. Peterson's deposition testimony) from which one may reasonably infer that NASA would have agreed to the contract in the form necessary to effect liability for asset value if that value, and not $8 million, had been presented at the outset (finding 11). Accordingly, we find a genuine material issue exists.

The Anti-Deficiency Act

NASA asserts that removal of the $8 million limitation in the indemnification provision would render the provision open-ended, thereby violating the Anti-Deficiency Act, 50 U.S.C. §§ 1431 *et seq.* However, Mr. Peterson testified that he could only agree to specific contingent liability and that he would have *reserved* an amount to cover NASA's liability if he had known the true replacement value – "If they had said $30 million . . . [o]kay. I would have reserved $30 million" (finding 11). SPACEHAB has thus presented evidence from which we may draw the inference that, had asset-value been indemnified, the indemnity provision would not have been open-ended and funds would have been reserved in a specific amount. Reformation of the contract could, therefore, be accomplished without violating the Anti-Deficiency Act. Accordingly, we find there is a genuine issue regarding facts that would establish an Anti-Deficiency Act violation.

Other Issues

We see no point in proceeding further on the remaining bases for relief addressed by the parties. SPACEHAB has had only limited discovery, summary judgment has been denied on two of the bases raised, and further proceedings will be required. In these circumstances, "the better course would be to proceed to a full trial." *Anderson, supra,* 477 U.S. at 255. Accordingly, NASA's motion for summary judgment is denied.

Dated: 12 July 2006

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
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. 54880, Appeal of SPACEHAB, Inc., rendered in conformance with the Board's Charter.

Dated:

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