W. L. HOLBROOK,	)	**AGBCA Nos. 2000-174-1**
	)	**2000-175-1**
Appellant	)	**2001-110-1**
	)	**2001-131-1**
Representing the Appellant:	)	**2001-146-1**
	)	**2001-148-1**
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DECISION OF THE BOARD OF CONTRACT APPEALS

November 14, 2002

Before POLLACK, VERGILIO, WESTBROOK Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK.

These appeals arise out of Lease No. 57-43ZP-0-6, between W. L. Holbrook of Etowah, Tennessee (Appellant), and the U. S. Department of Agriculture, Forest Service (FS), Cherokee National Forest, Hiwassee Ranger District, Etowah, Tennessee. Appellant has filed six appeals arising out of claims and FS decisions on the lease. AGBCA No. 2000-175-1 addresses a claim for $37,301.50 (amended in Complaint of September 19, 2000, to $41,610.75) and involves wear and tear and damages to the leased property. In her decision, the Contracting Officer (CO) allowed $1,976 for that claim. AGBCA No. 2000-174-1, for $49,854.02, is a claim asking for $43,548.36 for hall modifications, $5,055.66 for two months= rent and $1,250 for property damage. The CO allowed $630, which was payment in full for two items of property damage and partial payment for a third item. Appellant thereafter filed four additional claims. Each was denied by the FS and then appealed. Those were AGBCA No. 2001-110-1 for two months= rent in the amount of $5,055.66; No. 2001-131-1 for two months= rent and costs of fireplace construction in the amount of $8,755.62; No. 2001-146-1 for two months= rent in the amount of $5,055.66; No. 2001-146-1 for four months=

rent in the amount of $10,111.32; and No. 2001-148-1 for four months= rent (this the final claim for the period of December 4, 2000 through April 3, 2001) in the amount of $10,111.32. Appellant, initially proceeded *pro se* and elected to proceed on the first two appeals on an accelerated basis. In a conference call, Appellant withdrew that election. Thereafter, Appellant secured counsel. A hearing was held on all appeals in Chattanooga, Tennessee.

The Board has jurisdiction to decide the appeals under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. ' ' 601-613, as amended.

FINDINGS OF FACT

1. On or about August 1989, the FS issued a solicitation which called on prospective offerors to furnish to the FS a building, Anew or existing,@ and outside space in accordance with the terms and conditions set out in the Solicitation for Offers, SFO-R8-89-26. This was set out as a negotiated procurement. (Appeal File (AF) D 92-93.) The original lease called for a 5-year term. The lease allowed for a 5-year extension upon 30 days notification by the Government. (AF D 15.)

2. As part of the solicitation the FS provided a floor plan dated 8-15-89. The FS describes the plan as a floor plan sketch. Mr. Alan Alsobrook, who prepared the sketch, and at the time was the newly appointed FS Ranger, said that while the FS may have called it a floor plan, it was a grouping of offices. According to Mr . Alsobrook, the FS provided the floor plan Aas a guide to all bidders,@ and the Asketch@ was not meant to satisfy or waive other specifications in the contract. (Transcript (Tr.) 124-27.) Among the limited features on the FS plan was the size of the building and the configuration of various rooms. Hallways were depicted as 3-feet wide throughout the structure. Essentially, no other details were provided. The plan was on graph paper and each square on the plan represented a square foot. (AF D 72; Tr. 21.) Included within the solicitation under C. DESCRIPTION/SPECIFICATION/WORK STATEMENT at 1b., Type and Amount of Net Usable Space, the solicitation specified that the FS required 3,366 square feet of net usable space and then set out a list which identified 15 separate rooms (along with square footage for each) and which called for floor-to-ceiling partitions in each room. The room sizes set out on the list ranged from 100 square feet to 352 square feet. Seven of the rooms were identified as private offices with the remaining identified for a particular use. For example, the conference training area was designated for 342 square feet. (AF D 15.) The rooms and sizes here described (AF D 15) are consistent with the sketch (AF D 72). According to Mr. Alsobrook, the initial square footage of 3,366 square feet came from General Services Administration (GSA) standards which provide the square footage for the amount of office space allotted to an official (Tr. 143).

3. The solicitation package provided to offerors contained a number of provisions and directions that are pertinent to the disputes in issue. As part of the package, the FS included a three-page table of contents. (AF D 5-7.) The table of contents is not entirely complete, however, it does provide a general road map through the solicitation. We will address various provisions in the package in the order in which they are listed and appear in the Appeal File. Some provisions will be quoted in full, others in part, and some just referenced (the text being in the Appeal File).

4. The first substantive section of the solicitation package was titled AC. Descriptions/ Specifications/Work Statement.@ The following from that section is pertinent.

> 1b. Type and Amount of Net Usable Space: 3,366 square feet of first class net usable office and related space with floor-to-ceiling partitioning as indicated below:

Following the above was a listing of 15 rooms, each with a designated square footage and each identified as a private office or other specialized function such as reception area or conference room. (AF D 15.)

5. In the same section as above, the solicitation package contained, as additional subparagraphs, the following:

> 6. Termination:
>
> The Government may terminate the lease in whole or in part at any time during the renewal period by giving at least 60 days notice in writing to the Lessor and no rental shall accrue after the effective date of the termination. Said notice shall be computed with the day of mailing.
>
> 7. Special Space Requirements:
>
> 1. RADIO ANTENNA
>
> The lessor shall allow the Government to erect a radio antenna on roof of office building or on premises at Forest Service expense.
>
> * * * *
>
> 3. CONFERENCE AND TRAINING AREA
>
> This space shall be finished to office standards with the following additions or exceptions:
>
> * * * *
>
> 4. Electrical outlets shall be installed as follows:
> (1) One 110V duplex outlet every 8 LF of wall space.
> (2) Two 110V duplex outlets to be provided 42" above the floor for audio visual equipment to be specified by Forest Service.
>
> 4. GENERAL SPECIFICATIONS - COMPUTER ROOM

This space shall be finished to office standards with the following additions or exceptions:

* * * * *

L. After award to the successful offeror the Forest Service shall locate terminal stations throughout the space. Location of these terminals will be placed on the plans for the installation of conduit by the owner. Computer cables will be run from these stations to the computer room. A 2 ft. tail shall be left at each terminal station. Two 1 1/4 inch conduits shall be installed in the computer room wall for computer wires to be run through. A terminal box shall be installed at the bottom of the conduits in the computer room. A 10 ft. tail of computer wire shall be left at this location. Each wire shall be identified as to its terminal station. A box shall be installed at each terminal station identical in type and height to the receptacle in place. Computer wire will be provided and installed by the Forest Service.

M. A 3/4 inch conduit shall be installed in the wall of the computer room for phone wires to be run through. A terminal box shall be installed at the bottom of the conduit. The Forest Service shall locate the conduit location for the owner on the plans before construction.

(AF D 15-17.)

6. The solicitation package continued with the next section where the pages were designated as CC. The following is from that section.

2. GENERAL BUILDING REQUIREMENTS AND SPECIFICATIONS

a.. General Architectural

5. Type of Building:

* * * * *

. . . Unless specifically exempted elsewhere in this solicitation or by written statement of the Contracting Officer, any building being considered in whole or part for lease must, as a minimum, meet local building and fire codes, standards in the Occupational Safety and Health Administration, and other Federal requirements applicable to new privately owned buildings with a classification equivalent to that type of space specified in this Solicitation. Where requirements conflict, the more stringent requirement will prevail.

> All construction and operation in new or existing buildings must be in accordance with the following codes and standards as applicable.
>
> a. Uniform Building Code (UBC)
> b. Uniform Mechanical Code (UMC)
> c. Uniform Plumbing Code (UPC)
> d. National Electrical Code (NEC)
> e. National Fire Code (NPPA)
> f. Southern Building Code (SBC)
> g. Building Officials & Code Administrators International Inc. (BOCA)
> 8. Local building and health codes that may be more stringent than those codes listed above.

(AF D 19.)

> 6. Plans and Specifications
>
> * * * * *
>
> B. After award the successful offeror will be requested by the C.O. to furnish, within 14 days a floor plan . . . of the space offered. The plan shall show the location of all windows, mechanical equipment rooms, restrooms, doors, stairwells and elevators. Upon receipt of this plan, the Government will show location of walls, doors, electrical outlets, work station location and return to the successful offeror so that construction may begin.

(AF D 20.)

7. In the same section as above, the solicitation identified at paragraph 12, titled Handicapped Accessibility, various requirements relating to that subject matter (AF D 21). Paragraph 12 had 6 subparagraphs, designated as follows: A. Parking; B. Walks; C. Ramps; D. Entrances; E. Stairs; and, F. Handrails. Nothing in these paragraphs specifically addressed corridors, however, at least one main entrance must be handicapped accessible and implicitly be connected to some other accessible space or spaces within the building. (AF D 22.) At paragraph 15, titled Wall Covering, the provision noted that the walls could be covered with either paneling, vinyl wall covering, or paint, except for the reception area and the Ranger=s office. Those two areas were to be covered with paneling or vinyl wall covering as selected by the CO=s Representative (COR). The colors were to be approved ultimately by the CO. (AF D 23.) Paragraph 26 of this section was titled Carpet. Within the description under Paragraph 26 was the following sentence, ALessor shall be responsible for carpet replacement as required throughout the term of the lease.@ There, however, was nothing in the lease which specified any schedule for that to be done. (AF D 24.) Paragraph 31, titled Drinking

Fountains, is also of note. It is of note because it contains very specific directions as to placement and size to accommodate the handicapped, including floor space around the fountain and the fountain=s height. (AF D 25.) Similarly, paragraph 32, Restrooms, also addresses handicapped access in detail in its subsection C., Handicapped, which includes the following:

> All toilet rooms must be located along an accessible path of travel and must have accessible fixtures, accessories, doors and adequate maneuvering clearances. The interior will allow an unobstructed floor space of 5 feet in diameter, measured 12 inches above the floor. At least one men=s and one women=s toilet room on each floor where the Government leases part of the floor, or all toilet rooms where the Government leases the entire floor must have one toilet stall that:
>
> > Is three feet wide.
> > Is at least 5 feet but preferably 6 feet deep.
> > Has a door (where doors are used) that is 32 inches wide and swings out.

In addition to the above, there are numerous other specific size requirements. (AF D 25-27.)

8. Continuing in the same portion of the solicitation the provisions contain the following:

> 37. Electrical: Distribution
>
> Duplex floor and wall electrical outlets must be provided for as specified by the Government. Fourplex outlets may be required in specified locations. . . .
>
> The Government may locate outlets where desired; 220 volt electric service must be available on all floors. Switchgear, fuses and circuit breakers must be plainly marked or labeled to identify circuits or equipment supplied through them.
>
> 38. Telephone Equipment
>
> The successful offeror must allow the Forest Service access to the premises to install its equipment, conduits, cable, etc., and must provide location for the installation of the required telephone switching equipment. The Government will make arrangements for furnishing all necessary appurtenances and will coordinate the installation of the equipment with the Lessor during building renovations or construction. The Government will insure that installation of all telephone systems and necessary equipment will be in compliance with State, County, and /or local codes and ordinances and will be responsible to the Lessor for any damage to the building caused by installation of the telephone system.

(AF D 28.)

9. Subsection E, noted in the table of contents at (AF D 7) was titled Inspection and Acceptance. It stated in the first sentence, AThe unconditional acceptance of an offer received to the solicitation establishes a valid contract extending to all covenants of the solicitation offer, and acceptance between the offeror and the Government.@ (AF D 38.) It then continued that at all times after receipt of the offer, the property would be accessible to the CO or technical personnel to determine that the essential requirements of the solicitation or lease were met (AF D 38).

10. The next pertinent section of the solicitation package, was designated as GENERAL CLAUSES (Acquisition of Leasehold Interests in Real Property) (AF D 48). The following from this section are pertinent.

> 2. 552.270-29 TERMINATION FOR DEFAULT (JUN 1985)
>
> If the Lessor fails to prosecute the work required to deliver the leased premises ready for occupancy by the Government with such diligence as will ensure delivery of the leased premises within the time required by the lease agreement, or any extension of the specified time, or if the Lessor fails to complete said work within such time, the Government may, by written notice to the Lessor, terminate the lease agreement. Regardless of whether the lease is terminated, the Lessor and his sureties shall be liable for any damage to the Government resulting from his failure to deliver the premises ready for occupancy within the specified time.

(AF D 48.)

> 14. 552.270-19 ALTERATIONS (JUN 1985)
>
> The Government shall have the right during the existence of this lease to make alterations, attach fixtures, and erect structures or signs in or upon the premises hereby leased, which fixtures, additions or structures so placed in, on, upon, or attached to said premises shall be and remain the property of the Government and may be removed or otherwise disposed of by the Government. If the lease contemplates that the Government is the sole occupant of the building, for purposes of this clause, the leased premises include the land on which the building is sited and the building itself. Otherwise, the Government shall have the right to tie into or make any physical connection with any structure located on the property as is reasonably necessary for appropriate utilization of the leased space.

(AF D 49.) In addition to the above, this portion of the package contained, at paragraph 9, Inspection of Premises, Deviation, which required the property to be accessible for Government inspection during construction, so that the Government could determine whether the essential requirements of the solicitation were being met (AF D 49). The package also contained at paragraph 17 a clause titled Changes (AF D 50).

11. Finally, on a document titled EVALUATION FACTORS FOR AWARD, the package advised proposers of various factors that would be taken into account in evaluating the successful offer. Six technical factors were listed in order of importance, the first being Handicapped Facilities. After directions as to price and as to other matters the Government placed the following:

> Handicapped Facilities
>
> The Government will give the most consideration to those offers that fully meet the requirements contained in the current GSA Accessibility Standard.
>
> In the event that offerors do not meet this Act, (42 USC 4151-4157), they could either be rejected or, where appropriate, priority will be given to that space which most substantially meets the requirements. If more than one offer which most nearly meets the full standard, then preferences will be given to that offer which most nearly meets the full standard.
>
> In the event that offerors do not meet the Act (42 USC 4151-4157) an award will be made on the basis of the offer most advantageous to the Government which satisfies the other requirements of the solicitation including consideration of the extent to which offers can meet accessibility standards for entrances, elevators, toilets and water fountains.

(AF D 85-86.)

12. As noted above, the Plans and Specifications section of the lease (AF D 20) called for the offeror to furnish with their offer a site plan, a diagram showing the physical appearance of the existing and planned building, configuration of the space in the building and location of corridors. The solicitation continued that after award, the successful offeror would be requested by the CO to provide a floor plan showing windows, mechanical equipment rooms, restrooms, doors, etc. Upon receipt of that, the Government would show location of walls, doors, electrical outlets and work station locations. Further, paragraph 28 of the lease, titled Layout and Finishes, provided that the Government will deliver layout drawings within 45 days after award. (AF D 25.) As is pointed out below, the above did not happen.

13. The first reported date of negotiations with Mr. Holbrook was on October 6, 1989, with the FS represented by Mr. David Trull (the CO), Mr. Alsobrook and a third individual (AF C 18-19). At the time, Mr. Alsobrook had just been assigned as the FS Ranger (head of the office) at Etowah (Tr. 125). In the memorandum of negotiations prepared by Mr. Trull on December 1, 1989, he referred to negotiations on October 6 and stated that at the time of those negotiations, AAll critical items of the SFO were reviewed.@ (AF C 18-19). At that time (October 6), the FS had from the Appellant, a breakdown of costs for various aspects of construction. The breakdown which had been provided to the FS on or about September 10, 1989, was used by the FS for evaluation purposes. (AF D 111.)

14. Appellant submitted a written offer dated October 13, 1989. The Appellant did not provide its own site plan with that offer. In the October 13 offer, the Appellant stated that among other things, it would not provide blueprint preparation, fencing and services of a civil engineer. These were items that had been specified in the solicitation by the FS. In addition, Appellant conditioned and specified a number of other items, among which was that he would exclude partitions in the toilets, noting that Aonly one commode provided in each toilet (handicapped) and one urinal in mens.@ (AF D 111-22.) The FS then proceeded to continue to conduct negotiations with the Appellant and the one other offeror. At that time, it appears that all parties were working off of the original Alsobrook sketch. (AF C 18-19.)

