Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DENIED: October 16, 2002

GSBCA 15070, 15189, 15252

HENRY H. NORMAN,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

David L. Shakes and Virginia G. Amend of Hendricks, Hendricks & Shakes, P.C., Colorado Springs, CO, counsel for Appellant.

Dalton F. Phillips and Robert M. Notigan, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **NEILL**, **DeGRAFF,** and **GOODMAN**.

NEILL, Board Judge.

These three appeals relate to a single lease entered into by Henry H. Norman (the appellant) and the General Services Administration (GSA). Because the appeals share a common core of facts, we have consolidated them for purposes of this decision.[1]

Under its lease with Mr. Norman, GSA secured office space for the use of the Internal Revenue Service (IRS) in a building owned by Mr. Norman and his wife and located in Colorado Springs, Colorado. On the night of April 9, 1999, a fire occurred in this building. The space on the ground floor leased to the Government for the use of IRS was severely damaged. As a result of the fire, GSA terminated the lease. Mr. Norman contests the propriety of that termination. He argues that the termination was improper and constituted a breach of the lease (GSBCA 15070). In the alternative, Mr. Norman argues that, even if

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[1] When citing to the appeal files submitted by the parties to these proceedings, we make no mention of the particular case or docket number to which they may refer. Rather, because we have consolidated these appeals and because the parties have taken care to number consecutively the appeal file exhibits for all three appeals, we will refer simply to the "Appeal File" without any further reference to a specific docket number.

the termination of his lease was proper, the Government nonetheless breached the lease by failing to pay for the cost of tenant improvements and by failing to pay rent associated with a hold-over tenancy (GSBCA 15189). In addition, Mr. Norman seeks to recover damages resulting from an alleged breach of the Government's duty to disclose information in its possession regarding risks of damage to the premises and regarding recommendations known to GSA and/or IRS but which remained undisclosed to him both before and after contract award (GSBCA 15252).

The parties have asked the Board to decide only the issue of entitlement on all three of the appeals currently before us. We have, therefore, limited this decision to issues relating solely to entitlement. Nevertheless, since we have denied each of the appeals, there is no need to address quantum in any subsequent decision. We consider each appeal in turn and our findings will be grouped under the heading of the case to which they primarily refer. Because these cases are consolidated, however, our numbering of the findings of fact will be continuous throughout and our reliance on them should not be understood as limited to the appeal to which we consider them to relate primarily.

GSBCA 15070--Termination of Appellant's Lease

Findings of Fact

1. Prior to leasing space from Mr. Norman for the IRS offices, GSA leased space for IRS's offices in Colorado Springs in the Bell Tower office building. On May 3, 1997, these offices were severely damaged by fire (the Bell Tower fire). Appeal File, Exhibits 112-16.

2. Newspaper accounts reporting on the Bell Tower fire spoke of ongoing investigations regarding the cause of the fire, which reportedly started inside the IRS offices. Damage was said to have been estimated at more than one million dollars. Appeal File, Exhibits 114-15. Government investigators working on the case were quoted as saying that the fire was deliberately set by someone who forced an entry into the building and set the blaze. Respondent's Trial Exhibit 1.

3. Mr. Norman is an experienced businessman, civil engineer, and contractor. He holds a bachelor's degree in engineering. After finishing college, he entered the United States Air Force as a second lieutenant and was assigned to a civil engineering squadron. While in the military, he received additional training in electrical, mechanical, and structural engineering. During that period, he also received a master's degree in research and development systems management. Although he never took a specific safety course while in the Air Force, he nevertheless was called upon, on occasion, to interpret manuals on safety requirements and to critique safety programs when making site inspections. For thirty years he has been licensed by the Colorado Springs/El Paso County Regional Building Department as an "A contractor," i.e., licensed to build any structure without qualification. As a home builder, he has had some formal instruction in safety. Transcript at 62-66.

4. Following the Bell Tower fire, GSA entered into discussions with Mr. Norman regarding the leasing of temporary space for IRS in the Lake Plaza building, a building in Colorado Springs owned by Mr. Norman and his wife. Agreement was reached for the

temporary lease of office space on the second floor. This temporary lease was renewed several times while GSA searched for and ultimately built-out permanent space for IRS's new permanent offices. Appeal File, Exhibit 109.

5. Mr. Norman had not initially planned to make an offer to GSA on the permanent lease of space for IRS. By letter dated November 19, 1997, however, the GSA contracting officer encouraged Mr. Norman to submit an offer on the "current procurement for space to house the IRS within Colorado Springs." He assured Mr. Norman that GSA planned to award this permanent lease on the basis of full and open competition. Transcript at 271-72; Appeal File, Exhibit 16.

6. The solicitation for offers (SFO) on this procurement expressly stated that GSA was interested in leasing approximately 10,000 square feet of rentable space and that the initial tenant was intended to be the IRS. Appeal File, Exhibit 1 at 6.[2] Among the SFO provisions is the following:

> After review of "Best and Final" offers is complete, the lease will be awarded to the responsible Offeror whose offer conforms to the requirements of this solicitation and is the lowest priced offer submitted. . . . The Contracting Officer will require the Offeror selected for award to execute the proposed lease prepared by GSA that reflects the proposed agreement of the parties.
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> The proposed lease shall consist of:
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> (1) Standard Form 2, U.S. Government lease for Real Property,
> (2) GSA Form 3517, General Clauses,
> (3) GSA Form 3518, Representations and Certifications,
> (4) The pertinent provisions of the offer, and
> (5) The pertinent provisions of the SFO.

Id. at 8.

7. The GSA Form 3517 mentioned in the above-quoted provision of the SFO is a twenty-four-page document entitled "General Clauses." It contains the text of forty-five clauses used in contracts for the acquisition of leasehold interests in real property. Appeal File, Exhibit 120. One clause of particular significance for this case is clause number seventeen, "FIRE AND CASUALTY DAMAGE." It reads:

> If the entire premises are destroyed by fire or other casualty, this lease will immediately terminate. In case of partial destruction or damage, so as to render the premises untenantable, as determined by the Government, the

[2] This and many other exhibits in the appeal file for these cases have manually written or stamped page numbers as well as printed page numbers. Unless otherwise noted in citations to the record, all page references will be to the manually written or stamped page numbers.

> Government may terminate the lease by giving written notice to the Lessor within 15 calendar days of the fire or other casualty; if so terminated, no rent will accrue to the Lessor after such partial destruction or damage; and if not so terminated, the rent will be reduced proportionately by supplemental agreement hereto effective from the date of such partial damage to or destruction of property of the United States of America caused by the willful or negligent act or omission of Lessor.

Id. at 6-7.

8. At the time GSA was soliciting offers for the long-term leasing of space for the IRS offices in Colorado Springs, it also had available for use a Form 3517A. This is a two-page form which bears the title: "GENERAL CLAUSES (Short Form)." Appeal File, Exhibit 21at 5-7. On a line immediately below this title is the following parenthetical note: "(Simplified Acquisition of Leasehold Interests in Real Property Leases Up to $100,000 Annual Rent)." Following this parenthetical note, Form 3517A has six numbered paragraphs. The first four of these six paragraphs are brief clauses. The first clause claims for the Government the right, at any time after the lease is signed, to inspect the leased premises. The second clause is similar in purpose to the FIRE AND CASUALTY DAMAGE provision appearing in Form 3517. The clause reads:

> 2. If the building is partially or totally destroyed or damaged by fire or other casualty so that the leased space is untenantable as determined by the Government, the Government may terminate the lease upon 15 calendar days written notice to the Lessor and no further rental will be due.

The third paragraph in Form 3517A is a clause requiring the lessor to maintain the premises in good repair and tenantable condition. The fourth paragraph is a clause which reserves to the Government the right to perform services or provide items at the lessor's expense in the event the lessor, who is obliged to provide the service or item under the lease, fails to do so. The fifth paragraph in Form 3517A is Federal Acquisition Regulation (FAR) clause 52.252-2. This clause simply states that the contract incorporates clauses by reference with the same force and effect as if they were given in full text. This FAR clause serves as a preamble for the sixth and longest of the paragraphs set out in Form 3517A.

9. The sixth paragraph in Form 3517A lists seventeen contract clauses found either in the FAR or the General Services Acquisition Regulation (GSAR) and provides for them to be incorporated by reference – either without qualification or under certain specified circumstances. Four of the clauses listed are obviously to be included in any lease to which the form applies since there is no note on any of these clauses regarding their limited applicability. These include a disputes clause, a clause regarding assignment of claims, a prompt payment provision, and a clause regarding a covenant against contingent fees. The remaining fourteen clauses are said to be "applicable to leases over" specified dollar thresholds. For some of these clauses, the dollar threshold for inclusion is as low as $2500 (a clause regarding affirmative action for handicapped workers) or $10,000 (an equal opportunity clause). For other clauses, the application threshold is as high as $500,000 (a

liquidated damages clause) or $1 million (a clause dealing with preaward equal opportunity compliance review). Appeal File, Exhibit 21 at 6-7.

