JILL REESE,	)	**AGBCA No. 97-160-1**
		)
Appellant		)
		)
Appearing for the Appellant:		)
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DECISION OF THE BOARD OF CONTRACT APPEALS

OPINION BY ADMINISTRATIVE JUDGE EDWARD HOURY

This appeal arose from a June 22, 1995, lease of space in the Hillstrom Building in Palmer, Alaska. The lease was executed by Robert Stevens as lessor and by the State Chairperson of the Agricultural Stabilization and Conservation Service (ASCS), U. S. Department of Agriculture. The ASCS functions have since been assumed by the Farm Service Agency (FSA), U. S. Department of Agriculture.

The lease was for 2,500 square feet of office space for an annual rental of $44,050, beginning July 1, 1995, and continuing through June 30, 2000. Ownership of the Hillstrom Building was transferred from Robert Stevens to Jill Reese (Appellant or Jill Reese) in November 1995 as a result of a marital property settlement. The FSA terminated the lease and vacated the premises. Appellant seeks $111,500 in damages for the alleged wrongful termination.

Procedurally, the Government insists that a proper appeal of an April 16, 1996 CO's decision on Jill Reese's claim was never made within 90 days and that, therefore, such decision became final,

rendering the subsequent claims, decisions and appeals moot. The Government notes that the property was transferred by Jill Reese as the landlord on April 17, 1996, to J. Reese Investments & Brokerage, Ltd., and that Jill Reese as president of J. Reese Investments & Brokerage, Ltd. was the entity that filed the appeal.

On the merits, the parties disagree over whether a proper basis existed for the Government's termination. Moreover, Appellant asserts that the Government official who terminated the lease had no authority to do so. The Government contests this assertion, but asserts that even if the Board concludes that the official had no authority, the most Appellant could recover is 120 days of rent allowed by Clause 4.d. of the lease. Appellant insists Clause 4.d. is not applicable, because it was incorrectly included. The Government insists that Appellant failed to prove any damages, because Appellant was able to re-rent the space vacated by the Government, along with an adjacent area that Appellant had not been able to rent, to a single tenant for a greater annual rent than Appellant would have received from the Government. Appellant insists it was damaged because the rental rate per square foot of its new leasee was less than the Government's rate and that it incurred other expenses because of the Government's termination.

A hearing was conducted in Palmer, Alaska, May 21-22, 1997. The presiding judge retired April 3, 1998.

FINDINGS OF FACT

The Lease Renewal; Terms and Conditions

1. The Government had occupied the Hillstrom Building under a prior lease. The lease was scheduled to expire June 30, 1995, and the expiring lease rate was $.88 per square foot per month (AF 145). The building was conveyed to Robert Stevens in April 1995. Mr. Stevens wanted to keep the Government as a tenant and offered to make improvements upon execution of a new lease, including a new roof, new curtains, construct computer room walls, provide for air exchange cooling for computer room, paint walls, clean carpets, add electrical service to main room, meet all handicap code requirements, and install a sink in the break room. (Appeal File (AF) 33; Transcript (Tr.) 85, 99, 121, 332-334). Mr. Stevens' final offer was $1.47 per square foot per month, virtually the same as a competitor (AF 145).

2. ASCS accepted Mr. Stevens' final offer. The lease, executed June 22, 1995, required "high quality office space," free from health and safety hazards, maintained in a clean, safe, watertight and fully operational condition. Chilled water drinking fountains were to be located within 100 feet of the office space and the building was required to meet all local building codes. (AF 5-14.) The lease required snow removal and janitorial services by the lessor including daily disposition of trash, cleaning toilet facilities and replenishment of supplies (AF 7, 18). The term of the lease was from July 1, 1995 through June 30, 2000, at an annual rental of $44,050 for 2,500 net useable square feet,

or $1.47 per square foot per month [1](AF 4).

3. Clause 4.d. on the first page of the lease allowed the "County ASC Committee" to terminate the lease or reduce the space at any time by giving at least 120 days' written notice. Notice was to commence 1 day after mailing and no rent was to accrue after the termination became effective. (AF 4.) The Solicitation, Offer and Award For Collocated County Offices was incorporated into the lease (AF 5-6). Schedule A, USDA-Collocated Requirements, clause 6, Termination, also provided for a 120-day termination provision. However, clause 6 allowed termination only if funds for continued operations were not available, or the "ASCS Deputy Administrator for Management" determined that "this office" shall move to another location.[2] The clause also provided that

> This clause is independent of any other termination provision in the lease that related to the lessor's performance or ability to carry out the terms and conditions of the lease.

(AF 10.)

4. Mr. Stevens testified that he relied on clause 6, essentially disregarding clause 4.d. on the very first page of the lease. He also testified that for purposes of his marital property settlement with Jill Reese, the Hillstrom Building was valued at $450,000, but would only have been valued at $100,000 if the Government could terminate with 120 days notice, as clause 4.d. of the lease provides. (Tr. 82-84, 88, 91-92.) Evidence was also presented regarding Jill Reese's reliance on the two clauses at the time the property was transferred to her in November 1995. (Tr. 203, 206, 258-260.) However, her reliance in November 1995, if any, would have affected the marital property settlement, not the rights and obligations between her and the Government. In any event, the Board considered the testimony regarding reliance to have been unpersuasive.

5. Under Schedule D, clause 5, Termination for Default, allowed termination by the "USDA by written notice" if the lessor failed to deliver the leased premises on time, or if the lessor failed to complete "the work" on time, holding the lessor liable for damages for any such failure. The clause permitted the imposition of liquidated damages for such failures. The clause also provided that the lease shall not be terminated or damages imposed if the delay resulted from unforeseeable causes

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[1] The lease shows the annual rental rate per square foot as $17.62. The $1.47 was calculated by dividing $17.62 by 12 months.