15. During negotiations with the two offerors for the lease, Mr. Alsobrook prepared a second sketch, dated November 1, 1989 (Exhibit (Ex.) A; Tr. 22). The drawing reduced the size of the building from the earlier drawing, reconfigured and altered the space, and included specific room dimensions. It continued to show the 36-inch hallways which had been included on the prior sketch. (AF D 72; Ex. A.) We take notice that to meet the room sizes designated at that point by the FS and given the footprint of the building, a change to the 3 foot hallways would have required a change in either the building size or designated room sizes.

16. In a letter of November 3, 1989, Mr. Holbrook wrote to the FS regarding the above November 1 floor plan. He stated that the letter superceded all previous bids and letters to that date and said, AI have received a new floorplan of proposed Forest Service Building in Etowah, Tennessee. I understand that this new floorplan reduces size of building to 3200 SF and net usable space to 2762 SF. I agree to construct building by this floorplan. I agree to lease 2762 SF at $10.46 per SF of usable space under the following conditions.@ In this opinion, we need not address the conditions noted by Mr. Holbrook, since they are not material to the dispute in the various appeals. (AF D 87.)

17. On December 6, 1989, the FS accepted by letter from the CO, the Appellant=s Best and Final offer to furnish 2,762 square feet of net usable office space. Mr. Trull stated, AYou are cautioned that all work must meet the requirements cited in Solicitation No. R8-89-26. The building must also meet the requirements of the Uniform Accessibility Standards (8/84) as well as state and local accessibility codes.@ (Tr. 54.) Mr. Alsobrook was named the COR for the contract and a copy of the COR designation was included with the award letter. The COR designation contained a number of limitations on Mr. Alsobrook=s authority. (AF C 16-17.)

18. At the time Mr. Holbrook received the award letter he was not knowledgeable as to the specific requirements of accessibility codes, nor did he take steps to acquire that knowledge. He did not ask the FS for copies of the referenced codes. (Tr. 54.)

19. Soon after award, on or about December 13, 1989, Mr. Alsobrook prepared a third floor plan. This was similar in configuration to the prior two plans but was not identical. On this plan the FS did not set out the specific room dimensions, as was the case on the earlier drawing, however, the size of the rooms were clear by using the graph paper, which had each square as one foot. Using that unstated scale, the hallways remained at 3 feet. Further, some of the room dimensions on this

plan differed from the earlier plan. (AF D 89.) This new plan however did add new information. It located and identified where the Appellant was to place doors and windows. (AF D 89.)

20. At some point after December 13, again after award but before the start of construction, yet another floor plan was prepared. This plan (Ex. C) used the earlier December13 plan, however, it added information as to wiring, outlets and telephone. The new plan at the upper left hand corner listed 18 computer terminals, 20 phone outlets, and 12 radio outlets. It called for 110 of the 110 outlets and three of the 220 service outlets. The location of the items was set out in the drawing by use of the following symbols: R for radio; DT for desk telephone; WT for wall telephone; C for computer terminal; a circle for 110 outlets and a circle with an x for 220 outlets. (Ex. C.). Nothing on this drawing indicated at what height various items were to be placed, although, we take notice that a wall phone will generally be set at approximately chest height. It is of note that at least at one location, the conference room, the specification noted special heights for wall penetrations. There the specifications said for the electrical in conference and training area, a 110 outlet was to be set at every 8 linear feet and two were to be set at 42 inches above the floor for audiovisual use. (AF D 16.)

CONSTRUCTION OF THE BUILDING

21. In January 1990, Appellant proceeded on the construction of the building. Although Mr. Trull was the CO, Mr. Holbrook had no direct communications with Mr. Trull during construction. (Tr. 23.) To the best of Mr. Holbrook=s recollection, as of the time the lease was terminated, he had seen Mr. Trull on only two occasions, the first when Mr. Trull was in the area looking over properties (pre-award) and the second, when Mr. Trull came back for the final inspection after the construction was completed (Tr. 23). Appellant, however, dealt with Mr. Alsobrook on a regular basis (Tr. 23, 130). During construction Mr. Holbrook would obtain and ask for Mr. Alsobrook=s input (Tr. 130). Mr. Alsobrook stated that during construction, he was in regular contact with Mr. Trull and would have spoken to him every 3 or 4 four weeks (Tr. 149). In regard to his knowledge as to contacts between Mr. Trull and Mr. Alsobrook, Mr. Holbrook said he knew that Mr. Alsobrook was in contact with Mr. Trull. By way of amplification, he noted that he had put in a bigger breaker box in the computer room than called for in the specifications. Although the solicitation called for a 60 amp. box, Mr. Holbrook and his electrician were concerned that there was too much equipment for that size box to carry the load. They therefore decided to put in a 100 amp. box with appropriate wiring going to it. Mr. Alsobrook talked to Mr. Trull about it. Mr. Trull said that the FS would turn down the building if it did not precisely meet the solicitation. Mr. Holbrook had to take it all out and put in the 60 amp. box. (Tr. 109.) Mr. Holbrook stated that he did not know when the above conversation occurred in relation to his raising concerns over continuing with the 36-inch halls. What he did remember was that the breaker matter came up after the stud walls were up but before drywall was in. (Tr. 110.) Mr. Alsobrook was also questioned about the conversation with Mr. Holbrook relating to the electrical box change. He acknowledged a faint recollection of a matter involving an electrical breaker box, which had to be attached to a stud, and further stated that he did not doubt that the conversation happened. (Tr. 109-10, 149.)

22. The evidence shows that the building was generally constructed following the plan on Ex. C, the last of the four drawings made by Mr. Alsobrook. During the construction, Mr. Holbrook was at the site almost daily. According to Mr. Holbrook, he built it the way he was told by Mr. Alsobrook, who oversaw the job. At some point, during that construction, he got concerned that the building might be turned down because the halls were too narrow. He was looking through the solicitation and became concerned about codes. He testified that he expressed his concerns to Mr. Alsobrook. In response to Mr. Holbrook=s concerns, Mr. Alsobrook told Mr. Holbrook that he (Alsobrook) had drawn the plans and the CO Trull had okayed them. He told Mr. Holbrook not to worry. Mr. Holbrook could not give a precise date for the conversation. (Tr. 23-24) According to Mr. Holbrook, based on those representations from Mr. Alsobrook, he went ahead and completed the building per the drawings (Tr. 25). Under questioning from the Board, Mr. Holbrook testified that at the time he brought up the 36-inch hallways with Mr. Alsobrook, the studs were probably up but he did not know about the drywall (Tr. 106-07). It appears that the construction and coordination between the parties ran generally smoothly, with Mr. Trull being quoted as saying that this was one of the better leases he had been involved in and Mr. Alsobrook stating that Mr. Holbrook was a wonderful person to work with (AF A 20; Tr. 131). As to maintenance during the lease, Mr. Holbrook was very accessible and would readily and immediately get on any problems which the FS identified (Tr. 136). Finally, while noting it was not a construction contract, Mr. Alsobrook testified that he did think that a FS engineer came down on occasion and looked at the construction (Tr. 132). Mr. Alsobrook also recollected talking to the engineer about where the radio tower would go and to the communication people as to the location of telephones (Tr. 132).

23. Mr. Alsobrook acknowledged that during construction, he recognized that the walls were 36 inches, however, he did not specifically recollect the conversation described above by Mr. Holbrook. When he was asked if he recalled having a discussion with Mr. Holbrook about the narrowness of the hallways, he testified as follows:

> Quite frankly, I do not remember us specifically talking about that issue until, gosh, maybe after it was done and before we had accepted it. I don=t remember, I apologize. I wish I could. I have racked my brain hard to try to remember that conversation.

(Tr. 132.)

24. While he could not recall the specific conversation addressed by Mr. Holbrook, Mr. Alsobrook did recollect that at some point before the final inspection he was aware that there was a potential problem with the 36-inch hallways. He and Mr. Holbrook looked at it. (Tr. 132.) He had a faint recollection that it was brought about because of concerns about bringing in desks. At that point the drywall in the specific area was up (Tr. 150-52.) In addition to the above, at some point, the hall behind the reception area was changed to be wider than the 3 feet shown on the sketch (Tr. 135). Mr. Alsobrook said he did not remember having a specific discussion with Mr. Holbrook regarding hallways directly behind the entrance but did agree that the area behind the wall, which blocked the bathrooms from view, was built wider than the 3 feet shown on Ex. C. (Tr. 135). He

did recollect that there was a problem associated with what he thought might be 48-inch doors for the bathrooms at the hallway. In that regard, he said, in an attempt to explain why the hallway was wider, the following, Aat some point in time, I think that we felt, whether it was himself or whoever, that there possibly would be 48-inch doors in the bathrooms. I don=t know why we thought that. I went back and tried to remember that.@ (Tr. 150.) According to Mr. Holbrook the area in front of the bathroom was built wider than the other hallways to get to the handicapped rest room. He stated that he did not make the decision to change the size from the 3 feet shown on the drawings. He said that the COR, Mr. Alsobrook, made that decision. When challenged by FS counsel on the matter that the building was not built exactly according to the sketch in all instances, Mr. Holbrook stated that he built it the way he was told to build it. He also noted that in another location, a wall was moved 2 feet. That wall was between the open area and the FMO office. The larger hallway in the bathroom area was not modified during construction but rather was built that way before construction of the studding at that location had begun. In contrast, the wall at the FMO office was moved after the studding was in (Tr. 86-87, 99, 104). Other than that it was changed to make access for handicapped, Mr. Holbrook was unable to give many more details about the widened hallway. He was not able to place a time on the decision to widen the area, other than to say that construction in that area had not started (Tr. 99).

25. On a number of matters, Mr. Alsobrook either had no recollection or was very hazy as to matters occurring during construction and the lease. Evidence developed during the hearing showed that many of the nonremembered events or occurrences did happen. For example, Mr. Alsobrook initially could not remember if the FS put in electrical outlets or computer outlets after it occupied the building. (Tr. 137.) He said they may have, however, he could not specifically pinpoint anything that the FS had done (Tr. 137). On another matter, Mr. Alsobrook noted that it was not until he had looked at documents in preparation for the hearing that he found out that Mr. Holbrook had written a letter saying he was not going to blueprint the property. As he described it, because it was 10 to 11 years ago, he just did not remember what Mr. Trull and Mr. Holbrook had agreed to. (Tr. 131-32.) When asked if he had any discussions with Mr. Holbrook about the wider hallway behind the entrance (in front of the bathrooms), Mr. Alsobrook replied that he did not remember (Tr. 135). Based on the fact that Mr. Alsobrook did discuss the breaker box with Mr. Trull, we find it is virtually inconceivable that he would not have spoken to Mr. Trull before moving walls for handicap accommodation purposes.

26. During construction some of the work was done by Appellant and some by the FS (Tr. 110-13). Mr. Kiersted, who was a communications specialist for the FS at the time, said that the Mr. Holbrook installed the electrical wiring and the FS installed the radio, telephone, computer and paging systems (Tr. 169-70). During the time period that Mr. Holbrook=s electrician was putting in the electrical wiring, the FS was putting in the phone jacks and computer outlets (Tr. 177). As far as placement of various terminals, Mr. Holbrook testified that he placed the terminals in the positions shown on drawing Ex. C (Tr. 26).

INSPECTION

27. On April 27, 1990, a final inspection was held by the FS, which was documented in a letter of May 2, 1990, from Mr. Trull to the Appellant. There Mr. Trull pointed out a number of items that needed correction and completion by May 31, 1990. Included with the letter was a lease to be signed by Mr. Holbrook. The FS had calculated the net usable square feet as 2,900. Construction finished in May 1990. (Tr. 104-05.) The parties signed a lease which specified a date of lease of May 1, 1990, with an initial lease period of May 1, 1990, to April 30, 1995 (AF D 2-3).

28. In an internal memorandum to the Property and Procurement Director, Southern Region FS, from Randy L. Warbington, Facilities Engineer, Southern Region, dated July 3, 2000, Mr. Warbington provided further information as to events surrounding the acceptance of the Hiwassee Ranger District Office Lease. He attended the inspection in the spring of 1990, at the request of the Leasing Officer, Mr. Trull (the then CO). At that time, Mr. Trull told him that this was one of the best leases he had been involved in and he wanted Mr. Warbington to accompany him on the final inspection to assure that the construction met technical requirements of the contract prior to acceptance. Mr. Warbington stated that he recalled that the building had what he considered to be major flaws in the design, making it unacceptable for use as a Government facility. The halls were narrow and there were problems as to the restroom size and knobs and with meeting the accessibility standards. Mr. Warbington discussed this with Mr. Trull and with his own supervisor, who was also present. They agreed that widening the hallways would be very expensive. He was shown a floor plan on 8 2 @ by 11" graph paper which had been provided to the lessor by the FS and was part of the lease prospectus. He was told that Mr. Alsobrook and his staff had inspected the building periodically during construction and no major problems had been noted. FS officials and Mr. Warbington discussed the issue of implied acceptance. Mr. Trull eventually decided that while the building was not what would have been preferred, the FS was still able to use the building, since the public areas (front entrance, reception space and conference room) met ADA standards and since the women=s rest room could be designated as an accessible facility for both sexes. Therefore, Mr. Trull made the decision to accept the building, requiring only a few modifications, but not widening the hallways and doorways to individual office spaces. (AF A 20.)

29. The record also contains a memorandum to file from Mr. Alsobrook dated June 29, 2000, where he relates some of his recollection of events. He stated that as the FS representative it was his job to periodically inspect the various construction phases of the building and approve various items such as floor covering, paint colors, location of computers and telephone hookups. He then stated, AA Forest Service engineer inspected and approved the technical aspects of the construction.@ He described construction as proceeding without problems and continued that upon inspection in mid-spring three items were noted that caused concern, the handles of the doors were knob type rather than lever, the men=s bathroom did not have enough space to accommodate a wheelchair, and the halls were narrow, thus making Aall@ the offices in the building inaccessible. He concluded stating that the women=s bathroom would be designated as the handicapped bathroom, the handles on the conference room would be changed to lever, and the public areas would all be considered as meeting ADA. (AF A 19.)

30. After the lease was entered into and the building fully constructed, the FS, at various times, conducted construction operations in the building. More specifically, the FS added a new computer system (apparently telephone/computer system) which involved modifications to the outlets previously installed. Mr. Alsobrook recollected the FS putting in a new telephone system between 1994 and 1996 but could not recall if it resulted in more outlets. Mr. Kiersted, the FS communications specialist, confirmed that a new computerized telephone system was put in during 1995, and in doing that the FS added only one outlet, that being in the computer room. (Tr. 170.) Mr. Alsobrook also remembered a change in the computer system in 1999, but noted that he left around that time to take another position (Tr. 138-39). It is also undisputed that at final closeout of the lease, Mr. Kiersted pulled out computer and telephone wiring, he said at the request of Mr. Holbrook (Tr. 171).

31. On or about March 17, 1995, the FS exercised the option in the lease for the second 5 year term, thereby continuing the lease from May 1, 1995, through April 30, 2000 (AF D 1, 2). The parties agree that the lease contained a provision that allowed the Government to terminate the lease any time during the lease period, by giving 60 days notice (AF D 15). During the 10 years of the lease, the Appellant did provide maintenance with no serious problems encountered (Tr. 31-32).

32. At a point in time, approximately 6 to 7 years into the lease, Mr. Alsobrook called Mr. Holbrook into his office and said that the FS and Holbrook were going to have to do something about the halls before the next contract period. He said they were illegal. According to Mr. Holbrook, he agreed to widen the halls at his own expense. He said that Mr. Alsobrook suggested that he wait until a new contract. (Tr. 33.)

33. The FS acted to terminate the lease by letter of January 31, 2000 (AF C 15). There was a problem as to delivery; however, it is not disputed that the Appellant got the termination letter by February 11, 2000 (AF C 14). The letter which stated an effective date of February 3, called for the space to be vacated by April 3, 2000. That was more than 60 days from January 31, 2000, the date of mailing, but less than 60 days from February 11, 2000. However, as the FS correctly points out, the lease would have expired by its own terms on April 30, 2000, regardless of the notice. (AF D 1-2.)

34. By letter of March 3, 2000, Appellant responded to the FS notice terminating the lease and made several statements regarding promises made to Appellant in April 1990, that the FS would occupy the building for 10 years. The CO responded by letter of March 10, 2000 (AF C 12), explaining that the termination was due to reorganization actions of the FS. She referenced a telephone conversation on March 8, 2000, where she requested Appellant=s approval to extend the termination date from April 3 to April 17 and noted that Mr. Holbrook had agreed. (AF C 13.) The CO noted in her letter that Mr. Holbrook had mentioned that there were damages to the facility and she asked for documentation and also indicated she would be conducting a walk-through of the premises (AF C 13).