10. At the time GSA was soliciting offers for the long-term leasing of space for the IRS offices in Colorado Springs, it also had available for use Forms 3518 and 3518A. These forms bear the title "REPRESENTATIONS AND CERTIFICATIONS" and are to be used for the acquisition of leasehold interests in real property. Form 3518 is the longer version of the form while 3518A is a two-page form which bears the title "REPRESENTATIONS AND CERTIFICATIONS (Short Form)." Appeal File, Exhibit 1 at 41-42. Like Form 3517A, this form also has immediately below its title the following parenthetical note: "(Simplified Acquisition of Leasehold Interests in Real Property for Leases Up to $100,000 Annual Rent)." This form contains seven numbered paragraphs which are to be reviewed, filled out where appropriate, signed, and submitted with any offer. The seven paragraphs apply either without qualification or under certain specified circumstances. Three of the paragraphs which are listed are obviously to be addressed regardless of the value of the lease. These include representations regarding the offeror's small business status, taxpayer identification, and Dun and Bradstreet (DUNS) number. The remaining four paragraphs are said to be "applicable to leases which exceed" specified dollar thresholds. For three of these paragraphs, the dollar threshold is $10,000. For the remaining paragraph, a certification and disclosure regarding payments to influence certain federal transactions, the threshold is $100,000. Appeal File, Exhibit 1 at 41-42.

11. Mr. Norman says that copies of Form 3517A and Form 3518A were furnished to him when he received his copy of the SFO regarding permanent space for the IRS offices; no copies of Form 3517 or Form 3518 were included.[3] Transcript at 689. In an affidavit filed earlier in these proceedings in connection with a motion for summary relief, Mr. Norman explained that, at the time the permanent lease of space for the IRS was being negotiated with GSA, he was not even aware that there were both a long and a short version of Form 3517. Affidavit of Henry H. Norman (Norman Affidavit) (Aug. 5, 2001) ¶ 13. At the hearing for these appeals, Mr. Norman testified that the contracting officer made it very clear that any lease to be awarded would use Form 3517A and Form 3518A. Transcript at 159, 161, 692, 695-96. He stated that he accepted this instruction without discussion or objection. Id. at 157-58.

12. After receiving the SFO, Mr. Norman prepared an initial proposal. He and a local realtor who was assisting him with his proposal met with the contracting officer in the realtor's office on December 2, 1997. The purpose of the meeting was to submit to the contracting officer Mr. Norman's initial proposal to lease space for the IRS offices in his Lake Plaza building on a long-term basis. Appeal File, Exhibit 111; Transcript at 692. The

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[3] Mr. Norman initially testified that he did not believe that he received a copy of Form 3517A with the SFO, but rather was given a copy of the form by the contracting officer during the course of negotiations. Transcript at 158-61. At the close of the hearing, however, after listening to the testimony of others, which apparently served to refresh his memory, he testified with what the Board observed to be greater certainty that Form 3517A was initially provided to him with the SFO. Transcript at 689, 692, 694.

proposal offered to lease 10,486 rentable square feet at a rentable square foot (rsf) per year (yr) rate of $23. According to data on the GSA Form 1364 in Mr. Norman's proposal, this $23 rate included various "components for rental." Among the listed components are operating costs at $3.91/rsf/yr and tenant improvements at $7.14/rsf/yr. Appeal File, Exhibit 111 at 5 (unnumbered). Also included in the proposal was a Form 3518A prepared and signed by Mr. Norman. It bears the date of October 30, 1997. Except for the paragraph calling for the offeror's DUNS number, which he labeled "N/A," Mr. Norman provided the information asked for in the other paragraphs of the form without exception. Appeal File, Exhibit 111 at 4-5 (unnumbered). The SFO did not require a signed copy of Form 3517A to accompany the proposal. Id., Exhibit 1 at 8. Nevertheless, Mr. Norman had his copy of the form with him at the meeting. Transcript at 695. He testified that Form 3517A was discussed briefly by the contracting officer. He understood her to state that, if he should get the award, he would be signing Form 3517A and Form 3518A. Id. at 693. Mr. Norman has testified that there was no detailed discussion of the contents of Form 3517 at this meeting. Indeed, aware at the time of hearing of the length of this form, he testified that there was no time for any such detailed discussion. He recalls that the meeting lasted less than an hour and included a discussion of his proposal and list of exceptions which the contracting officer had not even seen until that time. Id. at 692-93.

13. The contracting officer has stated in a declaration given under penalty of perjury that, in putting together the GSA lease of floor space at Mr. Norman's Lake Plaza building, she included "GSA Form 3517A the short form in the lease agreement as a substitute for GSA Form 3517." She further states that she advised Mr. Norman of this fact via correspondence summarizing his offer to GSA. Respondent's Supplemental Appeal File, Exhibit D, Declaration of Shelley A. Smith (Smith Declaration) (July 31, 2000) ¶ 4. The correspondence to which the contracting officer referred in her declaration is dated February 12, 1998. The letter provides comments on Mr. Norman's pending proposal to lease approximately 10,000 rentable square feet of office space on the south end of the first floor of his Lake Plaza building. The letter contains thirty-one numbered paragraphs. Paragraph twenty-one reads: "GSA Form 3517A, 'General Clauses' will be attached and made part of any ensuing lease agreement. A duplicate copy is attached." Appeal File, Exhibit 3 at 2 (printed page number).[4]

14. The contracting officer's recollection of her meeting with Mr. Norman and his local realtor on December 2, 1997, differs somewhat from Mr. Norman's description of the same meeting. In her testimony, the contracting officer initially described the meeting as one which followed her "agenda" rather than Mr. Norman's. She described the meeting as typical of the first meeting with bidders in which she reviews SFO provisions, clauses, and various forms and indicates the general schedule or time-line the procurement will follow. Transcript at 641-43.

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[4] The contracting officer's declaration states that the lease in which she substituted Form 3517A for Form 3517 was for the second floor space. This is clearly in error since the second floor space was the subject of a temporary lease of space for the IRS offices, which had already been awarded several months prior to her letter of February 12, 1998. At the time of that letter, she was obviously working on the permanent lease of space on the first floor of Mr. Norman's building.

15. When asked by the Board why she met individually with Mr. Norman and his associate rather than with all prospective offerors at the same time in a bidders conference, the contracting officer explained that for a larger project a bidders conference would have been held. In this case, however, she explained:

> Well, in this region, . . . because we deal with so many . . . mom and pop-type things, over 70 percent of what we do is under 10,000 feet. So, generally, . . . we just sit down with each . . . offeror and have a discussion rather than call them all together and inform them. If there is a change, then it goes out by mail.

Transcript at 642. The contracting office then went on to say that, if at these meetings there is already an initial statement of interest or incomplete proposal, that also is the subject of discussion. If additional information or clarifications are required, this is called to the offeror's attention. In this sense, these meetings can resemble more a negotiation session than a bidders conference. Id. at 644-45.

16. The contracting officer testified that for her meeting with Mr. Norman and his associate she brought "a pile of forms . . . , copies of just about everything, and we sat at the table and – went through them." This, she stated, included Form 3517. She further testified that, after she had gone through the provisions of Form 3517, she explained to Mr. Norman and his associate that she was going to use the shorter two-page 3517A for sake of brevity and paper reduction. Transcript at 628. She also testified that for this meeting Mr. Norman had an initial submission which she was able to discuss with him. Id. at 644-45.

17. In her testimony at the hearing, the contracting officer readily confirmed that, in dealing with Mr. Norman on the long-term lease of space on the first floor of his Lake Plaza building, she substituted Form 3517A for Form 3517. Transcript at 654-55. Nevertheless, she qualified this action by stating: "I changed the forms, the size of the forms, but not the content of the forms." She later explained that, in her mind, the two forms are the same; the only difference between them is that certain clauses that are set out in Form 3517 are not set out verbatim in Form 3517A but rather are incorporated by reference. Id. at 656.

18. After hearing Mr. Norman's version of what transpired at her meeting with him and his local realtor (Finding 12), the contracting officer testified that she still distinctly remembered discussing the Form 3517 during her meeting with them. Transcript at 703.

19. In the same affidavit mentioned earlier (Finding 11), Mr. Norman wrote that, during negotiations, he was instructed by the contracting officer that the 3517A and other documents given to him were to become part of any lease he might be awarded and that the language in these documents was not open to negotiation. He writes: "It was my impression that they were required boilerplate documents for all GSA leases and that, like the provisions of the SFO, not all language in the package of documents necessarily applied to this lease." Norman Affidavit ¶¶ 10-11. Mr. Norman's testimony regarding his understanding of the paragraphs in Form 3517A was in the same vein. He explained that he considered some of the provisions in the form to be applicable and others not applicable. Transcript at 138-39, 700-02. He considered the language of Form 3517A sufficiently clear and not in need of any clarification. Id. at 702. Because his lease was in excess of $100,000 annual rent, he did not

consider the first four paragraphs of Form 3517A applicable. This included the second paragraph dealing with termination in the event of fire or casualty damage. Id. at 138-39.

20. During the course of negotiations, Mr. Norman modified his proposal. According to a revised Form 1364, the area offered for lease was reduced to 9763 rentable square feet. The offered rental rate was reduced to $19.85/rsf/yr, which was said to include $4.47/rsf/yr for tenant improvements and $3.89/rsf/yr for operating costs. Appeal File, Exhibit 18 at 4. In his best and final offer, Mr. Norman further reduced the offered rental rate to $16.96/rsf/yr, which was said to include $4.05/rsf/yr for tenant improvements and $3.89/rsf/yr for operating costs. By letter dated February 9, 1998, GSA accepted Mr. Norman's best and final offer. Id., Exhibit 4. As negotiated and agreed, the annual rental was to be $165,580.48 (9763 rentable square feet at $16.96/rsf/yr), paid at a rate of $13,798.37 per month in arrears. The term of lease was to be seven years with five years firm. The estimated effective date of the lease was to be May 2, 1998. Id., Exhibits 1, 118.