[2] On page 31 of Appellant's Post Hearing Brief Appellant refers to Termination clauses for leases prescribed in ASCS Handbook 31-AS, Amendment 3, September 20. 1993, as Appellant's Exhibit 1. The Appellant's Exhibit 1 in the record, however is ASCS Handbook 10-AS (Revision 1), which does not include the precise reference in Appellant's Brief. The Handbook appears to be an internal ASCS document or instruction which provides guidance and direction for the agency, but does not change or affect the legal rights of the parties. Consequently, no reliance was placed on the Handbook by the Board.

beyond the control of the lessor, and the lessor notifies the ASCS County Executive Director (CED) at least 30 days prior to any scheduled delivery date. The clause did not provide that an improper termination for default would be converted to a termination for convenience. (AF 19-20.)

6. Under Schedule D, clause 9, Termination - Erroneous Representation Concerning Asbestos, PCBs, Radon, Hazardous Waste, and Environmental Safety, permitted the "ASCS" to require the lessor to correct problems associated with hazards listed in Schedule F (AF 20). Schedule F, clause 15, included a certification that the offered space complied with applicable Federal, State and local regulations concerning a safe work environment, free from environmental contaminants and hazards (AF 29).

7. Also under Schedule D, clause 17, Failure in Performance, allowed the CED to reduce rental payments for the lessor's failure to provide any service, utility, maintenance or repairs required by the lease (AF 27). The lease incorporated Federal Acquisition Clause 52.233-1, Disputes. This clause provides that a claim exceeding $50,000 is not a claim unless certified as prescribed by the clause. (AF 21, 22.)

Performance Under the Lease

8. By letter dated July 18, 1995, the ASCS confirmed the prior agreement with Robert Stevens including a new projected completion date for the agreed-to repairs of August 1, 1995. The new roof Robert Stevens had ordered had not been received. Many of the agreed-to improvements had not been completed by July 18, 1995. (AF 31; Tr. 335-336.) Many of the improvements, including the roof, had not been completed by October 24, 1996. (AF 32; Tr. 336, 390-392, 398-399.)

9. Jill Reese acquired the Hillstrom Building in November 1995 as part of a marital property division. (Tr. 91-93, 204-205, 260). Thereafter, all correspondence and contacts by the Government were with Jill Reese. Three lease amendments were signed by "Jill Reese" as "Jill Reese/J. Reese Investments" between December 1, 1995 and January 29, 1996. (Appellant's Exhibit (App. Ex.) 22, 25, 26.) The first amendment reduced the net useable space from 2,500 to 2,349.93 square feet and the annual rental from $44,050 to $41,405.77. The square footage rate remained $17.62 per square foot. (AF 30.) Prior to Jill Reese acquiring title, Mr. Stevens had replaced a large section of the roof (Tr. 96-98).

10. By letter dated January 25, 1996, Appellant was informed that on two separate occasions, the drinking fountain and kitchen sink were found to have sewage gas coming up through their drains. Also, the dishwasher backwashed into the drinking fountain and splattered soapy water on the drinking fountain and a wall (AF 34.)

11. Prior to January 11, 1996, there had been very little snow. However, thereafter, until early February there was a lot of snow. (Tr. 159-160, 299.) A substantial amount of water from the roof leaked into the agency space. Water was found dripping into a surge protector, a computer, and

agency papers. Water had blackened a light fixture. Water seeped under a wall and into the breakroom. (Tr. 128-130, 167, 200-201, 274-275, 280-283, 299.) The employee responsible for safety and health was concerned about the safety of the employees and did not feel that adequate measures were being taken by Appellant regarding his concerns (Tr. 135-136, 273-274, 279, 282).

12. On February 8, 1996, the water problems were discussed at an agency meeting. It was decided that Appellant would be notified that if the condition continued, the agency would terminate the lease (AF 35; Tr. 300, 403). The following February 8, 1995, letter was sent by the Palmer County FSA Committee to Jill Reese:

> This is a notification letter, that the roof needs to be repaired within 15 days from the date of this letter. The Committee noted that a temporary cover will be adequate until this spring or summer when a permanent cover can be completed.
>
> If you are not able to stop the leaks, you will have abrogated the conditions of the lease. We will be forced to begin preparations to move to a dry, properly maintained space.

13. The leakage continued to worsen (AF 127-128). By letter dated February 14, 1996, Jill Reese advised that she could not change the fact that the "prior owner did not get the roof finished by August." She stated that her only choice was "to try to contain the leakage until I can complete the job this spring." (AF 38.) By letter dated February 14, 1996, the agency advised Jill Reese that its safety concerns had escalated and that it was currently seeking "temporary space elsewhere to protect its employees, equipment and records. The letter also advised that water had leaked into another surge protector, into the copier/lunch room, that materials had been damaged, and that it was necessary to drape plastic over equipment. Water from the roof was being captured in buckets and coffee cans. Moreover, janitorial services required by the lease had not been performed since January 16, 1996 (AF 36-37; Tr. 301-302, 403).

14. By letter dated February 19, 1996, Jill Reese advised the FSA that work had begun on replacing the roof and that the work would be completed by February 23, 1996. The roof contractor was providing a 10-year warranty. (AF 39.) The FSA had an engineer inspect the roof. He concluded the repair was a "Band-aid" that should last 2 to 4 years (AF 124; Tr. 342).

15. On February 26, 1996, the state and county FSA committees met to discuss the roof problems and the plumbing problems. The problems with the roof, plumbing, electrical system, janitorial services and snow removal were discussed. The committees reached a consensus to terminate the lease and move if a health problem was confirmed. (AF 108-110.)