35. By letter of March 29, 2000, Mr. Holbrook wrote the CO and confirmed that he and the CO had agreed that the CO would be on site on April 3, 2000, for purposes of assessing property damage. According to Mr. Holbrook, he did not have a list of damages available at that time and he noted that FS personnel were still occupying the property and moving equipment from the building. He expressed concerns that additional damage might occur. He said a list of damages would be available to the CO at the onsite meeting of April 3. (AF C 11.)

36. By letter of April 3, 2000, Appellant wrote the FS regarding the April 3, 2000, meeting concerning damages. Mr. Holbrook stated that he had come from the meeting on damages and that the CO and Ranger had informed him that the FS was going to correct some of the damages incurred during the FS rental period. He continued, that AI must bring it to your attention that today is the last day of your lease. On account of liability and other reasons, I cannot have government employees or contractors on site after this date without legal requirements being met. Please contact me in writing so that we might negotiate terms for you or your agents= re-entry onto the property. Thank you very much.@ (AF C 10.)

37. On April 12, 2000, Mr. Holbrook again wrote to the CO. He noted he had received no reply to his April 3 letter. He referenced a contact that morning with a Mr. Marty Bentley, who was with the FS and who wanted to assess the damages. Mr. Holbrook noted that he agreed to an appointment for April 14, but then set out a series of conditions that the FS first had to adhere to. The conditions relate to liability matters, communications and some reimbursements. The sense of the letter is that Mr. Holbrook was expecting the FS to come in and make the repairs either on its own or through a contractor. More significant was that Mr. Holbrook contended that the FS, after April 3, and before the FS finished moving, had inflicted additional damages on the property. Six items were specifically identified. (AF C 8, 9.) It is also noted, however, that although no specific date is provided, that some point before Appellant re-took the building, the FS had Mr. Merrill, a technician, patch holes in the computer room (Tr. 195). Mr. Holbrook testified that he saw Mr. Merrill pushing wires back into the walls (Tr. 39-40).

38. By letter of June 12, 2000, Appellant wrote the CO responding to a telephone request by her to further inspect the property. Appellant agreed to that meeting provided it was limited to him and the CO. He was concerned that the presence of others would result in a lack of business-like atmosphere and pointed out that the property had been inspected on April 3 and photographed. He noted that it had been 70 days since the Government had vacated and he was asking for a decision on his first claim of April 3, 2000. (AF C 4.) Sometime prior to the June 12 letter, but when is not clear from the record, Mr. Holbrook provided the FS with a breakdown of damages, which was referred to by Holbrook and the FS as claim 1. This was for $37,301.50. The claim covered 29 separate items, some by room and other by activity. (AF B 1-4) Rather than laying out the total claim here, we defer that, until we address the individual items in our discussion of the CO=s decision in Finding of Fact (FF) 42.

39. By letter of June 19, 2000, Appellant followed up its April 12, 2000, letter. In this letter Appellant placed a dollar value on damages caused after the April 3, 2000, inspection. He also

submitted a claim for rent for the period of April 2000 through June 2000, pointing out that he had not received any funds or a decision on the damages to the property (those identified on April 3). In addition he discussed the 36-inch hallways. He stated that on the tour (April 3) he had brought to the CO=s attention the extremely narrow 36-inch hallways. He said that he was hoping that he could market the building without modifying them due to the expense and time involved. He said he could not market the property with them in that condition. He continued that he had brought these halls to the attention of Mr. Alsobrook during the construction phase of the building and told him that he was concerned that the halls did not meet specifications in building codes as outlined in the solicitation. In the letter Mr. Holbrook said that Mr. Alsobrook said that he had drawn the floor plan of the building and that David Trull (then the CO) had concurred so that there was no need to be concerned. At the time, Mr. Holbrook was under the impression that the FS would occupy the building indefinitely. He said that sometime later, after the FS was occupying the building, Mr. Alsobrook called him in and informed him that the hallway did not meet specifications of Government rental property and Appellant would need to make plans about widening the hallways before the next contract period. Appellant then concluded, stating: ARanger Alsobrook (COR) said he regrets making this decision now about the 36-inch halls and acknowledges that it was a mistake to build them too narrow. I want to emphasize that I had absolutely nothing to do with preparation of floorplan.@ Appellant then asked for $43,548.36 as compensation for hall modification. That included separate breakdowns for demolition, installation and material. The largest segment of this portion of the claim was $17,363.60 which Holbrook identified as loss of usable office space. In addition, Mr. Holbrook asked for the following: (1) Damage to lawn caused by backup of truck, ruts, $400; (2) damage when front desk was removed, which revealed further damage to wall and trim in amount of $300; (3) replacement of the mirror in the men=s restroom for $100; and, (4) replacement of the rear door due to damage, $450. He also claimed rent for April 3 through June 3, as he had not received any funds or decision on the damages. The rent claim totaled $5,055.66. According to Mr. Holbrook, FS personnel inspections documented the above damages on April 14, 2000. (AF B 5, Ex. D.)

40. On August 3, 2000, the CO issued two final decisions (AF 1-14). The first decision which this Board docketed as AGBCA No. 2000-175-3 (since renumbered to 2000-175-1), and which the FS called claim 2, involved the claim for damages to the property in the claimed sum of $49,854.02, provided to the CO on June 21, 2000. The components of the claim were set out on a chart which covered the following: lawn ruts claim of $400, replacement of trim when front desk removed of $300, broken mirror in men=s room of $100, damage to the rear door of $450, additional rent from April 3 to June 3 for $5,055.66 and compensation for hall modifications of $43,548.36. Of the above, the FS allowed $80 for replacement of trim, $100 for the mirror, and $450 for damage to the rear door. (AF A 10-14). Mr. Holbrook accepted those figures in his Complaint regarding Claim 2, dated September 19, 2000.

41. The FS addressed on the merits the items for which it denied payment. First as to the lawn ruts, the Government denied payment stating that an inspection of the site on June 21 revealed no damage. As to the claim for holdover rent, the CO reiterated that the notice of the termination of the lease was sent to Appellant on January 31, 2000. The CO stated that the Government in no way

prevented Appellant from conducting the sale of, releasing, or any other transaction of the facility. She stated that she did not request a AHoldover Tenancy.@ She further stated that each time a request was made by the FS to enter the premises, Appellant gave approval and permission, as well as was on site to witness all activity performed. (AF A 12.) As to the hallway issue, the CO cited the following in her decision. First she referred to the clause General Architectural 1, Type of Building (set out in pertinent part in FF 8) and cited the following language, A. . .When such hazards are detected they must be properly corrected at no expense to the Government. Unless specifically exempted elsewhere in this solicitation or by written statement of the Contracting Officer, any building being considered in whole or part for lease must, as a minimum, meet local building and fire codes, standards of the Occupational Safety and Health Administration, and other Federal requirements applicable. . . . Where requirements conflict, the more stringent requirement will prevail.@ She also cited page I-13, clause 20. 552.270-15 - Applicable Codes and Ordinances, which essentially calls for the lessor to comply with all codes and ordinances applicable to the ownership and operation of the building. (AF D 51.) She then asserted that Appellant under clause 6, Plans and Specifications, page CC-2, was supposed to submit a floor plan drawn to scale. She stated that the FS as a standard practice provides a conceptual drawing in most solicitations to all potential offerors to provide a general layout indicating the working relationship of the staff and to give a general idea for Ayour@ layout of space. She then pointed out that the acceptance letter of December 6, 1989, cautioned that work must meet requirements in the Uniform Accessibility Standards as well as state and local accessibility codes. She also said that where a conflict arises between specifications and drawings, the specifications are controlling. Finally she stated that AMore importantly, the contract does not provide for future use of the building. The Forest Service representatives only accepted and approved the building for its own occupancy and for the time period stated in the specifications.@ In her decision, the CO stated that a review of building codes in use during the time period of the construction indicated a minimum corridor of 44 inches. (AF A 12.) Appellant timely appealed and the matter was docketed at the Board as AGBCA No. 2000-175-1.

42. As noted above the CO issued two decisions on August 3, 2000. This second decision involved what had been considered Appellant=s claim 1, in the amount of $37,301.50. This too was timely appealed by Holbrook. It was docketed as AGBCA No. 2000-174-1. As with the other claim, the CO on this decision set out a chart addressing the various discrete claims. For the reception area, Appellant claimed $980 for patching 760 square feet of wall in the area where the FS had placed the Cherokee National Forest sign, as well as for the remainder of the reception area space. Appellant also claimed $755 for carpet damage and $70 for locks on thermostat covers. The FS allowed $170 for the sign wall damage and $70 for the locks. The CO denied any claim for carpet. Appellant asked in the Resource Clerk=s Office for wall damage of $395. The FS denied it. For the computer room, Appellant claimed $1,500, which included a drain line, computer wiring, plywood, electrical connections, ceiling tiles, sheetrock repair, wallpaper and ceiling tile repair. The FS allowed $100 which covered missing and damaged ceiling tile. In the men=s restroom, which included the soap dispenser torn from the wall and wallpaper damage, which the Appellant costed at $490, the FS allowed $30, that being for the soap dispenser. In the secured storage area, Appellant claimed $200 and $400, the latter to replace the solid core door. Both were denied, with the CO

saying the door had minor knicks and thus it was wear and tear. In the SSS office, where $725 was claimed, the FS allowed $7 for a missing switch cover and the labor to place it. In the Ranger=s office, where $745 was claimed the FS allowed $7, which again was for a switch cover and labor. As to the Appellant=s claim in this area for excessive computer and communication terminals, the FS said the terminals were part of conducting business. In the FMO office, the claim was $510 and the FS allowed $7. Since all that was identified in the claim related to sheetrock and wallpaper damage, the $7 is assumed to be a switch cover replacement. In the LEO office, the claim was $980 and the FS allowed $7, again we understand for switch plates. The FS denied Appellant=s claim for gouges and other wall damage in the hallway. Appellant had claimed $1,615. Appellant claimed in the open space area for holes in wall and for damage to carpet for a total of $1,646. The FS allowed $74 which was not for either wall or carpet damage. Rather, it was described as the cracked ceilings tiles (2), missing switch plates and cost of labor. The conference room damage claimed by Appellant was $1,130. It was denied. The mechanical storage room was costed by Appellant at $500 for wall damage. The FS denied it. The ORA office was a claim for $800 and covered damaged floor trim, electrical receptacle pulled loose, wall damage, and excessive computer and communication terminals. The FS allowed $90 for damage involving the floor trim and electrical receptacle. The FS broke it down to $20 for trim, $10 for paint, and $60 for labor for installation of trim. The TMA office was a claim for $800 for door trim damage and paneling damage, as well as wall damage and excessive terminals. The FS allowed $100 for the door trim. The claim for the office of Forester and Silviculturalist technician was for $1,170 and involved wall damage, covers missing, door missing, and excessive terminals. The FS allowed $114 for the missing door and device covers. The claim for office of Biologist and Co-Op was for $430 for wall damage and excessive terminals. The FS denied the claim. The kitchenette claim was for $350 which included both floor and wall damage. The FS denied it. The storage closet claim was for $110 for paint damage and it was denied. The fireplace claim for the mantel of $600 was allowed at $500. The claim for removal of the outside tower foundation at $5,000 was denied. The Appellant claimed $300 for window screens and the FS agreed to pay $100. As to the climate control for the computer room, which was priced at $3,000 by Appellant, the FS allowed $200. The electric box to operate the information sign was costed at $4,000 and denied. This involved more than simply the box and involved moving the sign, removing a wooden sidewalk and a retaining wall and reconstructing the area. The damage to the mountain stone wall was acknowledged by the FS but at $100 rather than the $300 claimed by Appellant. In addition, Appellant claimed $3,500 for the services of an electrician to remove all excess electrical wires, $2,500 to remove the cedar trees, and $1,500 for removing the recreation area. All these were denied. Finally, Appellant claimed $300 to remove refuse left by the FS and the FS agreed to that amount. In summary of the total claim of $37,301.50, the FS allowed $1,976. (AF A 1-13.)

43. Thereafter, on August 3, 2000, Appellant filed an additional claim for another two months of rent. The CO denied that claim on August 18, 2000. The Appellant appealed that denial which we docketed as AGBCA 2001-110-1. Thereafter, on November 4, 2000, Appellant filed a claim for $8,755.61 for rent for the time frame of August 4, 2000, to October 3, 2000. Of this, $5,055.66 was for rent and the remaining $3,699.96 was a claim for the fireplace, which Appellant said he provided at Mr. Alsobrook=s request, even though it was not specified by the FS. Appellant timely appealed

and this matter was docketed as AGBCA No. 2001-131-1. Subsequently, Appellant filed two more claims for holdover rent, those being docketed as AGBCA Nos. 2001-146-1 and 2001-148-1.

44. On January 3, 2001, the FS filed a Motion for Partial Summary Judgment. The motion identified AGBCA Nos. 2000-174-1 and 2000-175-1, and specifically addressed Appellant=s appeal of the CO=s decision on compensation for rent after April 30, 2000, and the appeal on the costs associated with the 36-inch hallways. Appellant responded to the FS motion on January 16, 2001. On March 26, 2001, the Board held a telephone conference with the parties. At that time, Appellant had secured counsel. The Board requested that the parties provide the Board with additional information as to the matters being addressed in the FS Motion and particularly explanations and details on who had access and occupancy of the building and explanations and details as to events surrounding the construction of the 36-inch hallways and the various floor plans. Each party provided a response to the Board=s request. (Administrative File AGBCA No. 2000-174-1.)

45. Appellant made its submission on April 18, 2001. Regarding Appellant=s claim of a lack of access and unavailability of keys (a prime element of the holdover claims), Appellant asserted that he would show that he did not retain a full set of keys to the building after the building was completed and turned over to the FS. Therefore, Appellant contended he did not have an opportunity to have keys made, after the originals were retained by the FS in April 2000. He had a key to the outside door only, which did not operate the inside locks. He did have actual physical access to the property after the FS vacated the premises on or about April 30, 2000. The FS did not physically occupy the property after April 30, 2000, however because of the ongoing controversy between Appellant and the FS, he did not feel he could occupy the property nor repair and attempt to re-let the property until this matter was resolved. Mr. Holbrook also asserted that Mr. Ed McDonald, the property procurement officer for the FS, specifically instructed him to not make any modifications or changes or repairs to the property during the pendency of the matter. (Administrative File. AGBCA No. 2000-174-1.)

46. The FS, in its April 17, 2001 response to the Board, asserted that Appellant had full access to the building after April 30, 2000. Only three interior doors had keys and only one, to a closet, was possibly locked. All FS visits after April 30 were with permission of Appellant. The final inspection was conducted on April 3, 2000, and was in the presence of Mr. Holbrook, his representative who videotaped the inspection, and the CO responsible for evaluating the property condition and any damages. (Administrative File, AGBCA No. 2000-174-1.)

47. As to the damages associated with the 36-inch halls, the Appellant in its letter of April 18, 2001, has stated that the FS solicitation packet he received from Mr. Alsobrook provided scaled drawings with 36-inch halls. The drawings were not prepared by Mr. Holbrook. Appellant says that after it started construction, no specific date identified, Mr. Holbrook expressed concerns to the COR about the hallway size and that they would not meet code. He contends that Mr. Alsobrook told him not to worry and further told him that the CO had concurred with the plans. Based on this, Mr. Holbrook proceeded. Appellant also contends that had he refused to follow the Government

directions regarding construction of the building, the Appellant ran the risk of default. (Administrative File, AGBCA No. 2000-174-1.)

48. Counsel for Appellant did acknowledge that the lease says that the building is to meet OSHA, local and various other national and regional building codes. Counsel, however, continued and pointed out that Aa clause in the contract allows a building to be specifically exempted from these codes if that exemption is contained elsewhere in the solicitation or by written statement of the contracting officer. (Page D:19).@ He also referenced the Plans and Specifications section of the lease that required the FS to show among other items, the location of all walls on the floor plan provided the offeror. Finally, he pointed to the Layout and Finish section of the lease which Arequired the Government to deliver layout drawings within forty five days after award is made.@ (AF D 25). The references in his letter are to the Appeal File. (Administrative File, AGBCA No. 2000-174-1.)