21. The ensuing lease agreement (hereinafter "the lease") contains GSA Form 3517A, as agreed. The first page of this form, like the other pages of the final lease agreement, is initialed by Mr. Norman and the GSA contracting officer.[5] Appeal File, Exhibit 1 at 40.

22. On April 9, 1999, at approximately 11:00 p.m., a serious fire was observed in progress in the IRS offices at Mr. Norman's Lake Plaza building (the Lake Plaza fire). Appeal File, Exhibit 7. A Federal Protective Service (FPS) incident report prepared shortly after the fire stated that an official of the Bureau of Alcohol, Tobacco, and Firearms (ATF) had determined that arson was involved and that the fire had been started by someone throwing a bag full of newspapers coated in gasoline through a broken window. Id., Exhibit 123. A report prepared by the Colorado Springs Fire Department arrived at a similar conclusion. Id., Exhibit 124.

23. Shortly after the Lake Plaza fire, a GSA official conducted a walk-through of the building to evaluate the damage done. He concluded that the building was unsuitable for GSA's lease purposes and recommended that no government tenants be assigned to the location without complete replacement of the wood floor system in the burned area. Appeal File, Exhibit 8.

24. By letter dated April 21, 1999, a GSA contracting officer, in a final decision, gave Mr. Norman formal notice of GSA's intent to terminate the lease, effective May 5, 1999, "[p]ursuant to the provisions of Paragraph 2 of GSA Form 3517A." The decision further states: "No further rental will be due." Appeal File, Exhibit 13. Mr. Norman's

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[5] The signed lease agreement found in Exhibit 1 does not contain page two of Form 3517A. Nevertheless, in view of our earlier findings regarding the contracting officer's intent to include the form and Mr. Norman's understanding that it was to be included in the lease, we deem it reasonable to conclude that the second page of this two-page form is, if not actually included in the lease, nonetheless incorporated into the lease by reference by virtue of the actual presence of the first and title page of the form. See Findings 11-13.

counsel filed an appeal of this decision. Id., Exhibit 14. This notice of appeal was received by the Board on July 19, 1999.

Discussion

Mr. Norman contends that the Government's termination of his contract pursuant to the termination clause in Form 3517A was improper because that clause is self-deleting from leases such as his which involve an annual rent in excess of $100,000. GSA defends its action arguing that the termination clause in Form 3517A is part of the lease notwithstanding the parenthetical note appearing immediately below the title of Form 3517A, which indicates that the form applies only to simplified acquisition of leasehold interests in real property leases with annual rent up to $100,000.

Given the evidence before us, we conclude that the termination clause in Form 3517A is part of the lease and that the Government's termination of the lease, in accordance with the terms of that clause, did not constitute a breach of the contract.

The record clearly supports a conclusion that the parties agreed to include Form 3517A in the contract. The contracting officer has stated that it was her intent to include that form as a substitute for GSA Form 3517. Her intention to do so was confirmed in writing in her letter of February 12, 1998, to Mr. Norman. Findings 13, 17. Mr. Norman has testified that it was his understanding that this was the contracting officer's intent, that inclusion of this form in the lease would be a condition to award, and that the language of the form was not open to negotiation. He has further stated that he accepted this instruction without discussion or objection. Findings 11-12, 19. Finally, the first page of that form, as initialed by the parties, is actually included in the copy of the lease provided for the record in this case. Finding 21.

Although not denying that it was her intent to include Form 3517A in the lease, the contracting officer nevertheless now claims that she did so simply for the sake of brevity and paper reduction. She insists that, at her first meeting with Mr. Norman, she reviewed in detail the contents of Form 3517 but explained that the lease would contain the shorter version of this form, namely Form 3517A. She justifies doing so on the ground that the contents of Form 3517A and Form 3517 are the same, the only difference being that certain clauses set out in Form 3517 are not set out verbatim in Form 3517A but rather are incorporated by reference. Findings 16-17. Mr. Norman states instead that, at that meeting, only the contents of Form 3517A were discussed. He further states that, at that time, he was not even aware of the existence of the longer Form 3517. Findings 11-12.

On balance, we find the testimony of Mr. Norman regarding what occurred at his initial meeting with the contracting officer far more credible than that of the contracting officer. We remain convinced that the contracting officer did in fact insist on and ultimately agree to the inclusion of Form 3517A in the lease. We are, however, unpersuaded that she agreed to this solely because she labored under the mistaken assumption that Form 3517A incorporated by reference all of the provisions included in Form 3517. This, of course, is totally incorrect. Compare Finding 7 with Findings 8-9. Even a cursory examination of the two forms readily reveals that forty-five clauses contained in the twenty-four-page Form

3517 are not incorporated by reference into the two-page Form 3517A. We cannot accept that an experienced contracting officer would not already be aware of this fact or readily realize it upon examining Form 3517A prior to insisting on the inclusion of that form in the lease.

In her testimony, the contracting officer also attempted to avoid the consequences of insisting on the use of Form 3517A by arguing that she did not have the authority to delete from the lease the provision covering termination for fire and casualty damage which appears in Form 3517. Transcript at 647. In its post-hearing brief, GSA makes a similar argument but provides us with no citation to its regulations which would support the contracting officer's contention that she lacked the authority to agree to the deletion of that clause. Respondent's Post-hearing Brief at 15 n.4. We are led to a different conclusion based upon 48 CFR 570.703 (1997) (GSAR 570.703). In that provision, various clauses are listed for inclusion in solicitations and contracts for leasehold interests in real property which exceed the simplified lease acquisition threshold. This same GSAR provision, however, states that the contracting officer may make a determination that use of one or more of these listed clauses is not appropriate. Among these clauses is the termination provision which the contracting officer contends that she lacked the authority to delete.

The GSAR in effect at the time Mr. Norman's lease was awarded provided that, as a matter of policy, simplified lease acquisition procedures were to be used to the maximum extent practicable for actions at or below the simplified lease acquisition threshold. GSAR 570.203. This threshold was, and still is, defined by the GSAR as: "$100,000 average annual rent, excluding the cost of operational services, such as heat, light, and janitorial services, whether furnished by the lessor, the government, or both, for the term of the lease, including option periods." GSAR 570.102.

From the contracting officer's actions and testimony, we conclude that, notwithstanding the possibility that the lease being negotiated with Mr. Norman might exceed the $100,000 annual rent threshold for simplified lease acquisition procedures, it was her intent to use these procedures for this procurement. In response to the Board's questions, she explained that, because this procurement was for a relatively small area (less than 10,000 square feet), she elected not to follow more formal procedures. Finding 15. Her decision to insist on the use of Form 3517A and Form 3518A – both intended for simplified lease acquisition procedures – confirms her apparent plan to follow simplified lease acquisition procedures for this procurement.

The introduction of Forms 3517A and 3518A into this procurement, however, gave rise to what we consider an inevitable and patent ambiguity. Given the contracting officer's insistence on the use of these forms, the presence of a phrase at the top of each indicating its non-applicability to a lease with an annual rent in excess of $100,000 most certainly should have alerted appellant that something was gravely askew.[6] A patent ambiguity is one

[6] At no time during this procurement would it have been reasonable for Mr. Norman to assume that perhaps his lease would involve an annual rental of $100,000 or less once operating costs were deducted from the proposed rental rate as provided in GSAR 570.102.

which is not subtle, hidden or minor. Major omissions, obvious discrepancies, and manifest conflicts in contract provisions constitute patent discrepancies. Community Heating and Plumbing v. Kelso, 987 F.2d 1575, 1579 (Fed. Cir. 1993); American Commercial Contractors Inc. v. General Services Administration, GSBCA 11713, 94-3 BCA ¶ 26,973, at 134,351.

The Court of Appeals for the Federal Circuit has succinctly set out the consequences of a contractor not making inquiry when confronted with a patent ambiguity. It wrote:

> Ambiguities in a government contract are normally resolved against the drafter. An exception to that general rule applies, however, if the ambiguity is patent. See Interstate Gen. Gov't Contractors, Inc. [v. Stone], 980 F2d [1433,] 1434-35 [(Fed. Cir. 1992)]. The existence of a patent ambiguity in a government contract "raises the duty of inquiry regardless of the reasonableness of the contractor's interpretation." Fortec Constructors v. United States, 760 F.2d 1288, 1291 (Fed. Cir. 1985). That duty requires the contractor to inquire of the contracting officer as to the true meaning of the contract before submitting a bid. See Newsom v. United States, 230 Ct. Cl. 301, 676 F.2d 647, 649 (1982). Absent such inquiry, a patent ambiguity in the contract will be resolved against the contractor. See Beacon Constr. Co. [v. United States], 314 F.2d [501], 504 [(Ct. Cl. 1963)].

Triax Pacific, Inc. v. West, 130 F.3d 1469, 1474-75 (Fed. Cir. 1997).

The lease, as presented to Mr. Norman for execution in February 1998, contained an obvious discrepancy. The annual rent was to be $165,580.48, yet the short form for GENERAL CLAUSES, i.e., Form 3517A, which the parties had agreed to include in the lease, had a parenthetical note at the top indicating that the form was applicable only to leases up to $100,000 annual rent. See Findings 8, 20. It would be difficult to imagine a more obvious discrepancy.