16. By letter dated February 28, 1996, the CED referred to the prior letter of January 25, 1996 (Findings of Fact (FF) 10), and notified Jill Reese that sewage odors from the sink and drinking fountain drains, and overflow problems had not been given proper attention, and that these problems

were persisting. The letter also advised of inadequate electrical outlets and service, inadequate snow removal from the sidewalk and handicap ramp, and janitorial services not being performed in accordance with the lease (AF 41-42; Tr. 302-303, 313, 365, 404). A bitumen roof surface was being placed over the existing roof without any attempt to repair areas where the existing roof was leaking (AF 118).

17. An inspection of the drinking fountain, sink drain, and sump pump by the State Engineer indicated the existence of an unsanitary condition and a possible source of disease (AF 111). The FSA requested the Palmer city inspector to inspect the leased space and determine whether a health problem existed (Tr. 344). The inspector inspected the leased space on March 4, 1996, and advised FSA that there were numerous code violations and that the installation of the drinking fountain, sink, sump pump, etc., were unsanitary. However, while these conditions were health and safety concerns that would require correction or cessation of use, they did not warrant an immediate direction by the inspector as to cessation of use or vacating the building. The inspector advised the FSA the same day of the results of the inspection, although his written report was not completed until a few days later. (AF 112-115; Tr. 52-56, 217, 344-346, 358).

Termination of the Lease

18. On March 4, 1996, the FSA Palmer county office contacted its Management Services Division (MSD) in Washington , DC regarding the building problems, and for advice or approval for cancellation of the lease (Tr. 124-125). The Palmer county FSA received verbal approval to relocate. The CED then wrote a letter terminating the lease which she sent to MSD for approval. MSD approved the letter which the CED issued on March 5, 1996, addressed to Jill Reese. The letter cited health and safety concerns associated with the pumped-drain system in the breakroom, wiring in the breakroom, and backflushing through the drinking fountain drain, causing sewer gas odors in the office and non-use of the drinking fountain. The roof was not leaking at the time, but the repair had been a "Bandaid" approach. The letter did not advise Appellant of its appeal rights (AF 59-60; Tr. 346-347).

19. The CED was authorized to provide explanations and interpretations to offerors (AF 8), evaluate the offers (AF 25), approve fire safety requirements (AF 15), grant approval to the lessor to inspect the premises (AF 17), oversee janitorial services (AF 18, direct changes to the lease (AF 19, 20), and determine the existence of excusable delays prior to termination (AF 20). However, the CED had no authority to terminate the lease (Tr. 347, 386, 397; ¶ 4 of the Government's Answer). The FSA Administrative Officer was the CO. However, the CED was the CO's supervisor (Tr. 396-397; Exhibit (Ex.) 70, page (p.) 57). On the March 5, 1996 termination date, the CO was in Fairbanks. The CO and the CED consulted with one another before and after the termination and concurred that the lease should be terminated (Tr. 348, 386, 404).

20. On March 8, 1996, the FSA executed a new lease for an annual rental of $23,350, a monthly

rental of $2,362.50, and a per square foot, per monthly rental of $1.35 (App. Ex. 48).[3] The new lease included the same 120-day lease cancellation clause 4.d. as in Appellant's lease, allowing cancellation without cause or reason. The Government vacated the Hillstrom Building on March 15, 1996 (AF 49; Tr. 218-219). The Government noted that there were eight new leaks in the roof at the time (AF 49).

Appellant's Claims

21. On March 20, 1996, "Jill Reese" as "Landlord" filed a certified claim in an unspecified amount for payment of the balance of the lease, reimbursement for improvements, reimbursement for additional work, costs, and attorney fees resulting from the termination. (AF 50-56). The claim was submitted on the stationary of J. Reese Investments & Brokerage, Ltd.

22. By letter from the CO to Jill Reese dated April 16, 1996, the CO denied Appellant's claim, stating that the Government was justified in terminating the lease because of health and safety concerns. Moreover, the Government stated that it considered the agreed upon building improvements to have been a condition for continuation of the lease, and that Appellant had not completed the improvements by the required completion date of October 1, 1995. (AF 1-2; Tr. 405.)

23. The Hillstrom Building was transferred by Jill Reese to J. Reese Investments & Brokerage, Ltd. April 17, 1996 (App. Ex.) 57). Between the time of the CO's decision on April 16, 1996 and November 8, 1996, there was no communication between the CO and Jill Reese or J. Reese Investments & Brokerage, Ltd. (Tr. 410). Jill Reese, as president of Jill Reese Investments & Brokerage, Inc., filed the appeal with the Board on May 8, 1996. The CO dealt with Jill Reese as the owner of the building (Tr. 412-414; AF 30).

24. An uncertified claim[4] signed by the attorney for J. Reese Investments & Brokerage, Ltd., as "the successor-in-interest to and assignee of [the] lease" was filed November 8, 1996, seeking damages in the amount of $500,000 for wrongful termination of the lease. The CO reiterated the rationale in her April 16, 1996 decision and denied this claim by decision dated December 12, 1996 addressed to the attorney. However, the CO referred to clauses D.7, D.9, and F.15 as the basis for the termination (see FF 5-7). The attorney filed a timely appeal January 19, 1997. (AGBCA No. 96-163-1 correspondence folder.) The CO testified that she did not consider her decision as a reconsideration of her April 16, 1996 decision (Tr. 406). This appeal was docketed as AGBCA No. 97-124-1 (Board's docketing letter of April 24, 1997, and Judge Doherty's letter of April 25, 1997.) The Government in its Answer denied that J. Reese Investments & Brokerage Ltd. was a successor-

[3] There is an apparent error on the new lease, because the $2,362.50 monthly rental is $28,350 per year, not $23,350.