49. In its April 17, 2001, letter to the Board, the FS emphasized a number of points as to the hallway issue. It first referenced the lease provision calling on the contractor to furnish with its offer a diagram that showed configuration and location of corridors. It then referenced another provision which said that the CO would request the contractor after award, to provide a floor plan drawn to a scale and which would also show windows, mechanical equipment rooms, doors and some other features. That clause, however, then went on to provide that the Government would then show location of walls, doors, electrical outlets and other features and return that to the successful offeror so that construction could begin. (AF D 20.) According to the FS, the above provisions in the solicitation made it clear that the sketch (AF D 72 (8-15-89)) provided to offerors was not meant to satisfy nor waive other specifications in the contract. The matter, however, was still unclear at that point as to whether and to what extent the FS provided Appellant with information as to the location of the walls and doors and to what extent if any that changed or affected the 36-inch hallways. (Administrative File, AGBCA No. 2000-174-1.)

50. The April 17, 2001, FS letter stated that Mr. Alsobrook made a new sketch during negotiations which reduced the size of the building. The FS points out that Appellant, in its best and final offer, conditioned that offer on not providing Ablueprint preparation, fencing, services of civil engineer.@ According to the FS those conditions put Appellant at risk of not meeting the specifications. The FS then referenced the statement in the FS acceptance letter of December 6, 1989, which stated that the building was to meet Uniform Accessibility Standards and other codes. Finally, the FS pointed out that the acceptance letter also set out the authority of the COR and noted the COR could not negotiate for alterations or renovation work and could not approve change orders. (Administrative File, AGBCA No. 2000-174-1.)

ATTEMPTING TO RE-LET

51. The major problem in re-letting the building is the narrow halls (Tr. 33). Mr. Holbrook said that he started some cosmetic work, started to pull nails, brackets and such off the walls, tried to clean mildew stain in reception area, and started to pull the letters off of the stone wall. He said that

then, Mr. McDonald of the FS called him and told him that the FS wanted to have another inspection. (Tr. 33.) According to Mr. Holbook when he told Mr. McDonald that he had started to do repairs, Mr. McDonald said it would not be a good idea (Tr. 33). From that point to the date of the hearing, Mr. Holbrook performed no further modifications (Tr. 34). After the conversation with Mr. McDonald, there were two more inspections for damage, one on April 6, 2001, by Wayne Johnson and Jim Kirk of the FS; and another on April 26, 2001, by Mr. Simpson, counsel for the Government and Ms. Carter, the current CO. (Tr. 34.) Appellant said that his basis for holdover claims was that he was being told not to repair the damage and since there were then two more inspections, he should not repair until settled (Tr. 34).

ITEMS OF DISPUTE AND DOLLARS

52. As noted above, the FS terminated the lease effective April 2000. A significant portion of Mr. Holbrook=s claim and this appeal involves alleged damages to the property. In general, Mr. Holbrook arrived at the dollars in his estimate for property damages by using dollars quoted to him by suppliers, some professional estimates, and information out of the computer. (AF B 1-3; Tr. 35.) As set out in Appellant=s brief, the initial claim as to the leased premises was $37,301.50. Of that $1,976 was allowed by the FS and paid on the claim. That left a balance of $35,325.50. Of the remaining claim, $1,615 relates to damage to hallway walls. If the claim for modification of the walls (claim 2) is allowed, the $1,615 claim for hall damage would become a duplicate payment and as such would not be claimed, thereby modifying the disputed total to $33,710.50. In addition to the former figure, counsel for Mr. Holbrook also cited additional damages of $1,250 which Holbrook claims occurred after the April 3, 2000, inspection by FS personnel. The FS allowed $630 on that claim. Finally, the FS paid $500 against a claim of $600 for the fireplace mantel. Netting out those figures leaves a total claim of $34,210.50 for AGBCA No. 2000-174-1.

53. While the FS disputes all of Holbrook=s damages claim but for those agreed to in the CO=s decisions, the FS through Mr. Wayne Johnson, a FS engineer, prepared three repair estimates for work claimed by Holbrook. In each of the estimates, the FS showed what it considered would be fair costs, if the Board agreed with Mr. Holbrook that some of the damages were compensable. When we use the word Aallowed@ in relation to Mr. Johnson=s estimates, that does not reflect an admission of liability by the FS but instead, a quantification. Mr. Johnson=s estimates differ in that in the first estimate, provided under cover letter of September 4, 2001, Mr. Johnson used labor and material costs from Means (a construction estimating manual) without including what he described as locality adjustments. His second estimate included locality adjustments and also added wallpaper costs. His third estimate, dated October 18 was essentially the same as the second estimate; however, the wallpaper costs were removed. (Tr. 200, 219-20, 226-27.) Another difference between the estimates is that in the September 4 estimate, Mr. Johnson did not break down specific costs for labor, material, taxes, overhead and profit. Rather, in that estimate he provided a lump sum for the work. In most instances, when one takes the breakdowns on the October 18 estimate (without locality adjustment) and combines the numbers, the breakdown totals come within several dollars of the lump sum. For example, drywall patching is shown as a combined $5.50 a square foot on the September 4 estimate and when calculated on the October 18 estimate, it comes to $5.46. In a few

limited instances it is difficult to calculate non-locality numbers from the October 18 estimate. Accordingly, when referring to non locality numbers, we use the September 4, numbers, unless otherwise noted. For purposes of organization, we will follow the sequence used by Mr. Johnson in the estimate. The estimate covers all of the areas claimed by Appellant in AGBCA No. 2000-174-1. In explaining his dollar allowance for drywall patching, Mr. Johnson noted that the figure he used was reasonable on a volume basis. (Tr. 213, 224-28.) Before we proceed to discuss individual areas, several overall points need to be addressed in order to understand how the parties approached the damages, particularly as to estimating costs for drywall damage. The primary numbers used by the Board in this decision are the non-locality numbers used in Mr. Johnson=s estimate of September 4, 2001. Whenever references are made to Mr. Johnson=s estimate or cost we are using the non-locality numbers, unless otherwise noted. All three estimates are in the Administrative File for AGBCA No. 2000-174-1. (Tr. 224.)

54. It is Appellant=s position, and reflected in his costing, that where there are holes on walls that require patching, he cannot match up wallpaper and the entire room needs the existing wallpaper removed. Appellant also takes the position that there is a good chance that removal of the wallpaper will tear up the sheetrock behind it and therefore will require new drywall and all that follows. (Tr. 36.) Accordingly, but for some exceptions, every time Appellant has patching and wallpaper coming down, Appellant=s claim included replacing sheetrock (Tr. 55-56). FS witness, Mr. Merrill, testified he was familiar with sheetrock work and acknowledged that sometimes when one takes down wallpaper, the sheetrock underneath will be damaged. He did not, however, conclude that every time wallpaper was removed the sheetrock had to be replaced. (Tr. 193.) Mr. Johnson also disagreed with the commercial reasonableness of removing sheetrock because of removing wallpaper (Tr. 202). The FS did take a position as to the cost of drywall repair. In the estimate of September 4, Mr. Johnson used $5.50 a square foot. In his estimate of October 18, he used $.31 per square foot as unit price for material and $3.24 per square foot for labor. The sum, however, does not include various markups such as labor burden and overhead or profit. In that regard, Mr. Johnson used approximately a 30% labor burden (which he called labor taxes) and overhead and profit at 10% respectively. (Tr. 205-06; October 18 Estimate.) Also, Mr. Johnson stated that he used Means guide for general pricing. He then stated that he used a locality factor for Chattanooga of 62% (that being that labor costs in Chattanooga were 62% of Means rates). That is reflected on the estimate where he specifies ALocation Factor.@ He further justified using the location factor, on the basis that Means uses union labor and big city costs. (Tr. 206.) On materials he concluded that costs in the Chattanooga area were close to the national average (Tr. 207). When the above sums and markups are calculated, they come to $5.46, virtually the same as the $5.50 in the September 4 estimate. Mr. Johnson=s estimate on the drywall was done on a volume basis and he acknowledged that on a small job the cost might be higher because of the number of passes required as to patching. (Tr. 215.) There was no evidence that Mr. Johnson had conducted any independent investigation of labor rates in the local area, nor had he investigated what amounts Mr. Holbrook had paid for various items. It is of note, however, then when questioned as to the estimate used by Mr. Holbrook for the hallway replacement, Mr. Johnson stated that it appeared to him to the costs shown by Mr. Holbrook were not unreasonable. (Tr. 227.)

55. Another common theme involving damages to the property relates to chest high holes in the walls, generally the size of an outlet or fixture wall plate. Generally, these were for telephones. Appellant claims in many instances that the number of holes was excessive. There are a significant number of chest high holes in the walls, as is evident from photographs and the video. There are also a large number of outlets throughout the structure. According to Mr. Holbrook, he complained to the FS about the number of outlets being put in and particularly the ones at chest level. (Tr. 58.) He said that the rectangular holes in the walls that were shown on the video at chest height were not put in by him but rather were put in by the FS two or three years before the FS ended the lease. The FS did not contact nor discuss the work with Mr. Holbrook before it was done. (Tr. 26, 27.) The testimony of Mr. Kiersted was that the chest high terminals were for telephones and were put in during construction (Tr. 177).

56. There is no question that the contract contemplated the FS installing portals and electrical outlets as well as various communications and computer terminals. The contract, however, did not specify an amount (except that electrical outlets in the conference room were to be placed at 8-foot intervals). The number and placement of outlets and terminals were determined by the FS after the award of the contract. The FS did not designate phone placement until some time after December 13, 1989, using Ex. C. Mr. Holbrook said that he was not contesting the right of the FS to make the installation. Rather, he was challenging the instances where holes were excessive. Mr. Holbrook did not consider that to be permitted under the contract. (Tr. 39, 56-59.) There were 10 wall telephones shown on Ex. C. According to Mr. Kiersted, two more were added, when the FS went to a computerized system. (Tr. 182.)

57. Regarding the matter of wall damage, the FS has taken the position that nail holes for hanging pictures are clearly wear and tear (Tr. 56, 187). The FS contended that wallpaper has a life expectancy of 7 years and thus at the time of the termination, the wallpaper had already exceeded its expected life (AF D 124, 128; Tr. 201). The FS also notes that the Appellant was responsible for painting portions of the building every 5 years and did not do that during the lease (AF D 23).

58. One final point before addressing the individual rooms as to alleged damages. Appellant prepared a video which was reviewed by the parties and Board at the hearing. The FS was given the opportunity to supplement the record with its own video after the hearing. The FS opted not to do that.

AGBCA No. 2000-175-1

59. The damage claim for the reception area involves three items: the carpet, the wall, and locks on thermostat covers. At the close of the lease there was a significant mildew stain on the carpet in the reception area which started at the door and covered an area of approximately 18 square yards. The surrounding carpet was not affected by the stain. Appellant alleged that the mildew stain was directly attributable to some type of mat being placed on the carpet by FS personnel. (Video; Tr. 59-61.) Mr. Johnson, the FS expert as to costing agreed that placing such a mat would lower the life expectancy of the carpet (Tr. 221). Mr. Holbrook testified that he tried to clean up the mildew area,

but the area would not match up to the rest of the carpet (Tr. 60). Mr. Holbrook contended that he should be able to replace 168 square feet of carpet in the area, the FS described it as 42 square yards. (AF B 1, October 18 Estimate.) Because a segment of the carpet at the entrance was mildewed, Mr. Holbrook asked for replacement of the entire reception area since the carpet could not be matched. Damage to the carpet in the reception area was worse than damage to the rest of the carpet in the building. Mr. Holbrook asserted that the rest of the carpet, but for one other area was not damaged and still suitable for use (Tr. 110-11) The carpet throughout the building was original. The solicitation addresses carpet at paragraph 26, where it states that the Lessor shall be responsible for carpet replacement as required through the term of the lease, however it does not specify any schedule for replacement. In the CO=s decision on this matter the FS took the position that the carpet damage was ordinary wear and tear. (AF A-1-13.)

60. The second part of the reception area claim involves the wall damage which Mr. Holbrook quantified as 760 square feet. (B-1.) Prior to vacating the property, the FS had a sign on the wall one sees upon entering the room, which was made of individual letters with the large lettering on the top stating Cherokee National Forest and the smaller, but still substantial, lettering on the bottom saying Hiwassee Ranger District. The sign appears to be about 8 feet in width. The wall itself was approximately 11 feet in width. (Ex. C: Video.) The signs were put up with glue and nails. When the letters were taken down, the wallpaper and to some extent drywall behind it was removed. It also left unsightly holes. In addition to the damage from the sign, the Appellant claims that there is an excessive number of outlets and connections in the room, a number of which would need to be closed by patching. There were nine terminals or receptacles in the lower portion of the wall of the reception area and one slightly higher up. According to Mr. Alsobrook there was some type of built-in desk, which would have hidden the outlets from the sight of one coming into the building. On Ex. C, the outlet floor plan, the sheet showed five outlets which appear to be both computer and electrical. According to Mr. Alsobrook, these five outlets were to reflect extra outlets at that location in the front desk, to take care of more machinery or office equipment than usual. Nothing on Ex. C indicated any high wall placement for telephone or other outlets. (Tr. 147; Ex. C; Video.) In addition, the walls in the reception area have numerous molly bolt size holes, which are clearly visible to the naked eye. In Mr. Johnson=s estimate, he shows 40 square feet of patch and repair of drywall, saying the FS should be responsible for significant damage only and that the filling of nail holes, etc., is included in surface finish (wallpaper and painting). Mr. Johnson=s price for drywall patching throughout the building was $5.50 a square foot. In the CO=s decision, the CO acknowledged that the sign removal would cause damages to sheetrock when taken down. The CO included $120 for labor and $50 for material for this item. The CO, in the decision, took the position that patching due to excess outlets was not the responsibility of the FS. The 40 square feet allowed in the CO=s decision and identified in Mr. Johnson=s estimate appears to us to include nothing for excess outlets. As to the thermostat, in the CO=s decision the CO allowed $70 (AF A 1-13; Video; September 4, Estimate).

61. In the Resource Clerk=s Office, a 12-foot-by-10-foot-room, the video shows a large hole in the wall at chest height. The hole would be for a wall telephone in this room. (Ex. C.) The number of outlets shown in the video was consistent with that on Ex. C. On the one wall which included

three outlets, Ex. C showed one for electrical, one for the radio and one for computer. (Video, Ex. C.) In his costing estimate, Mr. Johnson used 2 square feet of wall repair. The CO considered this room as ordinary wear and tear and gave no allowance. (AF A 1-13; Video; September 4, Estimate.)

62. The video showed the following in the computer room. There are two chest high holes with no plates. Nothing on Ex. C shows high terminals. There is a drain left from the climate control system that was in the room and that drain comes through the wall and is visible. In this room some of the wires were put behind the wall and then mudded over. This was done by Mr. Merrill of the FS who was not an electrician nor licensed in any building trade. Some wall plates and floor molding are damaged. The floor molding appears to be 8 feet or more. There is some electrical wire hanging loose behind the ceiling tile and the ceiling tile in the computer room has broken apart. (Video.) In the computer room Mr. Alsobrook said that he had put extra outlets on the sketch because one of the functions was computer training, so they needed extra outlets. (Tr. 146,195.)

63. The FS stated that all of the items such as drain line, computer wiring, plywood, electrical connections, ceiling tiles and sheetrock repair were part of the solicitation requirements under C-2, 4, General Specifications. The FS agreed that for missing and damaged ceiling tiles, Appellant would be entitled to $100 for material and labor. That is the only item allowed. In his estimate, while not admitting liability, Mr. Johnson shows patch and repair drywall of 2 square feet, as well as the removal of the condensation drain sticking through the wall, 16 broken ceiling tiles, and disconnect for one electrical wire. His price was $5.50 a square foot for patching and an additional $54.19 for removing the condensation drain. This was based on Mr. Johnson=s view that it would take a plumber less than an hour Mr. Johnson estimated it would take one-half hour for an electrician to disconnect the electrical wires and he priced that at $17.15. There is also 8 linear feet of floor molding at $6.57 for labor and material without markups. (AF A 1-13; September 4, Estimate; October 18, Estimate.)

64. The men=s restroom did not look to be in good repair on the video. However, this was common space and we take notice that it would logically have heavy use. Mr. Johnson included $72.03 for material and labor for the missing soap dispenser. The FS in the CO=s decision had allowed $30 for the soap dish using catalogue prices. The rest was considered wear and tear by the FS. Mr. Johnson identified some limited drywall in his cost estimate, estimating 2 square feet. (Video; September 6, Estimate.)