The Government's position with regard to the parenthetical phrase at the top of Form 3517A is simply that it is to be disregarded in view of the agreement of the parties in this case to include the form in the lease. The parenthetical note should not be understood, therefore, as having the effect of rendering inoperative any provision of the form even if the

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His initial proposal contained an offered rental rate of $23/rsf/yr, which included an operating cost of $3.91/rsf/yr. If these operating costs are removed from the proposed $23 rate, the annual rent for the offered space of 10,486 rentable square feet would amount to $200,177.74. See Finding 12. The subsequently reduced offered rental rate of $19.85/rsf/yr was said to contain operating costs of $3.89/rsf/yr. If these operating costs are removed from that offered rate, the annual rent for the offered space of 9763 rentable square feet would still have amounted to $155,817.48. A similar calculation based on the rental rate contained in Mr. Norman's best and final offer of $16.96/rsf/yr, which was said to contain operating costs of $3.89/rsf/yr, yields an annual rent of $127,602.41 – still well above the annual rent threshold of $100,000. See Finding 20.

form is contained in a lease providing for annual rent in excess of $100,000. Given the circumstances of this case, we find this interpretation of Form 3517A and, in particular, the parenthetical phrase at the top of the form entirely reasonable. We are convinced that, notwithstanding an annual rent in excess of $100,000, the parties agreed to the inclusion of Form 3517A in the lease. It makes little sense that they would agree on the inclusion of this GENERAL CLAUSES short form only to have the majority of its provisions deleted by virtue of the parenthetical note appearing at the top of the form. We, therefore, resolve the ambiguity against the contractor.

It is well settled that, in a case such as this, a court or tribunal "may not consider the reasonableness of the contractor's interpretation, if at all, until it has determined that a patent ambiguity did not exist." Newsom v. United States, 676 F.2d at 650 (citing Mountain Home Contractors v. United States, 425 F.2d 1260 (Ct. Cl. 1970)). Only if the ambiguity were found to be latent would the reasonableness of the contractor's interpretation be in issue. Strictly speaking, therefore, we need not address the reasonableness of Mr. Norman's interpretation of Form 3517A in view of our conclusion that the ambiguity in question is patent. Nevertheless, because Mr. Norman contends that it was precisely because of his interpretation that he failed to detect any discrepancy, we will address its reasonableness at least briefly.

Mr. Norman's interpretation is fundamentally flawed. Aside from the fact that it incongruously eliminates nearly all of the paragraphs of Form 3517A, it misconstrues the language used for fourteen of the clauses identified for incorporation by reference in paragraph six of the form. As we have already seen, each of these clauses has a note indicating its applicability for leases in excess of specific dollar amounts. See Finding 9. Mr. Norman has incorrectly assumed that those dollar amounts refer to annual rent figures. They do not. Rather, they represent total overall contract or lease values.

The dollar thresholds mentioned for certain clauses identified in paragraph six of Form 3517A must not be confused with the basic threshold for use of simplified lease acquisition procedures. That threshold, as already stated, is set by regulation at $100,000 annual rent. This, however, does not mean that the total value – as opposed to the average annual rent – of a lease awarded using those procedures may not exceed $100,000. For example, a ten-year lease involving an average annual rent of $100,000 could easily approach a value in the neighborhood of $1 million. Hence, GSA's regulations on simplified lease acquisitions require that, if the total cost of the lease is expected to exceed $500,000, cost and pricing data must be obtained unless the requirement is waived or a regulatory exception applies. GSAR 570.203-4(b). As a result, paragraph six of Form 3517A requires the inclusion of a clause dealing with cost or pricing data for leases exceeding $500,000. Similarly, a small business subcontracting plan must be provided by prospective lessors who are large businesses if the total contract value of the simplified lease will exceed $500,000. Id. 570.203-4(c). Accordingly, paragraph six of Form 3517A also calls for a clause dealing with this subject and expressly notes that this clause is "applicable to leases over $500,000."

By construing as annual rent the dollar thresholds mentioned for some clauses listed in paragraph six of Form 3517A, Mr. Norman attempts to breathe life into them alone. He relies on the parenthetical note at the top of the form regarding the form's inapplicability to

leases in excess of $100,000 annual rent to render inoperative all other clauses listed in paragraph six and in the other paragraphs of the form, including the termination provision in paragraph two. Nothing in the Form 3517A supports this interpretation. The statements regarding the applicability of some clauses mentioned in paragraph six make no mention of annual rents, and GSA's own published regulation confirms that these threshold values refer to the overall contract or lease value and not to annual rents.

The only reasonable interpretation we can give to the straightforward parenthetical note at the top of the Form 3517A is that, if not otherwise agreed by the parties, the clauses contained in the six paragraphs in Form 3517A apply only to leases at or below the $100,000 annual rent threshold for simplified lease acquisition procedures. While some clauses may or may not be applicable to a particular lease, depending on the overall total value of that lease, nevertheless all clauses, by virtue of the parenthetical note at the top of the form, are intended for use only in leases with an annual rent of $100,000 or less. On the other hand, if the parties to a lease with an annual rent in excess of that annual rent threshold are in agreement as to the inclusion of this GENERAL CLAUSES short form in their lease – as we find occurred in this case – then, given that agreement, the form obviously applies. This is true with regard to all the clauses contained therein provided the overall contract values triggering their applicability have been met. In the instant case, the termination clause in paragraph two would be applicable in any event since the few clauses whose applicability is limited to certain specified overall lease values are found only in paragraph six. Finding 9.

Another item worthy of brief note regarding Mr. Norman's interpretation of Form 3517A concerns his alleged reliance on it at the time he submitted his offer. Even if we were to conclude that the discrepancy in this case was latent rather than patent, and even if we were to conclude that Mr. Norman's interpretation of Form 3517A was not flawed, we would still expect him to demonstrate that the interpretation of Form 3517A which he now espouses was in fact his interpretation of the form at the time he submitted his offer. If an ambiguity is latent, relief may be possible if the contractor can demonstrate that he reasonably relied upon his interpretation of it at that time. Fruin-Colnon Corp. v. United States, 912 F.2d 1426, 1430 (Fed. Cir. 1990); Froeschle Sons, Inc. v. United States, 891 F.2d 270, 272 (Fed. Cir. 1989); Trataros Construction, Inc. v. General Services Administration, GSBCA 15059, 01-1 BCA ¶ 31,309; Griffin Services Inc. v. General Services Administration, GSBCA 14507, 00-2 BCA ¶ 30,988; Mmantec, Inc. v. General Services Administration, GSBCA 14222, 99-1 BCA ¶ 30,122 (1998).

Contemporaneous documentary evidence in the record is in stark contrast with Mr. Norman's testimony on this point. He clearly did not interpret Form 3518A as he claims he interpreted Form 3517A. We realize that the forms vary as to content. While Form 3517A determines the liability of the parties, Form 3518A is simply informational. Nevertheless, for purposes of this case, we consider the similarity of the two forms highly significant. Both contain the exact same parenthetical note as to the applicability of the form to leases with an annual rent of $100,000 or less, and both contain specified dollar thresholds relating to lease values. See Findings 8-10. Nevertheless, in preparing and executing Form 3518A, Mr. Norman apparently ignored the parenthetical note and deemed all paragraphs in the form, with the exception of that regarding the bidder's DUNS number, to be applicable.

Finding 10. We found Mr. Norman's explanations regarding his inconsistency in interpreting Forms 3517A and 3518A less than convincing.

In summary, we conclude that the Government's reliance on the termination provision in paragraph two of Form 3517A to terminate its lease of appellant's office space was proper. We are satisfied that the parties agreed to include this form in the lease and that the clause in paragraph two was a valid and operative provision of that form. Mr. Norman's appeal of the contracting officer's decision to terminate the lease based upon that provision is, therefore, denied.

GSBCA 15189--Appellant's Claims for Tenant Improvements and for the Hold-Over Tenancy

In filing Mr. Norman's first notice of appeal, counsel for appellant claimed damages based on several breaches in addition to the alleged breach of the lease by improper termination. Among these were: (1) a claim based on the Government's refusal to pay for tenant improvements and other amortized expenses after termination of the lease and (2) a claim for rent said to be due for a brief period after termination during which IRS allegedly continued to occupy the premises

In a prehearing conference with counsel after an exchange of pleadings, the Board noted that these claims had never been the subject of a contracting officer's decision. Nevertheless, because they were mentioned in the first notice of appeal and thus had already been before the contracting officer for considerable time, the possibility of an appeal from a deemed denial was discussed. Following the prehearing conference, counsel for GSA advised counsel for appellant and the Board that the Government was agreeable to have the other claims contained in appellant's notice of appeal brought before the Board based upon a deemed denial by the contracting officer. Board Correspondence File, GSBCA 15070, Letter from Respondent to the Board (Nov. 5, 1999). On December 3, 1999, the Board received Mr. Norman's appeal from a deemed denial of those claims. The appeal was docketed as GSBCA 15189.

Findings of Fact

Tenant Improvements

25. Various provisions in the SFO explained to offerors how they were to prepare their proposals. They were directed to make use of GSA's standard form for a proposal to lease space (Form 1364). Appeal File, Exhibit 1 at 8. On this form an offeror is expected to list, on a rentable-square-foot-per-annum basis, the costs and prices associated with various components of the offered per annum rental rate. Id., Exhibits 18 at 4, 111 at 5 (unnumbered).

26. Form 1364 and the SFO identify three categories of rental components. Appeal File, Exhibits 18 at 4, 111 at 5 (unnumbered). The first relates to the "shell," which is defined in the SFO as including real estate taxes and all the owner's expenses such as "property financing exclusive of tenant improvements, insurance, management, profit, etc."