[4] The claims generally took the form of Complaints and/or Amended Complaints that were filed with the Board or the CO.

in-interest to the lease, but conceding that Jill Reese was a successor-in-interest.

25. Appellant's attorney filed a certified, $232,000 Complaint with the Board on "behalf of J. Reese Investments & Brokerage Ltd." as successor-in-interest to Jill Reese, assignee of lease." Although the amount claimed had been reduced, the claim basis remained the Government's termination. The CO denied the claim by decision dated February 28, 1997. However, the underlying claim is not in the record and there is no evidence that the claim was certified. (App. Ex. 67.). The attorney filed a timely appeal and Complaint dated April 3, 1997 (withdrawn appeals folder) which was docketed as AGBCA No. 97-150-1.

26. Appellant filed a certified claim on behalf of "Jill Reese" in the amount of $111,500, dated April 22, 1997.[5] The claim basis was the Government's lease termination. The CO denied the claim by decision dated April 23, 1997, which was essentially identical to her decisions of February 28, 1997 and December 12, 1996. Appellant filed a timely appeal on the same date and requested

> that all prior Complaints docketed and/or otherwise filed with the [Board] be withdrawn upon acceptance of docketing and in substitution with the Complaint, dated April 23, 1997.

By letter dated April 24, 1997,

> The Government joins with Appellant in moving to dismiss all Complaints docketed prior to the present appeal involving this matter. The present Complaint appears to fully encapsulate all previous claims that were properly before the Board.

In its Answer under "Defenses" the Government asserted that the April 16, 1996 CO decision was final because such decision had not been appealed by a proper party. The Government also filed a Motion to Dismiss.

27. On May 1, 1997, the Board dismissed the prior appeals. The dismissal stated "as all matters in contention between the parties are included in AGBCA No. 97-160-1, the prior appeals are hereby dismissed." Ruling on Parties' Request to Withdraw Appeals, Jill Reese and/or J. Reese Investments & Brokerage, Ltd. (unpublished), AGBCA Nos. 96-163-1, 97-124-1 and 97-150-1, dated May 1, 1997.

28. Appellant's $111,500 claim included the elements of damages set forth below. The lease vacated by the Government, plus unleased space adjacent to the Government's space, was leased by Appellant to the Headstart Program. Rental losses through the June 30, 2000 lease term were

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[5] The claim was filed on behalf of "Jill Reese" as assignee of the lease. The claim was certified by "Jill Reese" (claim attached to Gov't Answer).

claimed to be $74,322. Preparation expenses of the space for Headstart were claimed to have been $13,500. The Headstart lease was claimed as creating greater building maintenance, repair and liability expenses. Repairs to the premises occupied by the Government were claimed at $13,078.85. "Lost opportunity costs relevant to professional real estate brokerage services rendered in conjunction with negotiating repairs to and substitute rental . . ." were claimed to have been $10,000. (April 22, 1997 claim attached to Gov't Answer.)

29. By letter dated April 24, 1997, Government Counsel filed a Motion to Dismiss asserting that "Jill Reese", never appealed the CO's decision of April 16, 1996 (see FF 22, 23) within 90 days, that the CO had never reconsidered this decision, and that therefore, the question of the propriety of the termination had become final. By letter dated April 29, 1997, the presiding judge deferred ruling on the Motion, citing "factual questions of the Government's seeming acceptance of Notice of Appeal in issuing responses thereto." By letter dated April 30, 1997, the Govemment renewed its Motion. The presiding judge issued a Notice of Hearing dated May 1, 1997, and the hearing was conducted on schedule May 21-22, 1997.

Proof Regarding the Claim Amount

30. The total rental loss portion of Appellant's $111,500 claim was $75,322 (Complaint,¶ 8). Appellant testified that the rental loss was $60,284.16. Appellant's revised Exhibit 13 indicates the rental loss is $51,626.22. The first page of Revised Exhibit 13 is set forth below.[6]

	A	B	C	D	E
1	Lease Terms Comparison for Hillston Building				jrusda1
2	Net Rentable Area = 12,151 sf				5/21/97
3					
4	USDA (US) Initial Term			HeadStart (HS) Overlap of US Term	
5	2349.93 sf (43% of HS)(1)	11/1/95-6/30/00		5,495 sf	11/1/95-6/3-/00
6	Income			Income	
7	11/1/95-6/30/96	27,603.84		11/1/95-6/30/96	0.00
8	7/1/96-6/30/97	41,405.76		7/1/96-6/30/97	60,445.00
9	7/1/97-6/30/98	41,405.76		7/1/97-6/30/98	65,940.00
10	7/1/98-6/30/99	41,405.76		7/1/98-6/30/99	65,940.00
11	7/1/99-6/30/00	41,405.76		7/1/99-6/30/00	65,940.00
12	Subtotal	193,226.88		Subtotal	258,265.00
13	Minus Payments Received	(20,525.13)		Minus Donation in Kind (3)	(106,196.00)
14	Total US Over US Term	172,701.75		Total HS Over US Term	192,325.00
15				43% Prorata (1)	82,699.75
16					
17	Expense (19% Prorata)(2)			Expense (19% Prorata)(2)	
18	Utilities over US term (4)	19,089.57		Utilities over US term	0.00

[6] Appellant withdrew Exhibit 13 and introduced another Exhibit 13 that was admitted over the objection of Government Counsel, based upon surprise, and the misgivings of the presiding judge. The square footage in the substitute Exhibit 13 was different from what the parties had stipulated to . (Tr. 227-231; 236-241.) Appellant acknowledged the need for corrections (AF 231-234). Appellant's "Revised 13" was admitted after the luncheon break at the hearing (Tr. 270). The Board's "Revised 13" includes lease payments of $41,405.76 per year (AF 30) and net rentable areas. Therefore, the numbers on Revised 13 are different from the numbers testified to at the hearing. Appellant also submitted a revised 13A attached to its Post Hearing Brief. (See Discussion.)