65. In the secured storage room there was significant damage to both hinge areas on the door. There is a large area of mildew damage on one of the walls. The CO called the damage ordinary wear and tear. Mr. Johnson priced replacing the door at $260.78 for the material and labor. (Video; September 4, Estimate.)

66. The damage to the SSS office is again wall damage, with at least one chest high hole. Ex. C shows no high terminals. The holes in the remainder of the room are consistent with Ex. C. The FS considered this ordinary wear and tear and noted that the missing switch cover was allowed for $2

for the cover and $5 for the labor. The CO said that computer terminals and communication terminals are parts of doing business. Mr. Johnson allowed no paneling damage saying that the communication wiring had been taken out at the request of the owner and can be covered with a blank cover. (AF A 1-13; Video; September 4, Estimate.)

67. In the Ranger=s office there are two chest high holes in the wall and five outlets or terminals in the paneling. The CO saw this wall situation as ordinary wear and tear but did allow for the missing wall switch cover at $7 for labor and material. The CO in the decision denying compensation, said that the number of computer and communication terminals were part of doing business. In his calculation of costs Mr. Johnson used a possible 4 square feet of patching. Ex. C in the Ranger=s office does show a wall telephone and the number of terminals put in are otherwise consistent with Ex. C. (AF A 1-13; Video; September 4, Estimate.)

68. In the FMO office, there is a large hole in the chest high wall. This room, sized at 10 by 12 feet, showed five electrical outlets and three specialized outlets in walls. The CO allowed $7 for switch cover. Mr. Johnson used 2 square feet of patching. No wall telephone was shown on Ex. C. (AF A 1-13; Video; September 4, Estimate.)

69. There is a broken ceiling tile in the Legal Enforcement Office. The Appellant has a claim for paneling, but nothing on video appeared to show more than wear and tear. The CO allowed $7 for the switch cover replacement. Mr. Johnson used 2 square feet here for drywall work. Again, there is a chest-high hole. (AF A 1-13; Video; September 4, Estimate.)

70. There are various scratches on paneling in the hallway. The CO saw this as ordinary wear and tear and that is supported on the video. (AF A 1-13; Video.)

71. In addition to claiming for the reception area, Appellant also claimed for what was described as the open area. In that area, there was a tear in the carpet. Based on Mr. Johnson=s estimate there is approximately 36 square feet in this area. Mr. Holbrook stated at his deposition that he assumed the tear at the seam was done by the FS moving furniture or some other item across the carpet (April 26, 2002, Deposition at 52). Mr. Johnson of the FS testified that in his opinion, it was a seam that was coming unraveled, which he did not find uncommon, especially in a high traffic areas (Tr. 202). He described the normal life expectancy of carpet as 11 years. The lease ran 10 years. (Tr. 201.) The tear looks to be more than simply a seam and this is an area that but for the tear would have been usable (Video). In making his conclusion on the carpet, Mr. Johnson said he did not do a close investigation (Tr. 202). But for the tear, the rest of the carpet in the vicinity was not damaged and would have been suitable for continued use (Tr. 110-11; Video). As to costing, Mr. Johnson, (October 18, Estimate) used $19.75 a square yard and $4.62 for labor per square yard for the carpet. The paneling had a large chest high hole. There are four damaged ceiling tiles. The CO considered all claimed damage in this area as wear and tear with the exception of the two cracked ceiling tiles and the missing switch plates for a total of $74. The conference room showed one wall telephone on Ex. C. (AF A 1-13; Video; September 4, Estimate; October 18, Estimate.)

72. In the conference room, there was also damage to the wallpaper from shelving placement. Mr. Johnson showed 6 square feet of drywall patching. There were also two chest-high holes. The CO says ordinary wear and tear. The specifications indicated that there would be two 42 inch-high outlets in this particular room. This was the only room where that was so noted. On his Ex. C, Mr. Alsobrook put in a total of 20 outlets and terminals in this room. (AF A 1-13, D 17; Video; September 4, Estimate.)

73. There is patching needed at a wire in the mechanical room. The CO described the condition as ordinary wear and tear. However, in his estimate, Mr. Johnson used 20 square feet of patching. There is extensive FS patching that was carried out in this room, however what is behind the patching is unknown. (AF A 1-13; Video; September 4, Estimate.)

74. In the ORA room, there were three outlets on the floor and one on the wall. Here the CO said that damages to the floor trim and electrical receptacle are allowable. She allowed $20 in trim, $10 in paint, $60 for labor for the installation of the trim and receptacle. In Mr. Johnson=s estimate, he had 2 square feet of drywall and 8 linear feet to repair floor trim, the latter. which he totaled at $13.99 for labor and material. (AF A 1-13; Video; September 4, Estimate.)

75. The CO allowed $100 in the TMA office. There are three outlets on one wall and one chest high terminal. Ex. C shows a wall telephone. Appellant claimed that paneling in this room needed to be replaced. (AF B1-2.) In Mr. Johnson=s estimate, he used 2 square feet of drywall and 16 linear feet to replace the door trim. His total for the door trim was $40.76. (AF A 1-13; Video; September 4, Estimate.)

76. There are several holes in the wall in the office of the forester. A door was taken out but then returned. The door however needs to be installed. The CO said that the missing door and device covers for communication devices (holes in the wall) are allowable at $114. The rest was described as wear and tear. In Mr. Johnson=s estimate, he put in $43.26 to install the door and had 2 square feet of drywall patching. (AF A 1-13; Video; September 4, Estimate.)

77. There are six low terminals in the Biologist=s room and two chest high wall terminals. There are also a number of visible nail holes. The FS says wear and tear. Mr. Johnson allowed 2 square feet of drywall. (AF A 1-13; Video; September 4, Estimate.)

78. In the kitchen there is floor damage around where the refrigerator sat. There is also some wall damage. The FS says wear and tear. Mr. Johnson estimated $121.56 in costs to replace the floor, which he estimated at 24 square feet. Mr. Johnson blamed some of the floor damage on a bad expansion joint in the concrete at that location (Tr. 203; Video; September 4, Estimate.)

79. The FS denied any liability for the storage closet. Mr. Johnson, however, did show 240 square feet for paint repair. (AF A 1-13; Video; September 4, Estimate.)

80. Another issue was the replacement of the mantel. Mr. Johnson showed $104.42 for material and labor. He showed 6 linear feet. The CO had earlier allowed $500 of the $600 claimed for this item. (AF A 1-13; September 4, Estimate.)

81. Mr. Holbrook needed to make repairs to the building siding. Mr. Holbrook was looking at removing entire siding panels, which Mr. Johnson described as labor intensive. In his estimate, Mr. Johnson took the position that Holbrook did not need to replace siding but rather to install plugs and refinish the area. His estimate was for removing the items and patching the holes with plugs. At least one piece of siding appears to need replacement, as a patch would be unsightly (Video). In costing the removing of the coolant lines, Mr. Johnson based his estimate on the assumption that the lines would pull right out and would not require additional drywall work on the inside. He did not know if the line was attached inside the wall and if that was the case, he acknowledged that one would have to go behind the drywall. In his costing which Mr. Johnson describes as installing plugs to match existing siding in holes where conduit had been removed, he uses a carpenter, which he estimated at $379.92. (Tr. 207-08; Video; September 4, Estimate; October 18, Estimate.)

82. The contract called for Holbrook to provide a concrete slab for the climate control unit which he did (Tr. 28). The FS placed the unit where they wanted it and hooked it into the building. The FS removed the unit when they left the premises but left the fencing which had been around the unit, and left the conduit and freon lines which ran into the building. (Tr. 28, 118; Picture 26.) Holbrook stated that the fence needs to be removed, the area where the fence and unit were sitting needs to be re-sodded, the freon tubes and conduit need to be removed from the walls and the walls need to be patched both inside and out. Also, the drainpipe which was broken needed to be excavated, repaired and replaced. The unit and the connections between the indoor and outdoor unit were specifically required by the solicitation. (AF D 17.) The outside unit was moved after the FS occupied the building (Tr. 63). The condensing unit that was moved was taken from the property (Tr. 185). As to the electrical work claimed at the climate control pad, Mr. Johnson saw no reason to remove the disconnect placed at that location for the unit, even though the unit was taken out. He noted that buildings have an outside disconnect; however, then said, while a fair number of buildings would have a disconnect there, Anot just exactly what we are talking about here. It would be a service disconnect for the building. This is actually a secondary from the panel back to this point, but it is not uncommon to have something like this at all.@ (Tr. 210.)

83. The next item on Mr. Johnson=s estimate was to remove the electrical box for the sign. He estimated 1 hour for a laborer to remove the box and install a weather proof cover on the building receptacle. He estimated $41.79 for the labor and material. He said that it was desirable to remove the wooden enclosure and that sort of thing, but then one could simply install an exterior outlet at that point. He said that is what the FS allowed for, basically, an exterior rainproof outlet, which he considered a benefit to the property. (Tr. 210; September 4, Estimate.)

84. The contract called for the Government to be allowed to install a radio tower on the roof of the office building or on the premises at FS expense (AF D 15). The FS made such an installation. The FS chose to install the tower on the property and anchored the tower by sinking three deep

concrete pilings into the ground (approximately 15 feet deep.) The FS removed the tower but left the pilings. (Tr. 29.) According to the Appellant, the pilings are unsightly and serve no purpose. This is confirmed by the video. In his estimate Mr. Johnson priced the work for removing the tower, backfilling and seeding at $8,211.42. (Video; September 4, Estimate.)

85. The FS planted a series of cedar trees. Mr. Holbrook asked for the removal on the basis that he is afraid the root system would grow into the septic tank system or lines. (Tr. 30.) The trees are roughly 20 feet from the septic tank (Tr. 116). The testimony of Mr. Johnson is that the system is in no danger from the trees. On the matter of the trees seeking out moisture, Mr. Johnson, while saying that he might not be qualified to say it, said that he did not consider cedars as thirsty trees or one that would seek out moisture. He noted that he thought the root system went down a couple of feet maximum and that the waste water lines are going to be a minimum of 2 feet plus. (Tr. 212-13.) Appellant provided some landscaping, under the contract, such as ties around the building, some trees and flowers and bushes (Tr. 30, Video.)

86. The FS added the picnic area. Mr. Holbrook wanted it restored to original condition. (Tr. 70.) This would require removal of 10 to 12 partially buried timbers, as well as requiring the area to be re-sodded. The costs for this were included in total with the communication tower in Mr. Johnson=s estimate. (Tr. 205; September 4, Estimate; October 18, Estimate.)

87. Mr. Holbrook had the professional who built the mountain rock wall estimate the price for its repair (Tr. 75). In placing lettering on the sign, the FS drilled several holes for every letter, which were then attached (Tr. 115). Mr. Holbrook contended that the repairs should be done in accordance with his estimate, which was obtained from the original mason (Tr. 221). While there appear to be more holes than necessary, the repairs do not require a new wall according to Mr. Johnson and can be patched (Tr. 211). Based on the video, it appears that patching the wall would be an acceptable fix. Mr. Johnson estimated a mason at $439.87 (Video; September 4, Estimate).

88. Another area of contention involved the removal of the wooden sidewalk and retaining wall in the bulletin board area. The FS installed a bulletin board sign with an accompanying foundation At the close of the lease, the FS removed the bulletin board portion of the alteration and left the wood sidewalk and retaining wall. (Tr. 27, 30, 31, Video.) Mr. Holbrook wanted it removed so he can backfill and re-asphalt, as he had concerns about maintenance in the future when the wood would begin to rot (Tr. 119-120). Mr. Johnson estimated $766.88 for this work, which included grading and seeding. Mr. Johnson noted that this was on the other side of the building from the tower work. (Tr. 210; September 4, Estimate.)

89. Mr. Holbrook claimed for the removal of electrical wires (AF B 3). The FS added wiring in 1995, for the 1999 installation of the phone system and wiring and for installation of the IBM system. (Tr. 171.) Mr. Merrill admitted that he cut off some of the wires in the computer room and stuffed wires back behind the wall (Tr. 195). That is consistent with the observation of Mr. Holbrook (Tr. 40). Mr. Holbrook wants wire removed back to its source and wall patched. His estimate for this was $3,500. (Tr. 69.) An electrical line to a service box outside of the building to

service a sign and a short electrical wire was added to the computer room. (Tr. 67-68, 170.) Mr. Johnson used one hour for a laborer to remove the box and to install a waterproof cover on the building receptacle. He priced it at $41.39. As to computer wiring, Mr. Kiersted stated that he had already removed the wires he had added for the computer system. (Tr. 170-71.) In the CO=s decision the CO stated that the solicitation requires conduits for computer and telephone wiring to run throughout the building (page C-2 - C-3, Clause 4, General Specifications- Computer Room. (September 4, Estimate.)

90. According to Mr. Holbrook there were three to five window screens damaged or missing (Tr. 63). Holbrook was paid $100 on that particular claim. He believes he is still owed $200. The FS used six screens and Mr. Johnson costed the work in his estimate at $159.59. (September 4, Estimate.)

91. Holbrook has a claim for removing the coolant lines. Mr. Johnson allotted 4 hours of labor at $139.37. He felt that the work was not necessary. (September 4, Estimate.)

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92. Holbrook=s claim for replacing the 36-inch hallway walls is $43,548.36. He has set out his costing in Ex. D. To arrive at the cost, Holbrook used a computer program called ARepair and Remodeling Estimator.@ Several figures are particularly important in our analysis regarding this claim. Holbrook uses 2,656 square feet in walls to be replaced. The FS has not challenged that figure nor provided any alternative. Holbrook prices drywall demolition at $.49 per square foot. This is independent of stud demolition. Holbrook shows 664 square feet of ceiling replacement at $.30 a square foot. He estimates refuse removal at $500. On the installation side, he shows drywall installation at $.95 a square foot and electrical labor at $27.65 per hour. Finally, under material, Mr. Holbrook shows 5/8 inch drywall at $12.49 per sheet, drop ceiling of $2.98 per panel and replacement material for plastic molding at $.75 per linear foot at $124. The numbers used on Ex. D, do not set out breakdowns as to labor burden, overhead and profit. We treat the numbers as if they contain any appropriate and applicable markups. To the extent that any hallway replacement is allowed, that would negate any claim in claim 1 (damages) for hallway repairs. (Tr. 37-38; Ex. D.)

DISCUSSION

AGBCA No. 2000-175-1

DAMAGES TO BUILDING

Absent specific contract language to the contrary, a lessee is generally held as to repair and replacement of the premises, to put the property in the same condition that existed at the commencement of the occupancy, except for reasonable and ordinary wear and tear, and damage by the elements. There is an implied covenant not to commit waste. HG Properties A, L.P., GSBCA No. 15219, 01-1 BCA & 31,376. While not referenced in this lease and therefore, not specifically applicable, the GSA Handbook, ALeasehold Interests in Real Property,@ Chapter 10, defines

reasonable and ordinary wear and tear as, Adisrepair, deterioration or depreciation of the premises resulting from ordinary use and occupancy for the purpose for which the property is leased.@

The Holbrook lease does not include a specific restoration clause. It does contain an alterations clause (FF 10), which allows the Government to make alterations, attach fixtures and erect structures or signs, but also states that such shall be and shall remain the property of the Government and may be removed or otherwise disposed of by the Government. Nothing in the alterations clause provides that the lessor cannot require the removal of items added and attached by the Government. Further, nothing in the clause provides that the lessor should not to be compensated for restoration or damages caused by removing the fixtures.

In its decision in HG Properties, the GSA Board addressed the application of the doctrine of waste when the lease contains an alteration but not a restoration clause. There, the Board stated that it has recognized that where a lease permits GSA to make an alteration to premises and does not contain a clause requiring GSA to restore the premises to the condition that existed when the lease term began, there nonetheless exists an implied obligation on GSA=s part not to damage the property; citing KMS Development, GSBCA No. 12584, 96-2 BCA & 28,404, reconsideration denied 97-1 BCA & 28,968; and Arnold D. Becker, GSBCA No. 5542, 80-2 BCA & 14654. The GSBCA did, however, pose a question in HG, noting that to that Board, it was not clear whether alterations that are within the contemplated use of the property, and are permitted under the lease, give rise to an obligation to compensate the landlord for costs of restoring a building to the configuration it was at the time the lease was executed. In its discussion of that matter, the GSBCA distinguished between alterations that were consonant with the contemplated use of the premises, as contrasted with those that impermissibly altered the permanent character of the leased space in ways that were not intended. In HG, the Board was dealing with a lease for a courthouse and office building. During the lease, GSA added a courtroom and thereby eliminated some office space. There was an issue as to whether this damaged the property given the uses contemplated. The Board concluded that the answer could only be decided by determining the intent and expectations of the parties. Since the HG matter was before the Board on summary judgment, the Board did not come to a conclusion at that time, noting that there was a material fact dispute that first needed to be resolved.