Id., Exhibit 1 at 9. The second rental component concerns "tenant improvements." Id. This category covers the "tenant improvements" which the successful offeror is expected to make upon award. The SFO explains:

> Tenant improvements will include all hard costs including the contractor's profit and overhead associated with providing all contemplated Government improvements including: HVAC [heating, ventilating, and air conditioning], plumbing, electrical, telephone, and lighting, doors, partitions, and any other Government specific improvement within the offered occupiable area of the building. Tenant improvements shall not include any of the owner's "shell" costs or perimeter walls.

Id. (emphasis in original). The third component of rental covers the contractor's operating costs. Id. at 10.

27. With regard to tenant improvements, the SFO required offerors to submit with their proposals satisfactory evidence of at least a conditional commitment of funds in the amount of $29 per rentable square foot to cover the cost of providing the Government required tenant improvements. Appeal File, Exhibit 1 at 6. The SFO also advised offerors that the actual reasonable cost of all tenant improvements would be amortized over the firm term of the lease at the lessor's cost of capital confirmed in the offeror's best and final offer. Id. at 14.

28. At the hearing for these appeals, appellant called as a witness an individual whom the Board recognized as an expert in commercial real estate leasing practices for the state of Colorado. Transcript at 408-09. In the opinion of this expert, the term "rent" does not include the costs of tenant improvements. He explained that a lessee's monthly payment covers three basic elements, namely, rent, operating expenses, and the costs of tenant finish (which are usually amortized over a period of time of the lease). On occasion, if the tenant prefers, the costs of tenant improvements may be prepaid in advance. Id. at 415-16.

Discussion

Appellant argues in the alternative that, even if the termination clause in Form 3517A is applicable to his contract, the Government is still liable to him for the costs of the tenant improvements. Counsel for appellant write:

> The termination language of form 3517A, if applicable, permits GSA to terminate the lease without any further payments of rent. It is silent about GSA's obligation, however, to reimburse Mr. Norman for his unrecovered tenant improvement costs which were amortized into the monthly payment to be recovered over the five-year term of the lease. Mr. Norman and GSA negotiated the amount to be amortized over the five year term to be $4.05 per square foot. It was the intent of the parties that Mr. Norman recover these costs over the life of the lease [citations to the record omitted].

Appellant's Post-hearing Brief at 26-27.

We disagree with appellant's contention that the termination provision in Form 3517A is silent regarding GSA's obligation to reimburse Mr. Norman for his tenant improvement costs. The provision expressly states "no further rental will be due." Finding 8. The meaning of the term "rental" is clear from the terms of the SFO as well as from the categories identified in GSA Form 1364. "Rental" refers to the offered, negotiated, and ultimately agreed upon composite per annum rate per rentable square foot. See Findings 25-26. The record confirms that Mr. Norman, in accordance with the SFO guidance, did indeed offer and negotiate a "rental" which contained tenant improvements as one of its specifically stated components. See Findings 12, 20. When the contract provision states that no further "rental" will be due, it obviously includes that component of the rental which covers the cost of tenant improvements.

We see no conflict with the conclusion we reach here and the testimony of appellant's expert. He distinguished between "rent" and "the costs of tenant finish" or improvements, and pointed out that they represent distinct components of a lessee's monthly payments. Finding 28. We have no quarrel with the distinctions he makes. We cannot, however, employ these distinctions to alter the plain meaning of the language appearing in the lease or to undo the contractual scheme actually used by the parties to price the lease. Based on the actual language of Form 1364 and the SFO (the pertinent provisions of both being included in the lease (Finding 6)), it is precisely the agreed-upon combined rate which constitutes the "rental" which the Government is relieved from paying under the termination provision in paragraph two of Form 3517A once the contract is actually terminated pursuant to that provision.

Contract interpretation is said to "begin with the plain language" of the contract. McAbee Construction, Inc. v. United States, 97 F.3d 1431, 1435 (Fed. Cir. 1996); Foley Co. v. United States, 11 F.3d 1032, 1034 (Fed. Cir. 1993). That language must be read in accordance with its express terms and plain meaning. C. Sanchez and Son, Inc. v. United States, 6 F.3d 1539, 1543 (Fed. Cir. 1993); Alaska Lumber & Pulp Co. v. Madigan, 2 F.3d 389, 392 (Fed. Cir. 1993); Hills Materials Co. v. Rice, 982 F.2d 514, 516 (Fed. Cir. 1992); Hol-Gar Manufacturing Corp. v. United States, 351 F.2d 972, 976 (Ct. Cl. 1965). The term of concern to us here is "rental." The termination clause does not speak of "rent" or the "shell" component of the rental due under the lease. It speaks simply of "rental." Given the explanation of the components of the offered per annum square foot rental rate in the SFO and the confirmation of this in the manner by which the components of rental are described in the GSA 1364 forms submitted by Mr. Norman during the course of negotiations, we must conclude that "rental" here unmistakably includes the tenant improvement cost component of the offered composite per annum rate per rentable square foot. See Findings 12, 20.

Appellant argues that, as a matter of policy, we ought to treat the costs of tenant improvements in this case much as incurred costs are treated when a contract is terminated for convenience. See Appellant's Post-hearing Brief at 27. This obviously cannot be done. The termination clause in Form 3517A on which the Government relied in terminating appellant's lease has no such provision. We can no more read provisions into the contract which are not there than we can ignore the plain meaning of those that are. The consequences of the termination clause in Form 3517A are clear. The risks of not being

reimbursed the costs of tenant improvements in the event of fire or other casualty are allocated to the lessor. We must interpret and enforce the contract as written. We agree, therefore, with respondent that the provision excusing the Government from "further rental" relieves the Government of any further liability for the costs of tenant improvements.

The parties in their reply briefs have expended considerable time and effort in discussing whether appellant is entitled to recover his claim for the cost of tenant improvement since he has already recovered some of those costs through insurance. Having concluded that there is no basis in the lease for recovery of these costs, we do not reach this issue.

In his initial complaint, appellant sought to recover not only the cost of tenant improvements made under the lease, but also rent said to be due from the Government from the period following termination of the lease on May 5, 1999, through June 30, 1999, the date on which the Government allegedly ceased to occupy the premises. In its answer, the Government denied any allegations of fact which might be included in this allegation. Appeal File, Exhibit 129 at 4 (printed). In its post-hearing briefs, appellant has offered nothing by way of factual proof or legal argument in support of this claim. Further, in a prehearing conference on January 8, 2002, appellant objected, on grounds of relevance, to the inclusion of documentation which related, at least in part, to this alleged hold-over tenancy. The material had been originally proposed by respondent for inclusion in the appeal file as exhibits 9 and 10. The Board sustained the objection. Conference Memorandum (Jan. 9, 2002). We conclude, therefore, that this portion of appellant's case has been abandoned.

The remaining claim for GSBCA 15189 is denied. The Government's refusal to compensate appellant for the cost of tenant improvements is not a breach of the lease, as alleged, but rather justified under the terms of the termination provision in Form 3517A.

GSBCA 15252--The Government's Alleged Breach of Its Implied Duty of Good Faith and Fair Dealing

In submitting Mr. Norman's notice of appeal of the contracting officer's decision to terminate the lease, his counsel, in addition to the claims which eventually became the subject of GSBCA 15189, asserted a claim based on gross negligence on the part of the government officials involved with the lease. When the Board pointed out at the initial prehearing conference that this claim sounded in tort and was not within its jurisdiction, counsel indicated that the claim would be revised.

When counsel for appellant filed their appeal from a deemed denial which became GSBCA 15189, they included an appeal from a deemed denial of a revised version of the original tort claim. This allegation, as revised, was based upon an alleged breach of the Government's implied, contractual duty of good faith and fair dealing. Counsel for GSA, however, objected to the appeal from a deemed denial of the claim thus revised and asked instead that the contracting officer be given leave to address the revised claim in a specific decision. The Board granted the request. The contracting officer issued her decision

denying the claim on January 19, 2000. The decision was appealed and thereafter docketed as GSBCA 15252.

Findings of Fact

Mr. Norman's Inquiries and Personal Observations

29. Shortly after the Bell Tower fire, while IRS was occupying the second floor of his building under a temporary lease, Mr. Norman spoke with the two IRS office managers working on site regarding the allegation that the fire was the result of arson. He testified that neither manager was willing to give him any information. They suggested instead that he speak with someone in the IRS criminal investigations division (CID). Acting on their suggestion, he spoke to a CID official. Mr. Norman's recollection of his discussion with this official is that he was told that there was an ongoing criminal investigation being conducted by the ATF and that, if arson were to be confirmed, certain suspects were already under close surveillance and the incident would not recur. Mr. Norman stated that he was led to believe that the suspects were thought to be from an anti-government group in the eastern part of the county, sometimes referred to as the "El Paso Crazies." Transcript at 70-73. This term, according to Mr. Norman, conjured up in his mind an image of the Three Stooges rather than of terrorists. Id. at 104.

30. The CID official with whom Mr. Norman contends he discussed the Bell Tower fire testified that he most certainly did have occasion to talk with Mr. Norman but was unable to recall specific incidents. He, therefore, did not recall any conversation regarding a specific group being under surveillance. Transcript at 507-08. The record contains an Associated Press (AP) release out of Colorado Springs, dated July 5, 1997, which discusses grand jury proceedings involving two local anti-government activists who were suspected of being involved in the Bell Tower fire. These individuals were quoted as stating that they had nothing to do with the fire but were of the opinion that the Government has no right to collect income taxes. Appeal File, Exhibit 211.