19	Janitorial over US term (5)	19,286.21	Janitorial over US term	0.00
20				
21	Total Expense	38,375.78	Total Expense	0.00
22				
23	Net Income for Term	134,325.97	Net Income for Term	82,699.75
24				
25				
26	US Net Income	134,325.97		
27	HS Net Income	82,699.75		
28	Rent Contract Claim	51,626.22		

31. Rental space in Palmer, Alaska, had a very low demand and rental property could remain unoccupied for years (Tr. 92, 226). At the time ASCS leased the space Appellant also had a lease with the State of Alaska for space in another portion of the Hillstrom Building. However, this space was not the space that was later occupied by Headstart. Headstart later occupied the space formerly occupied by ASCS plus other space which was vacant at the time, except for a one-office tenant who moved out about the same time as ASCS. (Tr. 256-257.) Had ASCS not moved out there would not have been enough space for Headstart (Tr. 257-258).

32. Referring to revised Exhibit 13 in FF 30, the 43% on lines 5 and 15 are derived by dividing the 5,495 Headstart square footage on line 5 into the 2,349.93 USDA square footage on line 5. The 19% on line 17 is derived by dividing the 2,349.93 USDA square footage by the 12,151 square footage on line 2. Appellant paid utilities and janitorial services (lines 18 and 19) under the USDA lease. These expenses were paid by Headstart under its lease. The third page portion of Exhibit 13 entitled "USDA Rents Received" shows $21,020.13 received from ASCS for the period 1/17/96 to 4/10/96. Appellant deducted $495 "for roof inspection" to arrive at the credit of $20,525.13 shown on line 13. There was no persuasive justification given for the deduction. All the evidence regarding the roof expenses indicates that these were Appellant's liability. (See FF 1, 8, 11, 13, 14.)

33. Referring to revised Exhibit 13 in FF 30 line 13 shows "Minus Donation In Kind of (3)" in the amount of $106,196 on line 13 that was deducted from the Headstart rental income. There is an arithmetic error in the subtraction. The $192,325 on line 14 should be $152,069. Lines 15, 23 and 27 should be $65,389.67. Therefore, the Rent Contract Claim on line 28 should be $68,936.30 in lieu of $51,626.22.

34. Up through the time of the hearing and Appellant's Post

Hearing Brief submittal, there was no evidence supporting the nature of the Donation in Kind deduction of $106,196. As Exhibit 82, Appellant attached a copy of the Headstart lease and an Agreement For In Kind Contribution to Appellant's Post Hearing Reply Brief. The later agreement requires Appellant to pay $103,718 not $106,196, through the 6/30/00 term of the USDA lease based upon attachment to such agreement ($2,478 x 12 + $2,327 x 12 + $2,169 x 12 + $2,003 x 10 = $103,718). However, one of the Headstart lease "Whereas clauses" indicates that the payments are for certain concessions contained in the lease. One such concession found is that Headstart incurred a liability for payment of real property taxes. ASCS was not liable for real property taxes under its lease. If the deduction for the $103,718 Donation in Kind is deleted, the rent portion of Appellant's claim is

reduced to $23,272.02, and to $22,777.02 after the $495 deducted for the roof repair (FF 32) is eliminated.

35. In addition to the Contract Rent Claim, Appellant testified that it had already incurred $13,655.43 to accommodate its new Headstart tenant and that $4,722 was the cost projected improvements (Tr. 242-243). A breakdown of the expenses appears in the attachments to Exhibit 13. It is not apparent from the breakdown how the total of $13,655.43 was derived. The listing shows a multitude of untotaled expenditures with $58,490 in "Tenant Reimbursements" subtracted to arrive at the $13,655.93 claimed. The listing includes window shades and screens, a gutter, replace damaged items, fire doors with windows, an exterior window, additional concrete, door knob, hoods, shelving, carpet, blinds, professional fees, fire alarm, install drain, toilet replacement, new water heater, Sheetrock, and $28,640.56 paid to Robert Stevens, or on behalf of Robert Stevens, the former owner. There is no indication in the testimony or the exhibit which expenses were reimbursed by the tenant or why the unreimbursed expenses are the liability of ASCS, particularly since some of the expenses were incurred in 1997.

36. Jill Reese testified that there would be increased building maintenance and repair in the amount of $10,000 over the life of the lease for the Headstart tenant, because a portion of the yard was now being used as a playground, and because the children would tend to cause more destruction to the building, such as spilling

"Kool Aid" on carpeting (Tr. 245-246). Even if the Board were to rely on this testimony, it is not apparent why expenses of this nature are the responsibility of the owner as opposed to the tenant.

37. Jill Reese testified that she incurred expenses to prepare the space for Headstart. These included the cost of the roof work which was more expensive because it was done during the winter. These costs were $9,263.29 plus $603.20 for a total of $9,866.49[7] (Tr. 246-247). There is no evidence that the claimed expenses were not simply expenses for which the owner was liable. For example, there is no question that the roof was leaking (FF 1, 8, 9, 11-15, 20) and that other legitimate ASCS complaints needed to be remedied (FF 10, 15-17).