In dealing with damage for alterations performed by the FS on this building, the situation here is quite different from that in HG. First, in virtually every instance where the Appellant asks for compensation to remove an alteration, the alteration through modification of the Government was no longer in the state it had been when it was originally put in. The best example is the footings for the communication tower. Here, the FS removed the tower but just left the footings. Even if an argument could be made that the FS could have left the communication tower and footings, once the FS removed the tower, leaving only foundations, what was left was clearly not the type of modification or improvement that would logically be intended to remain by a reasonable lessor. In varying degrees, as discussed below, other alterations, such as the area where the bulletin board was removed, but other portions left, fit into the same situation. (FF 84, 88.)

Turning now to the issue of wear and tear. One cannot always define, by using a uniform bright line, where damage crosses the line from ordinary wear and tear to damage that a lessee must repair or pay for. The decision as to whether damage is beyond normal wear and tear is often a matter of degree and judgment. That is the case here. Among the matters we need to consider are how and for what purpose the property was leased (a warehouse would be expected to have more wear and tear than an office); to what extent the property was used by the tenants and by outside persons; to what extent the tenants made changes to the property during the tenancy; and the length of time the lessee occupied the property.

The Holbrook property was constructed for use as an office. It was constructed as part of the lease contract. The building was in a rural area and while open to the public, it was used almost exclusively by Government employees. The overall operation did not appear to be one that would create greater than normal wear and tear. The building was not leased as a phone bank or a computer operation, but rather had discrete activities associated with running a national forest. (FF 1, 2.) While the building was constructed for the use of the FS and was built to specifications provided and approved by the FS, some features of construction, particularly at the time of award, were not well defined (FF 2-12).
Of particular relevance in the Holbrook appeals is the FS description of the number of outlets and terminals in each room. But for electrical outlets in the conference room, specified as 8 feet apart, all other outlets and terminals (electrical, computer, radio, telephone) were neither quantified nor located by the FS, until well after award. The initial outlets and terminals were ultimately quantified by the FS in Ex. C., a drawing prepared by Mr. Alsobrook, where he showed the location of the various outlets and terminals throughout the building. (FF 5, 8, 20.) This is particularly important in addressing the appeals before us, because much of the Appellant=s claim for wall damage involves excessive and non-specified outlets and terminals on the walls.

As a general rule of thumb, nail holes and nicks on walls and wear and discoloration of carpet are items of normal wear and tear. Walls can generally be corrected through use of spackling and painting. As to carpet, particularly in high traffic areas and near entrances, carpet could be expected to show considerable wear and even some extra staining and discoloration. That is particularly the case on a contract that ran 10 years. However, there are a number of rooms where we find holes for telephone or radio outlets were left uncovered and other areas where more than minor spackling would be required. There are also some rooms where the number of outlets are more than what would normally be expected and create an unsightly condition.

Appellant has never argued that it does not accept a reasonable number of outlets and terminals, however, where Holbrook and the FS differ is as to whether in some rooms the number and placement of outlets are excessive or unsightly. Holbrook has focused on chest high outlets, claiming those are per se compensable as beyond normal wear and tear. The FS has disagreed. We do not find the chest high holes to be compensable in all instances. Rather, we have considered the parties arguments and made our determinations in each room on an individual basis. In looking at the respective arguments of the parties, we have concluded that most of the outlets are not excessive. Although the FS did not quantify outlets until after award, the FS did indicate in the specifications

that in addition to telephone and electrical outlets, the FS would also be placing computer and radio type terminals. While the FS did not set out a specific number of outlets and terminals per room (until well after award), in most instances, particularly when one takes into account the number of types of terminals and outlets, the number of outlets and terminals, while approaching excessive do not cross over the line of reasonableness. Where we find either the holes or outlets to be items of repair by Holbrook which are beyond normal wear and tear, they are so identified as we discuss the individual rooms. Also, where outlets were left uncovered, the FS generally estimated and conceded that Appellant would be entitled to $7 per outlet for material and labor, so as to purchase and install a plate. In a number of instances, the cost of replacing the plates, is comparable with the cost of having to drywall patch that particular hole. The similarity in cost is also taken into account in arriving at our conclusions for the individual rooms. (FF 2-10.)

There are two other matters that should be addressed before discussing the alleged damage in specific rooms. First, in some instances, the FS mudded over (patched over) terminal holes without first notifying the Appellant. In some instances, Mr. Merrill (neither an electrician nor licensed in any building trade), stuffed wires back into those areas. The FS has contended that the wires were not live wires, however, absent the Appellant opening holes in those locations, it does not know what has been done with various wires behind those areas. While the FS can tell the Appellant that there are no problems for it to concern itself with, the Appellant is ultimately responsible to any new tenant for the building safety and given that this work was not done by an electrician and was conducted without notifying Appellant, the Appellant, under the particular circumstances of this case should be paid the reasonable cost for checking out the areas where Mr. Merrill mudded over wiring and the cost for taking whatever steps may be needed to correct. Based on Mr. Merrill=s testimony, we do not expect that Appellant will have to perform extensive corrective work and have taken that into account in estimating electrical time. (FF 62, 73.)

Another general matter involves Appellant=s claim that in those locations where it has to patch, the FS should be obligated to pay for taking down and replacing the wallpaper. This lease ran for 10 years. We do not find it unreasonable that after 10 years Appellant would either have to paint or change the wall covering for a new tenant. Further, we do not accept the contention that wallpaper removal equals drywall replacement. The removal of wallpaper is a common practice and should be accomplished without significant damage to the drywall. (FF 54, 57.)

Finally, there are several general points as to the calculation of damages for restoration. In calculating the appropriate dollars, in most instances but not all, we used Mr. Johnson=s estimate from Means We do not however use his locality adjustment, which dropped the labor in most cases by about 40%. Rather, we use the straight Means estimate. We simply were not convinced by Mr. Johnson that the locality numbers he used would actually be available to Holbrook on this project. We do not see that Holbrook would have benefitted from economies of scale, given the relative size of the various corrections involved. Mr. Johnson said that he took scale into account, particularly in relation to the drywall patching. We see the use of the straight Means numbers as a balance to the lack of scale. Further, as best we can determine, Mr. Johnson did not contact local subcontractors or trades to verify his belief that the local rates would be dramatically lower. For us to make the

dramatic reductions for locality, we needed more than Mr. Johnson provided. Accordingly, when we state that we are using Mr. Johnson=s estimate, we use as our base the raw Means number and not the locality adjustment number. That is reflected in the September 4, Estimate. In some limited instances, we have used Mr. Holbrook=s estimates and in one instance, as to carpeting we find Mr. Johnson=s October 18, Estimate more reasonable. In instances where we use Mr. Holbrook=s figures, we do so because the type of work was not estimated by Mr. Johnson or because Mr. Holbrook=s number, because of the limited hours seems more reasonable. When we use Mr. Holbrook=s figures, we understand those numbers to be loaded numbers containing all applicable markups. (FF 52-54.)

One final point as to the labor adjustment. Mr. Johnson provided three separate estimates in this case. The first had no locality adjustment. The locality adjustment, which reduced sums potentially due to Holbrook, only appeared after the initial damage figure was calculated. There is no evidence that the first estimate was coerced. While the dissent finds comfort in the later estimates, we do not ignore the fact that Johnson=s first approach did not find locality applicable.

Below we discuss and identify those items which we find to be more than ordinary wear and tear and those items for which Appellant is entitled to some compensation. Our conclusions involve matters of judgment and are based on the video, testimony and photographs.

RECEPTION AREA

This claim involves replacing carpet in the highest traffic area of the building and at the point where people would first be coming into the building from the outside (FF 59). We are not surprised that after 10 years the entrance area carpet would indeed have to be replaced. We find this to be ordinary wear and tear. While the use of a mat may have contributed and hastened the damage, we find that the conditions were in line with what one would expect after 10 years of wear.

As to the drywall damage and particularly the area where the lettering was installed and then removed, we find that the damage constituted more than wear and tear. In fact the FS recognized that. The CO allowed $170 for wall damage, which we understand to cover the sign area. In Mr. Johnson=s estimate he allowed for 40 square feet of drywall patching. He priced it however at a higher figure than did the CO=s decision. We use Mr. Johnson=s number of $5.50 a square foot for labor and material for drywall patching. For the 40 square feet of drywall acknowledged in the CO=s decision, that comes to $220.00. When we deduct as a credit, the $170 paid in the CO=s decision, that leaves $50.00 owing Appellant. (FF 42, 60.)

The FS has said in the CO=s decision that it has no liability here for excess outlets. Thus it follows that the 40 square feet of wall patching that the FS allows in that decision does not include any costs for the excess outlets part of Appellant=s claim. There are nine outlets on the single separation wall between the reception area and the bathrooms. We note that in his testimony, Mr. Alsobrook referred

to the original five outlets he showed on Ex. C. (created after award), as being more than usual. He did not refer to the additional computer terminals and radio terminal he also set out on that wall. The combination of nine outlets/terminals in the space behind the desk is excessive. We find that the number creates an unsightly condition that calls for removing some outlets or terminals and then drywall patching. In addition we note on the video that there are numerous molly bolt type holes in the walls in the reception area. These appear to require more than mere filler. Accordingly, we find that Mr. Holbrook is entitled to compensation for another 20 square feet of patching at the same $5.50 a square foot rate, which comes to $110.00. That additional 20 square feet is for the outlet area and for the numerous molly bolt type holes. (FF 42, 59-60.)

We also find that since some of the excess outlets would likely have wiring or connections that would have to either be capped or removed, Holbrook is entitled to 3 hours for electrical work . Here we use $27.65 an hour, the figure Mr. Holbrook provided for electrical work on Ex. D. We note that Mr. Johnson stated that the dollar figures, estimated by Holbrook on Ex. D, appeared to be reasonable in relation to the modifications associated with the hallways. The total electrical cost in this area is therefore $82.95. The final item addressed by the CO in this area, the thermostats, was paid for in the CO=s decision. The total for the reception room, after crediting the FS for the $170 allowed in the CO=s decision (deducted above), is an additional $242.95. (FF 42, 59-60.)

RESOURCE CLERK=S OFFICE

There is wall damage in this room which includes a large chest high hole left in this office. In his estimate, made for purposes of assigning a dollar figure, but not for admitting liability, Mr. Johnson allowed for 2 square feet of drywall patching for this room. Using Mr. Johnson=s figure of $5.50 per square foot, we allow $11.00. The hole does not appear to be an electrical outlet and thus, here and in other locations where the wiring would have been computer or telephone, we make no allowance for electrical work. (FF 42, 61.)

COMPUTER ROOM

The only item allowed by the CO here was broken ceiling tiles at $100. In this room there are chest high holes in the wall and a condensate drain line that comes into the computer room and penetrates the wall. There is missing floor molding and several areas show the start of drywall patching where Holbrook has stated that the FS (through Mr. Merrill, not licensed in any of the building trades) covered over where electrical and other lines had run. At one of the ceiling tiles there are open electrical wires. We find that there is drywall patching required that is beyond ordinary wear and tear. We use the 20 square feet shown by Mr. Johnson on his estimate. At $5.50 per square foot, that is $110.00. We find that Mr. Holbrook was entitled to have the condensate line capped and cut. We use Mr. Johnson=s estimate of $54.19 for this item. Since the FS, through Mr. Merrill, covered areas where there was potentially electrical wiring, it is reasonable for Appellant to bring in an electrician to look behind those areas and make any proper fixes. We estimate 2 hours of electrician time at Mr. Holbrook=s figure of $27.65 an hour or $55.30 for 2 hours. Finally, there was approximately 8 linear feet of floor molding at $6.57 for labor and material per linear foot, which

calculates to $52.56. The ceiling tile has been paid for. The total not yet paid for this room is $272.05. (FF 42, 62-63.)

MEN=S RESTROOM

The CO allowed $30 associated with the broken or missing soap dispenser. Mr. Johnson estimated $72.03 for the labor and materials. We allow the difference of $42.03 between Mr. Johnson=s figures and what the CO allowed. As to the drywall in the restroom, this was common space and obviously heavily used. Given its purpose, we find the conditions to be normal wear and tear. (FF 42, 64.)

SECURED STORAGE

We find the FS description of damage to the door, as ordinary wear and tear, to be understated. The door is in very rough shape and damaged at the hinge area. We allow for replacement at $260.78, the figure in Mr. Johnson=s estimate. We do not allow compensation for walls damage as we find that to be ordinary wear and tear. The total for this room is $260.78. (FF 42, 65.)

OFFICE/SSS

Here the CO allowed $2 for switch plate type covers and $5 for labor to install the missing switch covers. It allowed nothing more. We agree with the FS that the paneling damage claimed by Appellant (144 SF) does not exceed normal wear and tear. The paneling, evidenced some but not excessive scratching. Given the length of the lease and the fact that the scratching was almost entirely below the wainscoting, the scratching was not excessive. As to the number of outlets and terminals, we find that in this area they were within normal levels given the number of types of outlets addressed in the lease. The FS, however, does have liability for a hole at chest height left in the wall where a computer or telephone outlet had been in place. Mr. Holbrook is entitled to be paid for drywall patching in this room. We use Mr. Johnson=s estimate of 2 square feet at $5.50 per square foot for a total of $11. From that we need to deduct the $7 allowed by the FS since it was paid for plates in the area now to be patched. The total owed is $4. (FF 42, 66.)

OFFICE/RANGER

In this room we allow for 2 square feet of patching at $5.50 or a total of $11. This is for the chest high holes in the wall. We disallow 180 square feet for paneling replacement for same reasons stated above in the OFFICE/SSS room. We deduct the $7 that was allowed for patching in the CO=s decision, for the same reason noted above, thereby leaving $4. (FF 67.)

OFFICE/FMO

We allow 2 square feet of patching because of chest high holes for a total of $11. We deduct the $7 allowed by the CO decision for a total recovery of $4. (FF 42, 68.)

OFFICE/LEO

In this room there is a broken ceiling tile. The FS allowed $7 for labor and material for the switch cover. We allow 2 square feet of wall patching at $11 and estimate $1 for the ceiling tile material and labor. We deduct the $7 allowed by the CO from that $12 and therefore allow $5. (FF 42, 69.)

HALLWAYS

We allow no patching costs for the hallways as what we have seen appears to be ordinary wear and tear based on a 10-year occupancy. (FF 70.)

OPEN AREA

Here the CO allowed $74 to Holbrook, but did not break it out. We do find that there were a number of holes left in the wall and find that Appellant is entitled to patching of 10 square feet in this area or $55. As to the carpet damage, it appears from the video and photographs that the carpet was torn and not simply unraveled at a seam as claimed by Mr. Johnson. The FS argument that tearing is reasonable wear and tear is without merit. The carpet in the building was low nap and appears from the video that but for this area (and the stained area in near the entrance) the carpet was generally usable without replacement. Tearing carpet, even by accident is damage and not wear and tear. By the same token, the carpet had 10 years of wear. That still does not excuse the FS from some responsibility for the damage. Balancing the damage and age of the carpet, we use a price which we find to be fair under the circumstances. We will allow $10 a square yard as to the material (as opposed to the Johnson estimate of $19.75 for material and $.43 for tax), to account for fact that carpet was used for 10 years. Similarly, we will reduce the labor by approximately one-half for the same reason and use $3.63 a square yard for installation (the raw cost at $7.26 per square yard). The readjusted figure, with labor and material, comes to $13.63 a square yard. Therefore, $13.63 a square yard installed times 36 square yards is $490.68. Appellant is entitled to having the ceiling tile replaced at $.57 for labor and $.43 for material or one dollar times 8 tiles for $8. We deduct the $74 allowed by the FS from the total and find that Appellant is entitled to $479.68. (FF 42, 71.)

CONFERENCE ROOM

We find that there is excessive wall damage in this room due to the number of outlets and terminals (20). We allow 8 square feet of patching for a total of $44. (FF 42, 72.)