31. Mr. Norman testified that, following his discussion with the IRS CID official and after reading the AP release regarding the grand jury questioning of two suspects, he was satisfied that there was no continued threat of arson to the IRS space already under temporary lease in his building or to space which might be the subject of a more permanent lease. Transcript at 74-75.

32. Mr. Norman stated that his lack of concern regarding the continued threat of arson was further strengthened shortly before he signed the permanent lease of space for IRS. At the time, another firm leasing space in his building, Colorado Health Partners, specifically asked him about possible risk to the building owing to the presence of the IRS offices. Mr. Norman met with IRS and GSA security personnel to discuss the firm's concern. In particular, he asked about the intrusion alarm which was being installed in the IRS space. He testified that the government officials declined to give him details regarding the system but assured him that it was state of the art. He further testified that, in talking to these individuals, he was left with the impression that "everything necessary was being done." He, therefore, went back to Colorado Health Partners and assured them that, based

upon what he had been told, the building would be one of the safest in Colorado Springs. Transcript at 75-76.

33. At this same meeting with IRS and GSA security personnel, Mr. Norman also discussed the possibility of including glass-break detectors in the intrusion alarm system. He explained to them that these detectors had been installed on all first floor windows for the prior tenant. The system with its wiring had been left intact when the tenant vacated the premises. The offer was declined. From this he drew the conclusion that the new system included some other more sophisticated means of detecting glass breakage. Transcript at 80-83.

Vinyl Coating for Ground Floor Windows

34. The SFO for the permanent lease of space for IRS specifically called for all ground floor windows to be covered with a transparent, projectile-inhibitive, vinyl coating at least six millimeters thick. Appeal File, Exhibit 1 at 23. In his initial proposal, Mr. Norman wrote that he was not offering to provide this coating, and, if the coating were still required, he would charge for it as a tenant improvement. Id., Exhibit 17 at 2. Mr. Norman testified that he declined to include this requirement in his proposal because it was not clear to him precisely what was being sought and thus he could not price it. He was unsure whether the requirement was simply for a film that would prevent fragmentation or something that would actually stop a rock or a bullet. His oral requests for further information went unanswered. Transcript at 83-90.

35. During the preparation of the IRS floor plan shortly after award of the lease, Mr. Norman again broached the issue of the six-millimeter-projectile-inhibitive coating for the ground floor windows, but the IRS representative working with him did not pursue the matter. Transcript at 90. The requirement, therefore, remained unmet. Mr. Norman testified that the explanation eventually given to him for its deletion was that it was too expensive – although he had never been able to provide a cost for it. Id. at 83, 88.

36. The requirement in the SFO for a transparent, projectile-inhibitive vinyl coating of at least a six millimeter thickness was specifically included in the list of special requirements which IRS provided to GSA for its Colorado Springs office. Appeal File, Exhibit 142 at 2 (printed). This was the first time the contracting officer had encountered such a requirement. She considered it to be more than mere boilerplate. She personally asked an FPS officer what the purpose of the requirement was. She understood his explanation to be that it was to reduce the risk of injury from flying glass. The contracting officer is not aware of any written record indicating that this requirement was ever deleted by IRS. Transcript at 631-32, 657-58.

37. Mr. Norman has testified that prior to the filing of these appeals, he did not know that the requirement in the SFO for transparent, projectile-inhibitive vinyl coating on ground floor windows was a special requirement of IRS. It is his testimony that he would have persisted in his request for additional information in order to price this item for his proposal had he known that it was a special agency requirement and not merely a provision contained in GSA's standard SFO for office leases. Transcript at 94.

Guard Service

38. When IRS moved into the second floor of Mr. Norman's Lake Plaza building pursuant to the temporary lease, a twenty-four-hour guard service was provided initially. Mr. Norman's recollection is that this service gradually diminished over time and ceased altogether once the IRS offices were moved to the first floor after award of the permanent lease. Transcript at 92-93. E-mail messages in the record between IRS and GSA officials indicate that IRS did initially provide some reimbursement to GSA for guard services but that this ceased with the beginning of fiscal year 1998. Thereafter, GSA paid for the guard services from discretionary funds but only for a brief period at the start of fiscal year 1998. Appeal File, Exhibits 157, 158.

Fire Safety Prelease Certification Checklist

39. The permanent lease of space on the first floor of the Lake Plaza building contains a fire safety prelease certification checklist which confirms that the building did not have sprinklers and that the fire alarm was not a monitored alarm, i.e., it was a building alarm without automatic fire department notification. Appeal File, Exhibit 1 at 43; Transcript at 48-52. When asked, during the hearing for these appeals, about the absence of sprinklers in the Lake Plaza building, Mr. Norman explained that one reason why sprinklers were not installed was that in a building of such limited size they would not be cost-effective. Prospective tenants would not be disposed to pay the higher rent which a building owner would normally charge to recover the cost of providing and maintaining this additional feature. Transcript at 150-51.

GSA's Accident Review Board Report

40. Following the Bell Tower fire, several GSA employees in the agency's Rocky Mountain Region, including the regional fire protection engineer and security specialist, convened as an Accident Review Board to discuss the fire. Their final report concluded that the fire had been intentionally set. A final section of the report entitled "Actions taken and recommendations to prevent recurrence" spoke of the need to lease sprinkler-protected spaces in the future but recognized that IRS was currently housed temporarily in space which was not sprinkler-protected. This section of the report also pointed out that, although sprinkler protection cannot prevent arson, it can greatly reduce the damage from fire within acceptable limits. The report concluded that, in the wake of the recent fire, IRS and GSA were both sensitive to fire protection mechanisms and would in the future insist upon state-of-the-art security and fire protection systems. Appeal File, Exhibits 112, 140, 145, 148; Transcript at 218-19, 568-69.

41. The chairperson of the Accident Review Board was the Director of GSA's Colorado Service Center at the time. She testified that, based upon her experience in the real estate area of GSA, she would have expected a potential lessor to be informed of the Board's recommendations. She explained that a fire survey/safety survey is conducted as part of the

leasing process and that there normally is a discussion of such things during that time. She stated that, in this particular case, therefore, she would have expected the contracting officer to discuss the report's recommendations with Mr. Norman. Transcript at 219-22. The fire protection engineer for GSA's Rocky Mountain Region, however, who served as recorder for the Accident Review Board and claims to have written most of the report, testified that the Board's report was an internal report that would not be shared with any tenant. Id. at 583, 590, 613. She stated:

> So I don't feel like GSA needed to share [the report] with anybody, but it was developed for GSA, and it would help us develop policies. [Mr. Norman] needs to develop them on his own, – who[m] he rents to and whatever his policies are.

Id. at 614.

42. This same GSA fire protection engineer testified that, with regard to fire safety, GSA's mission both in leased buildings and in government-owned buildings is primarily life safety and secondarily property protection. Transcript at 592. She was, however, of the strong opinion that GSA and IRS should insist on sprinkler protection, not for life safety but because sprinklers are a proven and time-honored agent for the reduction of property loss. Id. at 601, 609. When asked about the absence of sprinklers in the space leased from Mr. Norman for the IRS offices, she responded that this was not a mistake but, in her opinion, simply a deliberate decision not to follow the Review Board's recommendation in this particular instance because of the costs that would be involved. Id. at 615.

43. Mr. Norman testified that, prior to the filing of these appeals, he was unaware that an Accident Review Board had been convened or that the Board had issued a report with recommendations. Transcript at 96. He testified that at the time he was negotiating the temporary lease for the IRS offices immediately after the Bell Tower fire, he was asked if his building had sprinklers. When he replied that it did not, he was asked what it would cost to install them.[7] Mr. Norman testified that he offered to get an estimate but that the matter was not pursued. Id. at 52-53. He further stated that the question of sprinklers was never discussed with him in conjunction with the permanent lease. Id. at 97-98.

44. Mr. Norman has testified that, had he known at the time he was negotiating with GSA of the Accident Review Board's recommendations regarding the need for sprinkler and fire protection systems, he would not have offered to lease space to the Government on a permanent basis. The reason he gives for this statement is that the recommendations contained in the report indicate a level of ongoing risk quite beyond any risk that he believed might exist after his earlier discussions with GSA and IRS security personnel (Findings 31-32). Transcript at 98-99.

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[7] The parties appear to be in agreement that the absence of sprinklers in Mr. Norman's Lake Plaza building was not a violation of local fire security requirements. Transcript at 54, 151, 585-86.

Vulnerability Assessments

45. Shortly after the fire in the Lake Plaza building, Mr. Norman agreed to be interviewed by an agent from the Inspector General's Office of the United States Treasury Department. Mr. Norman testified that, during the course of this interview, he was asked by the agent if he was familiar with the vulnerability survey done on the building. Mr. Norman replied that he was not. This, according to Mr. Norman, surprised the agent. Mr. Norman states that he was also asked if he was aware of any recommendation made for protection of the ground floor windows in his building. Again, he replied that he was not. The interview terminated shortly thereafter. Transcript at 68-69.

46. The Treasury agent's mention of "vulnerability," especially with regard to the Lake Plaza building, prompted Mr. Norman and his counsel to make inquiry during pretrial discovery regarding the alleged vulnerability survey. Transcript at 103-07. As a result of their requests, counsel for appellant secured access to two vulnerability assessments. The first is entitled Vulnerability Assessment of Federal Facilities and was issued by the Department of Justice (DOJ). Appeal File, Exhibit 117. The second is a vulnerability assessment arranged for by IRS for its Colorado Springs offices located on the first floor of Mr. Norman's Lake Plaza building. Id., Exhibit 138.