38. Jill Reese claimed "lost opportunity costs relevant to professional real estate brokerage" in the amount of $10,000. This was for the time needed "fighting the default," "doing the Headstart construction," and much additional work related to supervising renovation to ensure compliance with code requirements (Tr. 248-249).

DISCUSSION

The Record

Appellant attached a revised Exhibit 13A, and Exhibits 80 and 81 to its Post Hearing Brief. The Government attached Exhibit 79 to its brief. Appellant attached Exhibits 82 and 83 to its Post Hearing Reply Brief. Absent a specific agreement allowing these post hearing evidentiary submissions, or good cause shown, due process, and the need for orderly proceedings require the Board to consider the record closed when the parties rest at the end of the hearing. Schmalz Construction Ltd., AGBCA Nos. 86-207-1, 86-229-2 and 86-255-1, 91-3 BCA ¶ 24,183; Eagle Forest Products, AGBCA No. 85-143-3, 85-1 BCA ¶ 17,803; Greenwood Construction Co., Inc., AGBCA No. 75-127, 78-1 BCA ¶ 12,893.

The evidentiary record includes the Rule 4 file, 7 CFR § 24,21,

[7] There is an error in the transcript which shows the amount as $98,066.31.

Rule 4, and supplements. All pleadings and other submittals accepted by the Board prior to the hearing are also included. Appellant's hearing exhibits at Tr. 4 are a part of the record. These were admitted subject to supporting testimony (Tr. 60). Although Exhibits 62 and 79 are listed at Tr. 4, these exhibits were later withdrawn (Tr. 59, 238). Exhibits 58, 64, and 66 are also listed at Tr. 4. The transcript is in error where it indicated that Exhibits 58, 64 and 66, or perhaps some other version of these exhibits, were admitted at a later time (Tr. 2, 59, 60, 152.)

Regarding revised Exhibit 13A, the Board admitted revised Exhibit 13, consisting of 15 pages, over the objections of Government Counsel (FF 30), and revised exhibit 13 is a part of the record. Appellant's Exhibit 13A is not. The four pages Appellant characterizes as Exhibit 80 are already a part of revised Exhibit 13. To the extent Appellant's 21-page Exhibit 81 is not already in the record, it will not be considered further. The Government attached Exhibit 79 to its brief. Although Exhibit 79 had been withdrawn at the hearing, these same three pages appear as a part of revised Exhibit 13.

Appellant attached to its Post Hearing Reply Brief the Headstart Lease, an Agreement For In-Kind Contributions, and various other attachments totaling 27 pages, as Exhibit 82. There was an agreement to consider the Headstart lease after the close of the hearing. Such consideration appears to have been subject to a prior review by the Government (Tr. 428-429). By submission with its Reply Brief, Appellant has effectively precluded any meaningful Government review. We give such evidence the weight it is due (FF 34). To the extent Appellant's 15-page Exhibit 83 is not already a part of the record, it is not considered further.

Jurisdiction

The lease in issue was originally signed by Robert Stevens as the lessor. The Hillstrom Building was transferred to Jill Reese as a part of a marital property settlement in November 1995. Thereafter, the Government dealt with Jill Reese as the Hillstrom Building owner and lessor. The Government terminated the lease for cause by letter dated March 5, 1996, and vacated the building on March 15, 1996. Jill Reese as "landlord" filed a certified "claim" in an unspecified amount based upon the Government's alleged wrongful termination (FF 20, 21). The CO denied this

claim by decision dated April 16, 1996 (FF 22). On April 17, 1996, Jill Reese transferred the building by deed to J. Reese Investments & Brokerage Ltd. Jill Reese, as president of the corporation, filed an appeal on May 8, 1996. (FF 23.)

The Government asserts that Jill Reese in her individual capacity never appealed the CO's decision within 90 days, and that therefore, the decision became final.[8] The Government notes that the CO never reconsidered her decision even though three additional claims and final decisions were issued, and that therefore, the propriety of the lease termination may not be reviewed by this Board.

We are dealing here with more than a simple change in name of the legal entity with whom the Government is dealing. Plum Run, Inc., d/b/a Plum Run Corp., ASBCA Nos. 46091, 49203, 49207, 97-1 BCA ¶ 28,770. The transfer of the Hillstrom Building to J. Reese Investments & Brokerage Ltd.[9] and the subsequent appeal by the corporate entity is indicative that an assignment of Jill Reese's claim against the Government was intended, and that the succession of J. Reese Investments & Brokerage Ltd. to the rights of Jill Reese was not involuntary, or accomplished by operation of law. Consequently, if we were dealing with "claims" as that term is defined by applicable regulations, the Government position appears to have merit.[10] However, for the reasons expressed below we need not address this issue further.

By letter dated march 5, 1996, the CED advised Appellant that the lease was being terminated for cause. While the CED had extensive authority under the lease, consulted with the CO who was in

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[8] Under the Contract Disputes Act at 41 U.S.C. 605(b) and 606, a CO's decision on a claim is final and conclusive and not subject review unless appealed within 90 days by "the contractor" to an agency board of contract appeals.

[9] The Articles of Incorporation and the indemnity and financial interests of the corporate offices were not made a part of the record.