MECHANICAL STORAGE

We see significant drywall damage here and allow 20 square feet of drywall. There were a number of holes in the wall including several at chest height. Finally, at a number of locations, the walls in this room were mudded or patched. As we noted earlier, where the drywall was closed in by Mr.

Merrill, without the Appellant being able to see what was done, Appellant is entitled to open the area and have it checked by an electrician. We allow 2 hours for the electrician to check out this area and correct if needed. The total for this room is $110.00 for drywall patch plus 2 hours for electrical work at $27.65 each or $55.30. The total for this room is $165.30. (FF 42, 73.)

OFFICE ORA

The FS allowed $90 in the CO=s decision for floor trim damage and for correcting the electrical receptacle that was pulled loose. We allow for 2 square feet of drywall patching that was not allowed by the FS. There is also damage to the floor trim. The CO allowed $20 in trim, $10 in paint and $60 for labor. Mr. Johnson shows 6 linear feet to repair floor trim and 2 square feet of drywall patching. His estimate for the floor trim material and labor was under what the FS allowed and therefore, the floor trim item is considered paid for. We allow an additional $11 for the drywall. (FF. 42, 74.)

OFFICE TMA

We find that here the CO=s allowance more than covers the 2 square feet of drywall and 16 linear feet of door trim that needed to be repaired. (FF 42, 75.)

OFFICE FORESTER/SILVITECH

The FS allowed $114 for the door and for device covers. Since the door was returned, Appellant=s cost to install it is already included in the $114, and thus nothing more is owed on this item. We do find that there is entitlement to 3 square feet of drywall patch at $16.50. (FF 47, 76.)

OFFICE OF THE BIOLOGIST

In this room we allow 2 feet of drywall patching to cover holes in the wall. We allow $11. (FF 42, 77.)

KITCHENETTE

We find that the floor damage to linoleum after 10 years is within normal wear and tear. The hole in the wall is at chest height. However, that is not unreasonable for a kitchen area, where one would expect a wall phone. (FF 42, 78.)

STORAGE CLOSET

We find damage claimed by Appellant to be ordinary wear and tear. Painting is to be expected for this area at the close of a lease of 10 years. (FF 42, 79.)

FIREPLACE DAMAGE

The FS already had paid $500 for the mantel and that appears to be reasonable compensation. The FS agreed to pay this figure and there was no dispute at the time of the hearing. Thus, it was not appropriate to develop the matter. No further compensation is due on this item. (FF 42, 80.)

OUTSIDE WORK

We allow for the outside work $8,211.42. While we take this estimate from the September 4, Estimate, we define the scope by using the items set out in the October 18, Estimate for AOutside Work.@ The one exception is the removal of the wooden sidewalk, which Mr. Johnson seperately estimated in his September 4, Estimate and which we allow for separately. All of the items shown for AOutside@ work, but for the damaged downspout, were installed by the FS. All but the railroad timbers are not as originally put in by the FS. As to the timbers, they were put in for the FS use and do not add to the property. Appellant is entitled to have them removed. In addition we allow $159.59 for replacing six window screens, which were broken (again using Johnson=s September 4 estimate). The FS, however, allowed $100 for the screens in the CO=s decision and we credit that amount. The total is therefore $8,211.42 plus an additional $59.59 for the screens for a total of $8,271.01. (FF 82-83, 88.)

WOODEN SIDEWALK

The wooden sidewalk was built as part of a structure for the bulletin board. The FS removed the bulletin board segment but left the sidewalk and a retaining wall. Mr. Johnson estimated the cost of removal to be $768.68, noting that it would include site grading. We allow this item.

REPAIR THE BUILDING SIDING

We allow $379.92 for this item. This is for a day of work to be used for installing plugs so as to match the existing siding in those areas on the outside where conduit had been removed. (FF 81.)

REMOVE THE COOLANT LINES

These lines are inside the walls and as such create no structural or cosmetic problem. We do not find this compensable. (FF 41, 82.)

ELECTRICAL WORK AT CLIMATE CONTROL PAD

This is not compensable. (FF 42, 82.)

REMOVE ELECTRICAL BOX SIGN

We allow Mr. Johnson=s recommendation of a rain proof outlet at this location. The labor and material with markups using Mr. Johnson=s labor cost and tax on the material was $41.39. (FF 89.)

REPAIR STONE WALL

The multiple holes on the stone wall warrant repair. We allow $439.87, using Mr. Johnson=s estimate. This covers one day=s work. (FF 86.)

CEDAR TREES

Appellant has not established that the cedar trees represent a hazard to the septic system. Accordingly, we allow no relief. (FF 84.)

AGBCA No. 2000-174-1

HALLWAYS REPLACEMENT

This building was constructed under a lease with the FS. The lease and construction responsibilities were subject to default action and Holbrook thus was not in a position where he was free to proceed as he wished. Instead, he had to follow the agreement he made with the FS. (FF 1-12, 16-20.) It is clear that both parties made errors as to inclusion of the 36 inch hallways. The FS should not have put them on its floor plan. But it did. Mr. Holbrook, had he consulted the codes should have realized that there was a potential problem notwithstanding the fact the FS had specified a particular size. (FF 18, 28, 32.) But the fact remains that once the contract was awarded, Mr. Holbrook had to follow his proposal and was not free to modify hall sizes without getting the permission of the FS (FF 17). The FS charges that Holbrook had to meet codes and characterizes the building as a performance specification. Thus, the FS urges that problems involving the halls being too narrow are Holbrook=s problem and not the responsibility of the FS. Further, the FS charges that Holbrook got the full 10 years on the lease and thus has no basis to complain.

Had this record shown that Mr. Holbrook proceeded with construction, despite the FS error, and not said anything, and had the record shown that the FS was unaware of the handicapped access problem during construction, we would decide this issue totally in favor of the FS. However, the fact is that Holbrook did raise the issue to the FS before construction was completed and the record is clear that either earlier or at approximately the same time that Holbrook raised his concerns, the FS recognized in the hallway area near the restrooms that handicapped accessibility standards were not being met by use of a 36-inch hallway. (FF 21-25, 28.)

Mr. Holbrook realized, once he got the studs placed and had put in some drywall that the hallway width would be a problem. He brought it to the attention of Mr. Alsobrook, thus putting the FS on

notice. Mr. Alsobrook took credit for the design and told Mr. Holbrook that Mr. Trull had approved the design and that Holbrook should keep going. Mr. Holbrook followed that direction. (FF 22.)

Mr. Alsobrook testified that he was in regular contact with Mr. Trull. The record shows that when Mr. Alsobrook was concerned about the size of the breaker box being put in by Mr. Holbrook, Mr. Alsobrook consulted with Mr. Trull. Mr. Trull denied Mr. Holbrook the opportunity to put in a different box and this was conveyed to Mr. Holbrook by Mr. Alsobrook. (FF 21, 22.) If Mr. Trull and Mr. Alsobrook were talking about those matters, we find it unlikely that the matter of the hallways would not have been raised by Mr. Alsobrook with Mr. Trull. This is particularly true in light of our conclusion that Mr. Holbrook specifically brought the issue to Mr. Alsobrook=s attention and particularly because Mr. Alsobrook had Mr. Holbrook deviate from the plans to put in a different size hallway near the bathrooms. (FF 24.) We find the preponderance of the evidence supports that Mr. Trull was on notice of the problem with hallway sizes and on notice of Mr. Holbrook=s desire to change it before more work was completed. Finally, in addition to the above, there was another problem with the size of the hallways in relation to moving a desk. We simply cannot conclude that Mr. Trull had no knowledge of a hallway problem. (FF 23-25.)

We are mindful that in our discussion above, we have accepted Mr. Holbrook=s testimony that he discussed the matter of the hallways with Mr. Alsobrook during construction. In making that finding, we recognize that Mr. Alsobrook did not confirm the conversation, saying he had no such recollection. That said, we note that in assessing the credibility of both Mr. Holbrook and Mr. Alsobrook, the Board found that both gentlemen attempted to be as truthful and complete as possible with their testimony. Both appeared to be individuals who took the proceedings and their oath on the stand seriously. Both at times declined to speculate, even when that might have helped their respective positions. Mr. Alsobrook made it clear on several occasions that since events occurred 10 years prior, he did not remember some matters. (FF 25.) Given the length of time and the fact that construction details would have more likely been remembered by Mr. Holbrook, than by Mr. Alsobrook (who had other duties and was no longer even at the location), we conclude that Mr. Holbrook did put Mr. Alsobrook on notice. We further find that Mr. Alsobrook, as a competent and involved COR would have passed Holbrook=s concerns about the hall sizes to Mr. Trull. In making that conclusion we take into account the fact that Mr. Alsobrook and Mr. Trull were in contact during the construction and that decisions as to construction matters, for one the circuit breaker, were engaged in by the two men. We simply cannot see how the hallway matter somehow was ignored. In its brief, the FS references this Board=s decision, Max Castle, AGBCA No. 97-137-1, 00-1 BCA & 30,871 as a basis for us to deny this part of the appeal. In that case, an issue arose regarding notice. There we specifically found that the CO was unaware of particular conversations between Castle and an official of the FS, which potentially could have bound the Government. In Castle, not only did the on notice individual testify that he did not bring the matter to the CO=s attention, but the CO also testified that she had no knowledge. Finally, there were no surrounding circumstances, which provided any real basis to doubt their memory or testimony.

While we find that Mr. Holbrook put the FS on notice, we need to take into account that he did not raise the issue until after the studding was in place and after portions of the drywall were in place (FF

22). To the extent the studding and drywall were already up, Mr. Holbrook=s questioning was too late to qualify him for recovery for that installed work.. However, once he raised the issue and asked for the opportunity to change the remaining work, the FS had an obligation to allow him to so proceed. Had Mr. Holbrook been allowed to remedy the hallways at that juncture, he would not now have to be removing portions of the drywall that are now in place.

This portion of the appeal raises unusual and unique facts, which do not allow us to resolve this case through applying direct precedent. Here, we have a situation where the FS prepared a floor plan that was defective. That was acknowledged by Mr. Alsobrook, by the CO and by other FS officials who discussed the deficiencies and possible Government responsibility just prior to accepting occupancy. The discussions prior to accepting the lease were recorded, after the fact in a July 3, 2000, memorandum. (FF 28, 32, 41.) The Government however did not require or order corrections at that time, but rather accepted the lease and used the property, notwithstanding the inadequate and defective hallway sizes.

Here we are dealing with an agreement regarding construction of a building that remained the property of the Appellant. This was not a consumable product or one whose normal life would be limited solely to the time of the initial lease. This was not a building that was created for a special or limited use. Rather, it was constructed to be an office building. To be used as an office building for the its normal life span, the building was required to have handicapped compliant hallways. The reason it lacked such hallways was first, because the FS designed the hallways too narrow; second, because Appellant proceeded to follow that direction, and finally, because once Appellant realized that there was a problem, the FS refused to allow it make corrections for at least the remaining work. Under the facts of this case, it is appropriate to compensate the Appellant for the rework that could have been avoided (the drywall performed after the notice of non-compliance).

As stated above, there is no clear precedent to rely on given these facts. However, recognizing that the following present different fact situations, there are several legal theories and principles under which the limited relief we give is justified. First, the Government impliedly warrants that if its specifications and drawings are followed, a satisfactory result would be produced. United States v. Spearin, 248 U.S. 132 (1918). The Government is responsible for errors or deficiencies in its specifications or drawings. Datametrics, Inc., ASBCA No. 16086, 74-2 BCA & 10,742; Canadian Commercial Corporation, ASBCA No. 17187, 76-2 BCA & 12,145. The law also places upon the parties to a contract, an implicit duty to cooperate. In determining if there has been a government breach of that duty, Courts and Boards have generally applied a standard which in addition to willful and negligent interference, not the case here, also covers unreasonable interference with or hindrance of a contractor=s performance. This duty includes unreasonable administration of a contract by the Government. Potlatch Corp., AGBCA No. 96-191-1, 98-1 BCA & 29,621; Keno and Sons Construction Company, ENG BCA No. 5837, 95-2 BCA & 27,687; PBI Electric Corp. v. United States, 17 Cl. Ct. 128 (1989). See also Evans, Inc., VABCA No. 2043, 2044, 86-2 BCA & 18,760. The law also provides relief where a contractor is required to perform work that qualifies as economic waste. See Granite Construction Co. v. United States, 962 F. 2d 998 (Fed. Cir.1992), Valley Asphalt Corp., ASBCA No. 17595, 74-2 BCA & 10,680.

Given the specific facts of this case, there is no reason here not to hold the FS responsible for requiring the Appellant to have to do a portion of the work twice. The operative act causing the added cost was the FS directing Appellant to continue to put in 36 inch hallways, when at that point the Appellant should have been permitted to widen the remaining hallways. While the Appellant did bid the project with thirty-six inch hallways, that should not translate into it having to absorb the costs of mistakes, when those mistakes were identified and correctable, but for the Government=s direction otherwise. This case makes no new law. It simply assigns to the FS the costs for which it was responsible.

Having concluded that Holbrook could qualify for relief, we must now turn to the question of damages. In arguing the case, the FS has contended that the Appellant should not recover as it has already benefitted from rent secured over the life of the ten year lease. More specifically, Holbrook was paid monthly on the basis of net usable space (square footage excluding hallways). If Holbrook had been permitted to widen the hallways at the time in issue, then the square footage of the rooms would have had to be reduced to accommodate the wider space in the hall. This would then have reduced the monthly rent by the affected square footage. Thus, to the extent that Holbrook is entitled to costs for having to perform rework, that cost is properly reduced by any additional rent Holbrook secured because of the narrower hallway.

First, we calculate the damages or costs involved in having to redo the work performed after notice of the non-compliance. Unfortunately, in attempting to arrive at compensation, there is no specific evidence which shows exactly how much of the drywall was in at the time the Appellant asked to be able to make corrections. It is only for the work after that date, that Appellant can receive compensation. On this matter we find that the best approach is to jury verdict the amount and conclude that two-thirds of the drywall in the hallways was in, as of the date of the notice. We use that figure, which slightly favors the FS, because we believe that Appellant, since it is he who is pursuing the claim, should have the greater burden to prove monetary damage.

The total square footage of walls was 2,656 square feet (FF 92). Of that we allow for one-third or 885 square feet that could have been avoided. Using Mr. Holbrook=s numbers, the demolition of the drywall and replacing it again at a new stud is $.49 a square foot for the demolition and $ .95 for the installation. That is a total of $1.44 a square foot and total recovery of $1,274.40. In addition, we also allow 6 hours for electrical work or $165.90. We also make an allowance of 18 square feet for carpet which we costed at $13.63 a square yard for labor and material as adjusted which totals $245.34. We allow 55 feet of molding installation at $2.30 a linear foot, $.35 for demolition per linear foot and $.75 for the molding material. The total for this item is $3.40 times 55 linear feet or $187. The 55 linear feet represents 1/3 of the total linear footage of 166 linear feet, calculated by dividing $.75 into $124, the total shown on Ex. D. Finally, we take one-third of the drywall material costs set out in Mr. Holbrook=s billing estimate. That figure is $173.36. The total for redoing the work is $2,046. (FF 39, 41, 92.)

We now calculate the added rent that Holbrook secured over the life of the lease because of the narrow hallways, which in turn accounted for more square footage in the rooms. As noted above, we have calculated 55 lineal feet of molding and drywall that was placed after the notice. We have used the figures on Holbrook=s Exhibit D to come to that number. We take the 55 feet to represent two sides of the wall (the hallway side and room side). Accordingly, that calculates to 22.5 linear feet of hallway. The installed hallway was 36 inches and code was 44 inches. Thus, had the hallway been widened, then Holbrook would have lost rent, each month, for 22.5 linear feet times 8 inches a linear foot. When we carry out that multiplication and then carry it out over twelve months and then 10 years, we come to approximately 1,836 square feet over the life of the lease times $1.15 per square foot, the lease rate. The product is $2,111.40, which exceeds the cost of redoing the work which we calculated at $2,046. (FF 41.) Accordingly, since the added rent was more than the costs of making the corrections, the Appellant is not entitled to recovery.

Our colleague in his dissent has questioned the fact finding and legal conclusions of the majority. The majority decision rests on a combination of evidence presented at the hearing, observations of the witnesses and recognition of the fact that events in issue occurred over ten years ago. It was evident that while Mr. Alsobrook tried his best, on many issues, he was relying on what was at best a fuzzy recollection.