47. DOJ's Vulnerability Assessment of Federal Facilities was issued as a result of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City. On April 19, 1995, the day following the bombing, the President directed DOJ to assess the vulnerability of federal office buildings in the United States, particularly to acts of terrorism and other forms of violence. Because of its expertise in court security, the United States Marshals Service coordinated this study. A national review of the kind called for by the President had never before been undertaken. On June 28, 1995, DOJ released this assessment. It is not a restricted or confidential publication. It contains recommended minimum security standards for various security levels of federal facilities. It also contains information regarding a sample survey of existing security conditions and discusses the cost implications of the study. A final section of the vulnerability assessment contains specific conclusions and recommendations for government-wide application. Appeal File, Exhibit 117.

48. The security levels of federal facilities described in DOJ's vulnerability assessment are of particular relevance to this dispute. Five levels are identified. They are said to be based primarily on staffing size, number of employees, use, and the need for public access. Level I is a facility with ten or fewer employees which covers 2500 square feet of office space with a low volume of public contact. Level II is a facility having between 11 and 150 employees and covering an area of 2500 to 80,000 square feet with a moderate volume of public contact. Federal activities that are routine in nature and similar to commercial activities are considered to belong to this level. An example would be a Social Security Administration Office in El Dorado, Colorado. Level III is a facility with between 151 and 450 employees and covering between 80,000 and 150,000 square feet with a moderate/high volume of public contact. This level includes law enforcement agencies, court-related agencies and functions, and government records and archives agencies. Level IV is a facility with over 450 employees and likely has more than 150,000 square feet and a high volume of public contact. On this level, one would expect to find tenant agencies

which would include high-risk law enforcement and intelligence agencies, courts, judicial offices, and agencies with highly sensitive government records. Level V is a building such as the Pentagon or Central Intelligence Agency Headquarters that contains mission functions critical to national security. Appeal File, Exhibit 117 at 2-3 to -5 (printed). In describing these security levels, the Assessment expressly cautions: "Final assignment of a security level to a building, will be adjusted based on threat intelligence, crime statistics, agency mission, etc." Id. at 2-3. DOJ's vulnerability assessment recognizes that, historically, GSA, and within GSA, the FPS, has the primary responsibility of implementing federal facility security in those buildings under its control. Id. at 4-1 to -5.

49. The IRS vulnerability assessment is one which the agency itself arranged to be done by an outside contractor. This assessment appears to have been intended primarily for the IRS Denver headquarters but also included a review of the agency's offices in Colorado Springs. Transcript at 351. The record contains only that portion of the assessment report which relates to the IRS offices in Mr. Norman's Lake Plaza building in Colorado Springs. The final report, dated July 1998, identified various vulnerabilities such as no lighting in the parking lot or in the immediate vicinity of the building, the unevenness of the terrain, and numerous small trees and vegetation next to the building walls providing hiding places for potential criminals, vandals, and persons intent on attempting to break into the building.

50. One item of particular concern to the contractor reviewing the IRS facility at Colorado Springs related to the windows on the first floor of the building. At the time the assessment was made, the IRS offices were still on the second floor of the Lake Plaza building, but the first floor space, recently leased for the new offices, was already under renovation. The assessment report noted that the windows in the area of the first floor which was being prepared for the IRS offices were at or near ground level and were of ordinary window glass. The combination of vegetation next to the walls of the building, the poor lighting close to the building, and the windows at ground level were said to create "a significant vulnerability." Two possible threat scenarios were mentioned. The first might involve an intruder who could secure access and egress at the IRS offices in ten or fifteen seconds merely by kicking out one of these windows. The second scenario might involve an incendiary attack made by breaking one of these windows and throwing a device through the broken window.[8] Appeal File, Exhibits 138 at VI-7 to -8 (printed), 202 at VI-6 to -7 (printed).

51. This same vulnerability assessment prepared for IRS made the following recommendation:

> To help prevent an attack similar to that which destroyed the previous building, it is recommended that either a grillwork or break-resistant glass be

[8] The accuracy of this second scenario was borne out all too accurately on April 9, 1999, when the fire in Mr. Norman's building was started by an individual who broke one of these ground floor windows on the less illuminated side of the building and threw an incendiary device through the broken window. Appeal File, Exhibit 169 at 3 (unnumbered); Transcript at 112-13.

> installed on all the windows into the IRS space. Making it more difficult to enter through a window, coupled with the planned intrusion detection system will significantly reduce the vulnerability to the break-in attempt.

Appeal File, Exhibits 138 at VI-8 (printed), 202 at VI-8 (printed). In an appendix to the assessment, the contractor included cost estimates for the recommended work. The cost of replacing the ordinary glass in twenty ground floor windows with break-resistant or bullet resistant glass, with normal mark-up for overhead and profit, was listed at $45,342. The alternative of placing mesh or grillwork on each of the twenty windows was estimated at approximately $80 per window. Id. at D-8 (printed).

52. IRS's Chief of Safety and Security for the agency's Real Estate Facilities Management Branch in Washington, D.C., was called as a witness by appellant. He was familiar with the assessment made of the IRS facility in Colorado Springs, although he was reluctant to call it a vulnerability assessment.[9] He testified that it was his office which decided not to accept the report's recommendation regarding the ground floor windows of the Lake Plaza building. He explained that the proposal to install bullet-resistant glass was rejected because of its costs and because it was not standard policy or procedure for the agency to install it in any offices being considered for upgrade. He also pointed out that the Bell Tower fire had been set by a person or persons who had broken into the building. He considered that the anti-intrusion devices in place at the Lake Plaza building would be sufficient to prevent a similar occurrence. This witness also testified that, even after the Bell Tower fire and before the fire in Mr. Norman's building, he did not consider that the IRS offices in Colorado Springs were subject to more violence or hostility than any other government agency. Transcript at 468, 472-73. Finally, this witness stated that the alternative cost of the recommendation to install grillwork was not evaluated. Id. at 445, 461-62.

53. This same Chief of Safety and Security from IRS's Washington office testified that, following a risk assessment study on the agency's Denver headquarters, the next step taken by the agency was to request a site survey report as the second phase of the facility enhancement process. Transcript at 474. Such a report was submitted in March 1999, barely a month before the fire in Mr. Norman's Lake Plaza building. Appeal File, Exhibit 203. The site survey report has the following comment regarding the ground floor windows in that building:

> The glass in the Colorado Spring [sic] POD [post of duty] is low to the ground and does provide an opportunity for risk of entry or damage. The team could

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[9] This witness stated that the limited inspection of the IRS offices at Colorado Springs by the contractor's representative did not include the various steps normally associated with the agency's risk assessment process. He explained that this process focuses on a number of factors, such as mission criticality, location, police response time, history of incidents in or around the facility, history of incidents against the IRS, and value of assets. Transcript at 481, 486.

> not find any way of cost effectively rectifying this situation and thus provides no further recommendations on this matter.

Id. at 6 (printed). This IRS Chief of Safety and Security also testified that assessment reports are not public documents and, to the extent they reveal and discuss vulnerabilities, are tightly controlled and typically not shared with a landlord. Id. at 471, 481-82.

54. The record contains an excerpt from IRS's site survey report of March 1999. Attached to the title page of the report is a note bearing the date of April 27, 1999. It is addressed to the Chief of Safety and Security from IRS's Washington office and is signed by another IRS employee. It reads:

> This report was sent thru the Director's office to Denver site – pl[]ease see attached paragraph on "windows" paragraph D. Remember "we" told the Colorado Springs employees that the intention on the windows was just the reverse of this written report – looks like you and "me" are hanging out if they get a copy of this –
>
> WHAT'S THE DEAL??

Appeal File, Exhibit 206.

55. When questioned about the above-referenced Exhibit 206, the agency's Chief of Security testified that it was not evidence of any intent to "cover-up." He explained that two days after the Lake Plaza fire in early April 1999, he met in Colorado Springs with the IRS employee leadership and Union representatives. At that meeting he committed to the employees and the Union stewards that the agency would do whatever was necessary to protect the Lake Plaza space. The windows were of particular concern to those attending the meeting. The note in Exhibit 206 was to remind the Chief of Security that the assurances he had given at the meeting in Colorado Springs were in direct conflict with the course of action outlined in the Site Survey Report. The Chief of Security further testified that the Site Survey Report and its recommendations had only recently been issued and it was not known for certain whether the report was already in circulation in Colorado Springs or in Denver. Any employee reading the report for the first time after the fire and after management's meeting with IRS employees in Colorado Springs, might readily conclude that the assurances given at that meeting were meaningless and insincere. Transcript at 478-80. To avoid any misunderstanding in this regard, IRS had an addendum prepared for the Site Survey Report. The addendum specifically addressed the problem presented by the ground-floor windows and proposed for consideration several possible solutions to the risks they posed. Appeal File, Exhibit 204; Transcript at 482.

56. Mr. Norman testified that, prior to pretrial discovery and his review of the IRS assessment, he was not aware of his building's vulnerability based on the combination of ordinary glass in the ground floor windows, the terrain, vegetation, and lighting. Transcript at 112. He also stated that he had not been informed of the report's recommendation that either grillwork or break-resistant glass be installed on the windows in the IRS space. He acknowledged, of course, that there was an SFO requirement for six-millimeter

projectile-inhibitive film on the windows but noted that it made no mention of either grillwork or break-resistant glass. Id. at 114.