[10] The anti-assignment statutes, 31 U.S.C. 3297 and 41 U.S.C. 15, prohibit the assignment of claims against the Government except in limited circumstances not relevant here. The Supreme Court has recognized certain exceptions to the prohibition where the assignment involves interests passing to heirs/devisees, assignees in bankruptcy, and receivers. The Court extended the prohibition to mergers and consolidations, where the assignor ceased to exist. Seaboard Air Line Railway v. United States, 256 U.S. 655 (1921). Cases interpreting this decision indicate that unless the transfer of rights is by operation of law, or otherwise involuntary, the anti-assignment statutes prohibit recovery. E. Harold Patterson, Receiver, 173 Ct. Cl. 819 (1965); Bolivar Cotton Oil Co. v. United States, 95 Ct. Cl. 182 (1941); Doblin v. United States, 64 Ct. Cl. 352 (1928); Broadlake Partners, GSBCA No. 10713, 92-1 BCA ¶ 24,699; Albert Ginsberg, GSBCA No. 9911, 91-2 BCA ¶ 23,784; CBI Services, Inc., ASBCA No. 34893, 88-1 BCA ¶ 20,430; Mancon Liquidating Corp., ASBCA No. 18304, 74-1 BCA ¶ 10,470.

Fairbanks on March 5, 1996, and was the supervisor of the CO, the CED had no authority to terminate the lease (FF 19). The fact that the MSD approved the lease cancellation and gave the CED approval to cancel the lease (FF 18), does not change the fact that the CED had no authority to cancel the lease.[11] These facts are of little practical significance, since the ASCS physically vacated the premises on March 15, 1996, and Appellant filed a claim that was denied by the CO's April 16, 1996 decision.

In this instance the CO's April 16, 1996 decision was based on a "claim," which although certified, was in an unspecified amount (FF 21). The Disputes clause in the lease (FF 7) defined claim as a written demand seeking the "payment of money in a sum certain, the adjustment of contract terms, or other relief. . . ." Here Appellant was seeking the payment of money, but there was no sum certain. Therefore, there was no claim, Essex Electro Engineering, Inc. v. United States, 960 F.2d 1576 (Fed. Cir. 1992) cert. denied. 113 S. Ct. 408 (1992); KM Records, Inc., ASBCA No. 46219, 94-2 BCA ¶ 26,749, and the CO's final decision did not begin the appeal period. The CO's decision on a non-claim is essentially a nullity. Fisherman's Boat Shop, Inc., ASBCA No. 50324, 1997 WL 593934 (need exact date to cite); Harney County Gypsum Co., AGBCA No. 93-190-1, 94-1 BCA ¶ 26,455.

The $500,000 "claim" filed November 8, 1996, was filed by J. Reese Investments & Brokerage Ltd. However, this claim was not certified and therefore, it was also not a claim because the Disputes clause required claims in excess of $50,00 to be certified as prescribed by the clause. Uncertified claims in excess of $50,000 are not claims as defined by the Disputes clause. Thus, the CO's December 12, 1996, decision did not initiate the appeal period.

Appellant's attorney filed a Complaint dated March 28, 1997, based upon a CO's decision denying a $232,000 claim. However, although the Complaint includes a certification to the Board, there was no evidence that the underlying claim to the CO was certified.

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[11] A CO's decision terminating a contract was proper, where the CO was directed to terminate it, where the decision was prepared for the CO by the Office of the General Counsel, where the evidence showed that the CO reviewed the decision and made changes to it prior to signing it. PLB Grain Storage Corp., AGBCA Nos. 89-152-1, 89-153-1, 89-154-1 and 91-205-1, 92-1 BCA ¶ 24,731; affirmed PLB Grain Storage Corp. v. Glickman, 113 F.3d 1257 (Fed. Cir. 1997). Under the present facts, the relevant termination clauses permit the "USDA" or the "ASCS" to terminate the lease (FF 5, 6). Moreover, even though the CED was the CO's supervisor and coordinated the lease termination with the CO and the MSD, the Government has conceded that the CED had no authority to terminate the lease (FF 19).

Such claim was not made a part of the record. Thus, the CO's February 28, 1997 decision did not initiate the appeal period.

Jill Reese's April 22, 1997, $111,500, claim to the CO, was certified by Jill Reese. The April 23, 1997 CO's decision was timely appealed by Jill Reese. All the relevant prerequisites for Board jurisdiction on this claim exist.[12] Consequently, the Government's Motion is denied.

The 120-day Termination Provisions

Clause 4.d. of the lease and clause 6 of Schedule A of the solicitation, which was incorporated into the lease, allowed the Government to terminate the lease with 120-days notice (FF 3). Clause 4.d. did not require the Government to provide any cause or reason for the termination. On the other hand, clause 6 allowed termination only if funds for continued operations were not available, or the ASCS Deputy Administrator for Management determined that the office should move to another location. The parties refer to these clauses in their briefs as termination for convenience clauses, though neither is so captioned.

Regarding clause 6, the Government has not asserted a lack of funding, or that the Deputy Administrator determined that the office should move. Appellant insists that it relied only on clause 6 and that clause 4.d. simply explains or restricts clause 4.d., and that therefore, the clauses can be construed harmoniously. Apparently, Appellant's concern and the Government's wish is that if the Board finds that the termination for cause was without merit, the application of clause 4.d. would limit Appellant's recovery to 120-days' rent, or approximately $13,600.

Clause 4.d., the clause Appellant would essentially have the Board read out of the contract, appears prominently on the very first page of the lease. We conclude that the two clauses when read together cannot be harmoniously construed. There is a patent ambiguity that would have required Appellant to inquire. However, in this instance Appellant's failure to inquire is of no legal

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[12] Where the terms of an assignment are not clear, and the assignor files an appeal of a CO's decision denying a claim that accrued prior to the assignment, the question of whether the claim of the assignor remains with the assignor, is transferred to the assignee, or are extinguished as a condition of the assignment, is a question relating to the merits of the appeal rather than to the Board's jurisdiction over the appeal. John E. Gallno, AGBCA No. 97-146-1, 98-1 BCA ¶ 29, 616.

consequence.