AGBCA NOS. 2000-175-1, 2001-110-1, 2001-131-1, 2001-146-1, 2001-148-1

HOLDOVER CLAIMS

Appellant has claimed that it is entitled to compensation due to a wrongful Government holdover on its property or due to the Government preventing occupancy. The FS has challenged this, asserting first that the lease ended under its own terms as of April 30, 2000, and second that it has taken no steps or actions that constitute holdover.

We have examined Appellant=s evidence and allegations to support its claim that the FS should be responsible for holdover rent. But for a marginal argument, involving an alleged statement by Mr. McDonald of the FS that Appellant was not to disturb the property until the matter was resolved, there is no colorable evidence which supports Appellant=s charge that FS actions prevented it from proceeding to rent the property. (FF 26.) Appellant has acknowledged that it had control and possession of the property since April 2000. The only impediment to that control, which Holbrook has identified, is that the FS retained some interior keys. (FF 14-17, 20, 24, 26.) The fact that Appellant may have lacked some of the internal keys does not transform this into a holdover. If needed, Appellant could have brought in a locksmith. It is not reasonable in this case to find holdover because of retention of some keys. See T. W. Cole, PSBCA No. 3076, 92-3 BCA & 25,091; National Construction Co., PSBCA Nos. 3902, 3929, 99-2 BCA & 30,509.

Going back to the alleged statements of Mr. McDonald, there is no evidence of any contracting authority on Mr. McDonald=s part or evidence of the CO being involved or knowledgeable of the alleged direction not to repair (FF 26). Further, the record is undisputed that on April 3, 2000, the

parties examined the property and at that time Appellant took photographs and video of the site. That reasonably should have captured any necessary verification needed to establish the condition of the property as of that date. If Appellant did not proceed with re-letting because of statements of Mr. McDonald, then Appellant did that on its own. (FF 27.) To refrain from renting because of the alleged McDonald statement is simply not reasonable or warranted.

Finally, there was no indication at the time of the termination or thereafter, that the FS considered itself in control of the property. In the FS letter of March 10, 2000, responding to the Appellant; and in the CO=s decision of August 3, 2000, the FS made it clear that the lease had ended and the property was the Appellant=s. (FF 13, 20.) Further, in Appellant=s letter of April 12, 2000, he clearly proceeded as if he had full control over the facility, including putting conditions on any future visits by the FS. The conditioning of visits was reiterated in Appellant=s letter of June 12, 2000. (FF 16, 17.) Given the evidence in this appeal, any conclusion that the FS was holding over or claiming dominion over the property would be patently unreasonable.

PROPERTY DAMAGE IN AGBCA NO. 2001-131-1

In addition to its claim for holdover rent, the Appellant, in AGBCA No. 2001-131-1, claimed the following: $400 for lawn rut damage; $300 for wall damages when the front desk was removed; $100 for replacement of a bathroom mirror; and $450 for replacement of a rear door. The FS allowed $80 for replacement of door trim, $100 for the mirror and $450 for damage to the rear door. In its Complaint in this appeal, the Appellant accepted FS payments for these items. This left open the claim for the ruts and the wall damage attributed to taking out the front desk. Appellant=s evidence does not support entitlement to either of those remaining claims. Further, in our decision in AGBCA No. 2000-175-1, we allowed compensation for wall damage in the reception room and particularly on the wall behind the desk. Therefore, as we see it, any damages claimed here have been covered in that item.

Finally, in addition to the claim for holdover rent and for the specific items set out above, Appellant also claimed that it should be compensated for putting in a fireplace, which Appellant said was not required by the specifications. We deny that portion of the claim. The evidence shows that Appellant put the fireplace in as a volunteer and was not coerced by any FS official. Moreover, the fireplace enhanced the building and adds value. While the building was constructed to meet the FS condition for a lease, the building is the property of Appellant, and clearly at the conclusion of the lease, whatever enhanced value had been included goes to the benefit of the property.

DECISION

Appellant is entitled to have its price under AGBCA No. 2000-175-1 adjusted by $11,474.15 for damages and removal of items. The entitlement is subject to CDA interest running from the dates of the claim. The claims on appeals AGBCA Nos. 2000-174-1; 2001-110-1; 2001-131-1; 2001-146-1 and 2001-148-1 are denied.

_____
HOWARD A. POLLACK
Administrative Judge

Concurring:

_____
ANNE W. WESTBROOK
Administrative Judge

Administrative Judge VERGILIO, concurring in part, dissenting in part.

I write separately largely to dissent from the majority in the factual conclusions and legal analysis; however, I do find entitlement to some relief. The majority runs roughshod over the facts and the law to reach a result. In its analysis, the majority rewrites the lease agreement and contract law, thereby making it particularly impossible for a contracting officer and Government counsel to rely upon contract terms and accepted standards when administering a contract or preparing a response to a claim and complaint. In part, the majority makes the Government liable for alleged (but not incurred) costs to renovate a building at the end of the lease term to a condition that did not exist at the start of the lease. Nothing in the lease makes the Government liable for such costs. The Government obtained the use of a building for the lease term. It occupied the building according to the described usage, and with few exceptions returned the premises in a reasonable condition after nearly ten years of occupancy.

The Government filed a motion for summary relief on two legal questions involving the dispute over the corridors and the claims of holdover. Based upon the motion and responses, I would grant the motion on the then-existing record. The timely Government motion could have served to focus the expenditure of efforts and resources of the parties and Board and could have helped to discourage the pursuit of those portions of a suit which lack factual and legal support.

<u>Corridors</u>

In the solicitation, the Government stated the required size for fifteen rooms; the Government did not specify the size or shape of the building or corridors. Under this negotiated procurement, the Government welcomed offers on existing or to-be-constructed buildings. No specific footprint for the building was dictated. The Government-provided sketches on graph paper contain walls of no thickness (a line of no dimension) and do not state that they are drawn to scale. It was the lessor who opted to make an offer on a building in accordance with a sketch.[1] The Government made the award based upon that offer. For purposes of this discussion, the lessor constructed the building in accordance with the sketch; the Government accepted that building despite the variations from code requirements applicable to corridors. At the time of lease signing, which occurred after construction, the corridors were set. The lease does not place upon the Government the costs to reconfigure the building after its departure. No basis exists to award the lessor its projected costs for corridor reconstruction. Therefore, I grant the motion for summary relief on this item and deny the claim for payment to alter the corridors.[2]

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[1] By letter dated November 3, 1999, in its best and final offer (Abe advised that this letter supercedes all previous bids and letters to this date@), the lessor stated that it had received a new floor plan reducing the size of the building to 3,200 square feet (SF) and 2,762 net usable square feet. AI agree to construct building by this floorplan. I agree to lease 2762 SF at $10.46 per SF of usable space under the following conditions[.]@ (Appeal File, Exhibit D at 87.)

[2] The lessor sought to recover $43,548.36, said to represent its estimate of costs to repair the corridors to bring them into compliance with Government standards. One element of this figure is $17,363.60 for the Aloss of usable office space (166 sq. ft. x $10.46 per sq ft. x 10 years).@ (Lessor Exhibit D). The solicitation and lease specify what constitutes net usable square feet for purposes of payment under the lease. The lessor has provided no basis for entitlement to rent for more than the net usable square footage determined and set forth on the lease agreement (Appeal File, Exhibit D at 2).

The developed record provides no basis to alter the legal conclusion. Regarding the size of the corridors, the majority states that after the lessor Araised the issue and asked for the opportunity to change the remaining work, the FS had an obligation to allow him to so proceed.@ (Majority opinion at 42). I cannot discern from whence the obligation arose, particularly when wider corridors would have reduced the size of rooms. The lessor priced its lease on constructing and leasing a building with the corridors of the given size. The Government accepted those corridors. The lessor never submitted a written change order request seeking to alter the size of the corridors. If the lessor deemed it imperative to alter the construction it should have properly notified the Government and pursued relief, although the Government is not obligated to issue a change order or make any room smaller than the required size. Regardless, after construction was complete, the lessor signed a lease without suggesting that a dispute or potential claim existed. No legal basis exists to award relief.

Factually, I also find inadequate support for the conclusion that the lessor raised the issue of corridor size prior to the installation of the dry wall. The claim does not assert facts supporting this basis for recovery. The testimony of the lessor is less than compelling regarding when the lessor raised with the contracting officer=s representative (COR) the matter of the corridor size:

> JUDGE: But, your conversation with [the COR] was specific to the size of the hallways?
>
> WITNESS: Yes. That is what I was concerned about not being in code.
>
> JUDGE: Would it be fair to say that you knew that the hallway, at that time, was 36 inches?
>
> WITNESS: Yes, sir.
>
> JUDGE: The hallways, probably, would have all ready been constructed at that point?
>
> WITNESS: They may have been now.
>
> JUDGE: Do you know if the studding had been up at that point?
>
> WITNESS: I would say that it probably had been.
>
> JUDGE: What about the drywall?
>
> WITNESS: I don=t know.
>
> JUDGE: You would have known that the hallways were 36 inches?
>
> WITNESS: Yes.
>
> JUDGE: At that point?
>
> WITNESS: Yes, sir.

(Transcript at 107.) Testimony of the lessor on direct is not more specific (Transcript at 24B25). On cross-examination, to the question AIsn=t it true that you do not know when, during construction, you brought this concern [about corridor size] to [the COR]?@, the lessor stated, AThat is true.@ (Transcript at 47-48). Testimony of the COR is as follows:

> JUDGE: When did you first become aware that there was a potential problem with the 36 inch hallways?

> WITNESS: It was before final. I believe that is when [the lessor] and I looked at it. Actually, I believe that the east hall is like 32 inches and has a sharp turn in it.
>
> JUDGE: What stage were we at in construction at this point?
>
> WITNESS: Panelling up, wainscoting up.
>
> JUDGE: Drywall in?
>
> WITNESS: Yes, sir.
>
> JUDGE: So, again, do you have any recollection as to what triggered it? Do you remember a conversation?
>
> WITNESS: Again, faintly, because I remember, we were trying to figure out how to get a desk in, what it was going to take to get our desks in, whether we had to turn them up on their sides or how we had to do it.

(Transcript at 152).

Based upon this factual and legal analysis I reject the assertions of the majority, but I also conclude that relief should be denied.

Holdover tenant

The Government issued a notice terminating the lease as of April 3, 2000. In his letter to the Government of that date, after a walk-through inspection had occurred, the lessor recognized that the termination was effective on that date: AI must bring it to your attention that today is the last day of your lease. On account of liability and other reasons I cannot have government employees or contractors on site after this date without legal requirements being met. Please contact me in writing so that we might negotiate terms for you or your agents= re-entry on the property.@ (Appeal File, Exhibit C at 10.)

As of April 3, 2000, the lease was over. The lessor regained full possession of the premises. The Government=s retention of a key or keys does not constitute a basis for holdover tenancy. This does not mean that the lessor could not have made a demand for the return of the key(s) or obtained payment for the rekeying of locks. Similarly, no relief is available under the alternative basis for this claim, that is, that the lessor did not attempt to alter or lease the premises based upon the oral communications of a Government employee other than the contracting officer or one with authority. Lessor reliance upon the communications of an unauthorized individual is not reasonable. The lessor has not asserted, much less demonstrated, that anyone with authority, such as the contracting officer, acquiesced in the statements. Based upon this analysis, which involves no fact in dispute, I grant this basis of the Government=s motion for summary relief and deny the claims asserting holdover.

Other items in dispute

Landscaping and outside work

As to landscaping, the lease provided, through the best and final offer, that the lessor Awill perform $1,000 of landscaping at site (this $1,000 is actual cost to offeror). If the government requires additional landscaping it will also be done at actual cost to offeror. The government will reimburse offeror for all landscaping.@ (Appeal File at D: 87). Nothing in the contract suggests that the landscaping will be undone or altered at the time the lease is completed. The wooden walkway, retaining wall and cedar trees are part of the landscaping around the building, constructed for use by the Government initially. No contractual basis exists to charge the Government with the costs of altering the landscape (to a pre-existing or other condition) upon the termination of the lease.

One of the Aspecial lease requirements@ states that the lessor Ashall allow the Government to erect a radio antenna on roof of office building or on premises at Forest Service expense.@ (Appeal File, Exhibit D at 15). The Government accordingly erected the antenna. Nothing in the lease calls for the Government to remove the supporting pilings at the end of the lease. The absence of language specifying that the removal of the supporting pilings is to occur at Forest Service expense, leads me to conclude that the costs for the removal are placed upon the lessor. The pilings made the site suitable for a specified Government use; the existence of the pilings (or other anchor) on the premises was within the contemplation of the parties at the time of lease signing.

In contrast, I would permit recovery for the repair of the mountain rock wall, from which letters were removed, and for the removal of the outside electrical box and the installation of a waterproof cover on the building receptacle.

Outlets

Through the contract the Government reserved the right to determine the placement of telephone, computer, and electrical outlets both initially and throughout the lease term. The solicitation specified that the Government would identify locations after award. (Appeal File, Exhibit D at 17, 20, 28.) The record does not demonstrate that the number of outlets and receptacles, whether near the floor or higher, are excessive or outside the realm for the office environment and type of building leased. Moreover, with the exception of a few items installed after the lease period began, the outlets and receptacles were in place at the time of lease signing. The additions or alterations over the life of the lease for a telephone and computer system are within the normal expectations for an office. As should be the case given the language of the agreement, the lessor raised no objections during construction or at the time of lease signing regarding the quantity or placement of the items.

The Government acted in accordance with the lease terms in placing the items. Nothing in the lease contemplates the removal of telephone, computer, or electrical lines at the time the Government vacates the premises. It was the lessor insisting upon the removal that caused many of the problems (Transcript at 170-71). The contracting officer correctly concluded that the Government was obligated to leave the walls with face plates; for missing face plates, the contracting officer compensated the lessor. The lessor has demonstrated entitlement to no additional money for patching or for electrical work.

Soap dispenser

For the soap dispenser in the men=s room, the lessor submitted a claim to recover $60. The contracting officer granted relief of $30. The majority grants relief of an additional $42.03, thereby providing relief in excess of the amount sought by the lessor, despite the fact that the lessor has provided no additional support for its claim. At best, the lessor is entitled to recover the additional $30 it seeks.

Carpet

The lease specifies that the lessor Awill be responsible for carpet replacement as required throughout the term of the lease@ (Appeal File, Exhibit D at 24). The following colloquy occurred in the deposition of the lessor:

> A: . . . but this was not caused by ordinary wear and tear. This was a seam that was torn, I assume, by moving furniture or whatever across it.
>
> Q: So how do you know the carpet was torn by someone moving furniture across it?
>
> A: I assume. I said I was assuming that. It was torn, though, because the strings was raveled out.

(Deposition Transcript at 52-53; Transcript at 202; Photograph 10.) The assumptions of the lessor, unsupported in the record, do not shift the risks of carpet replacement to the Government, when it has not been demonstrated that the seam was damaged by the Government. Because it is as likely that the seam was not properly installed as that the Government caused the damage because of other than ordinary wear and tear with occupancy of ten years, the lessor has not met its burden of proof to recover on this item.

Labor adjustment

The majority rejects any labor adjustment for the local area, although the Government estimator contends that the Means Guide provides for an adjustment of 62 percent of the national average rates. The lessor, in providing pricing on its construction in 1989, utilized similar costing guides and an area modification of 88 percent (Appeal File, Exhibit D at 121). The record amply demonstrates that the majority=s use of no adjustment is unsupported. A jury verdict approach should not be utilized when the party seeking relief has failed to provide credible support for its alleged costs.

Mantle

In this appeal, the lessor pursues its initial claim for $600 in reimbursement for a mantle; it seeks $100, because the Government has reimbursed $500. However, the lessor did not expend money for the mantle which the Government removed. As the lessor testified, the mantle Awas furnished by the Forestry Service. It was American Chestnut. It was a beautiful thing. [A Government employee, not the contracting officer] called me and asked if he could leave it and I said, ›Yeah, I=d like to have it.= I went down for the April 3rd inspection and it was gone. That=s it.@ (Transcript at 104.) The lessor has not demonstrated why it is entitled to any reimbursement for a mantle that was provided by and belonged to the Government. The lessor is entitled to no money after its removal. Accordingly, I would deny this claim in its entirety, such that the lessor is indebted to the Government for the $500 previously received for the mantle.

Conclusion

In accordance with the above, I grant in part the claim docketed as AGBCA 2000-175-1. Because I do not write in the majority, I do not address every item or every dollar amount of entitlement. I deny the other docketed appeals.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
November 14, 2002