Generally, a termination for default is converted to a termination for convenience, if the termination for default was improper. However, such a conversion results from the terms of the default clause. Under the present facts, none of the clauses providing for a termination for cause, provide that the termination is converted to a termination for convenience, if the termination for cause was improper. Moreover, clauses 4.d. and 6 are not termination for convenience clauses and there is no provision for the submission of settlement proposals or the application of the cost recovery regulations. A convenience termination clause will not be implied in a lease. Johnson v. United States, 15 Ct. Cl. 169 (1988); Lombardo's Lakeview Resort, Inc., ENG BCA No. 5873, 93-3 BCA ¶ 26,093. Finally, the Government never invoked clause 4.d. at any time prior to the appeal process. It cannot now reach back and invoke clause 4.d. for purposes of limiting its damages. Poston Logging, AGBCA No. 97-168-1

The Propriety of the Termination

The ASCS Hillstrom Building lease was expiring June 30, 1995, and the rental was $.88 per square foot per month (FF 1). As an inducement to have ASCS remain as a tenant, Mr. Stevens, the lessor, promised to make significant improvements to the building by August 1, 1995, including a new roof, in exchange for a 5-year lease and a rental rate increase to $1.47 per square foot per month (FF). The ASCS agreed to these terms and a new lease between the parties was executed.

The pace of making the improvements dragged on long after August 1, 1995, and the improvements caused new problems with the drinking fountain and breakroom sink, including odors, and drains backing up. Snow removal and janitorial services were not being performed, and the roof was leaking. There were also numerous building code violations. While none of these conditions required condemnation of the building or ASCS's immediate departure because of health or safety considerations, the conditions were health and safety concerns that required immediate correction.

It is clear that the conditions described above violated the agreement of the parties increasing the rental rate in exchange for the building improvements including the breakroom sink and a new roof by August 1, 1995. Problems with roof leakage and the

breakroom sink continued through the time the ASCS vacated the building on March 15, 1996. The lease itself at clause 5, Schedule D, also provided for termination on this basis. (FF 5.)

Further, the failure to provide adequate snow removal for the handicap ramp and sidewalk (FF), the failure to perform janitorial services specifically set forth in the lease for over a month (FF), combined with the roof leaks (FF) and plumbing problems resulting in sewer gas odors in the office and having the drinking fountain taped off to prevent usage (FF) was a breach of the lease requirement to provide high quality office space.

For these reasons, termination of the lease by the ASCS was proper. See David Kwok, GSBCA No. 7933, 90-1 BCA ¶ 22,292, affirmed Kwok v. United States, 918 F.2d Table 187 (Fed. Cir. 1990).

Proof Regarding Claim Amount

We decided above that the lease termination was legally justified. While we need not consider damages, we do so because the parties invested a considerable effort on the issue of damages and because the failure of proof on the subject of damages provides a separate and independent basis for denying the appeal.

Appellant's proof of claim at the hearing considered of $51,626.22 in rental loss, $13,655.43 an $4,722 in improvement costs to accommodate the new tenant, $10,000 in increased maintenance and repair, $9,866.49 in repairs of the vacated premises, and $10,000 in supervision and administrative costs. (FF 30-38.) The total claim is $99,870.14.

In order to recover damages the claimant must produce satisfactory evidence from which the court can determine the extent of the loss. L'Enfant Properties, Inc. v. United States, 3 Cl. Ct. 582, 588 (1983), citing Roberts v. United States, 174 Ct. Cl. 940, 941, 357 F.2d 938, 234 (1966). Moreover, the loss must have been within the contemplation of the parties at the time the contract was entered into, and the loss must also have been the proximate result of the breach. L'Enfant Plaza Properties, Inc. v. United States, supra, at 589, citing Northern Helex Co. v. United States, 207 Ct. Cl. 862, 886, 524 F.2d 707, 720 (1975).

The largest single element of Appellant's $111,500 claim is the $68,936.30 amount claimed as lost rent revenues over the 5-year term of the lease (FF 30, 33). As stated in Findings of Fact 32 and 34, Appellant's deduction for Donation in Kind and for roof repairs were not adequately justified. Elimination of these deductions reduces Appellant's lost rent revenues claim to $22,777.02 (FF 34).

Appellant's lost rent revenue's claim is based upon having rented 2,349.93 square feet to the ASCS for $1.47 per square foot per month in comparison to renting 5,495 square feet to Headstart for $.92 per square foot per month.[13] When the ASCS rate is reduced for janitorial ser vices and utilities that Appellant did not provide to Headstart, the $1.47 rate is reduced to $1.20 per square foot per month.[14] In this regard, ASCS' rental rate for the expiring lease was only $.88 per square foot per month (FF 1), and the increase to $1.47 was predicated on the new roof and other improvements that were not adequately implemented. The baseline for Appellant's damages of $1.47 per square foot per month is speculative at best, particularly when compared to the $.88 per square foot per month.

As indicated in Findings of Fact 35-38, the $13,655.43 and $4,722 claims for preparing the premises for Headstart, $10,000 for increased building maintenance and repair, the $9,866.49 for other lease preparation expenses, and $10,000 for lost opportunity costs and administrative expenses, were not adequately supported, and are not recoverable.

DECISION

The appeal is denied.

EDWARD HOURY

[13] From FF 30, the $60,445 annual rental divided by 5,495 square feet, divided further by 12 months equals $.92 per square foot per month.

[14] From FF 30, the $38,375.78 total in utility and janitorial expenses divided by 2,349.93 square feet and further divided by 60 months, equals $.27 per square foot per month.

Administrative Judge

Concurring:

_____	_____
HOWARD A. POLLACK	JOSEPH A. VERGILIO
Administrative Judge	Administrative Judge

Issued at Washington, DC