57. At the hearing for these appeals, Mr. Norman was asked what, if anything, he would have done differently had he known of the recommendation made for the installation of grillwork or break-resistant glass on the first floor windows. He replied that, because the recommendation was made after award of the lease, the matter would have required negotiation with GSA and IRS. His first preference would have been to have the Government pay for these measures. He was relatively certain that he could have made the modifications for considerably less than the estimates provided in the vulnerability assessment. He explained that the tenant improvements for IRS had been done strictly at his own cost without markup. He would have proposed a similar approach for the installation of break-resistant glass. Had the Government declined to accept or share the cost of replacing the windows, he stated that there was always the possibility of installing the grillwork for approximately $1600 (twenty windows at $80 per window), a cost which he most certainly would have been willing to absorb in its entirety if necessary. Transcript at 115-16, 120.

IRS's Request for a Security Level Upgrade

58. Shortly after the Bell Tower fire, the IRS District Director in Denver, Colorado, wrote to the Assistant Director of the FPS for GSA's Rocky Mountain Region (Region 8). At that time, the Assistant Director, although technically not the Regional Director for the FPS, was nevertheless, as the full-time manager for the FPS in the region, its virtual, de facto head. Appeal File, Exhibit 222 at 28-29 (printed). The letter, dated July 24, 1997, states in part:

> We are currently working with General Services Administration leasing specialists to obtain new permanent space for our office in Colorado Springs. We are requesting that the building be classified as a Level IV building.
>
> As you know, our previous location in Colorado Springs was destroyed by arson. This area of Colorado is statistically proven to be a center of Tax Protestor groups and is obviously a target for anti-government action.

Id., Exhibit 137.

59. The IRS employee who drafted this letter from the District Director to FPS asking that the agency office in Colorado Springs be upgraded to level IV was assigned at the time to the region's safety and security office. She had been assigned the task of working with FPS to reclassify the new IRS office site to level IV. She testified that the level IV to which the letter refers is the security level described in DOJ's vulnerability assessment. Transcript at 327-36. She also explained that, in working the issue of upgrading the office's security level, she had been advised by a security specialist with the FPS that the agency's request should be submitted in writing. Id. at 343.

60. The record does not contain any answer from the FPS to IRS's request for a security level upgrade. The IRS employee working on this initiative testified that she did not recall seeing a reply or if her section chief (who directed her to draft the letter) ever inquired regarding the status of the request. Transcript at 331-32, 353-54. The assistant FPS director to whom the letter was directed testified in his deposition that he did not recall the letter or whether a reply was ever sent to IRS. He explained, however, that, in most cases, such a request would have been given to his operations chief and to the physical security specialist responsible for the site. Any recommendation from them would then have been reviewed. Any applicable vulnerability assessment would also have been reviewed. After consulting on the matter with GSA's central office, FPS would have provided the agency with a reply. Appeal File, Exhibit 222 at 21-22, 31-32. Notwithstanding the absence of a reply to IRS's request, we are satisfied that the requesting letter was in fact sent and received since the copy contained in the record was found among GSA's own files. Id., Exhibit 223 at 6-7, 58-59, 68-69 (printed).

61. The IRS employee from the agency's local safety and security office who was assigned the task of drafting the letter to the FPS testified that the comment regarding IRS being a target for anti-government action was not based on any specific intelligence, but rather upon ongoing knowledge gathered from newspapers that there was a large number of tax protester groups and white separatist groups in the Rocky Mountain District area. In this regard, she acknowledged that she was aware of an incident at the agency's Reno, Nevada, office in May 1997 when an incendiary device was discovered outside the office. Transcript at 345-46.

62. Mr. Norman testified that, prior to the start of litigation, he was unaware of IRS's effort to upgrade the security level for the offices in his building. It is his testimony that, prior to a review of the security levels identified in the DOJ vulnerability assessment (provided during pretrial discovery), he was not even aware of the five security levels described in that publication. Other than the information provided to him in 1997 by the IRS CID official and the newspaper references to an anti-government group in the eastern part of El Paso County, he claims to have had no information indicating that his area of Colorado was considered to be a statistically proven center of tax protestor groups and an obvious target for anti-Government action. He testified that, regardless of whether the requested upgrade was granted, he found it "frightening" that the regional IRS director believed at that time that the IRS offices in the Lake Plaza building should be upgraded to a security level immediately below that assigned to CIA headquarters or the Pentagon. Transcript at 103-06.

Bomb Threats

63. A GSA accident/incident report (Standard Form 3155) in the record, prepared by an FPS officer, states that at 2:27 p.m. on January 20, 1999, a local news reporter for two television channels received a telephone call from an individual suggesting that a camera be sent to the IRS offices at the Lake Plaza building. The caller advised that the building was shortly to be blown up by two bombs planted within. The reporter notified the police. The police ordered the immediate evacuation of all federal and private sector employees from the building while an emergency crew searched for the bombs. When no device was found,

the police permitted the employees to reenter the building. Appeal File, Exhibits 191, 222 at 54 (printed).

64. Other witnesses testifying at the hearing for these appeals spoke of similar threats involving other IRS offices. The IRS employee assigned the task of upgrading the security level of the agency's Colorado Springs office remembered such an incident at the IRS offices in Reno, Nevada. Finding 61. A physical security specialist with GSA's FPS remembered reading about such an event and hearing a radio report during the same period but was unsure of the location. Transcript at 526-27. An IRS employee who, at the time of the Lake Plaza fire, was Facilities Branch Chief in the agency's Denver office testified that she recalled a security incident in Reno but was unsure of when it had occurred. Id. at 491-92. GSA's fire protection engineer for the Rocky Mountain Region recalled from her own experience while stationed in the Fresno area of California that there were several incidents of bomb threats in parking lots at the IRS offices – usually around April 15 of different years. Id. at 609.

65. Mr. Norman testified that he was not aware of the bomb threat regarding his Lake Plaza building when it occurred. Although he is uncertain when he eventually learned of it, he is certain that no one in the Government told him of it before the fire in his building a few months later in April. Transcript at 120-21. He testified that he subsequently also learned that, after the incident, IRS had convened a meeting of its employees to discuss the event, to brief its employees on what to do if a similar event should occur in the future, and to set up procedures to be followed. He testified that, in his opinion, he and his other tenants should have been involved in that meeting. Id.

66. During the course of his testimony, Mr. Norman had the following to say regarding his presence in the Lake Plaza building and his involvement in the resolution of tenant concerns:

> I'm a little bit different from most managers, building managers, that GSA works with in that I am an individual owner of a fairly small building. Although it's almost 45,000 square feet, by Government standards, that's not a particularly large building.
>
> . . . .
>
> I'm hands-on. I don't have a management company to do things for me. I manage the building. I built it. I manage it. I maintain it. I service it or – or hire people to do that for me, but in that respect, I am in that building anywhere from one to three or four times a week meeting with tenants, correcting deficiencies, checking janitorial, you know, making visual inspections, and – and so forth.

Transcript at 60.

Compliance Review

67. On April 7, 1999, shortly before the fire in the Lake Plaza building, an IRS support service specialist responsible for physical security and safety programs for various IRS offices in the area conducted a compliance review of the IRS offices in the Lake Plaza building in Colorado Springs. Under IRS regulations, this type of review is to be performed periodically. It follows a set format and consists of interviews with personnel on site and a personal review of the site itself. Appeal File, Exhibit 221 at 5, 14-16 (printed). The specialist has testified that she believes she handed in her report on the compliance review before the Lake Plaza fire on April 9. Id. at 17 (printed). In a finding discussing security weaknesses identified during the review, the specialist wrote:

> The site does not aggressively speak to being a "hard target." The site actually emits the presence of a "soft target" with considerable physical security vulnerabilities and potential security risks especially in light of past and recent event/threats.
>
> . . . .
>
> Systemic problems are apparent in relations between IRS and FPS. Far too much bureaucracy exists between once a problem is identified by a PSS [physical security specialist] professional and when and how that problem gets corrected. The main point is that IRS is dependent on FPS to do the work (in [sic] which they are slow to do) and IRS is reluctant or slow to pay for services or commit funds to improving security vulnerabilities.

Id., Exhibit 199 at 8-9.

Discussion

Although in this particular appeal, counsel for appellant have pled breach of the Government's implied duty of good faith and fair dealing, their post-hearing brief relies on several legal theories relating to good faith and fairness. Counsel write:

> There are a number of legal doctrines which impose a duty on the government to disclose material information to a government contractor, under principles of good faith and fair dealing and equitable estoppel. Whether this duty fits neatly into judicially created labels, such as the superior knowledge doctrine, the duty of continued communication, the duty of cooperation, or the duty to maintain a consistent position relied upon by the contractor (equitable estoppel), the fundamental elements are about the same.

Appellant's Post-hearing Brief at 6-7 (footnotes omitted). Counsel have, therefore, formulated a core set of requirements based, for the most part, on the requisite elements of a superior knowledge claim, and have argued that these requirements apply equally to the duty of continued communication and cooperation and to equitable estoppel. For purposes of this decision, however, we choose instead to discuss each of the theories of recovery individually.

The Government's Alleged Superior Knowledge

The superior knowledge doctrine imposes upon a contracting agency an implied duty to disclose to a contractor otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance. The doctrine is generally applied to situations where: (1) a contractor undertook to perform without vital knowledge of a fact that affects performance costs or duration; (2) the Government was aware the contractor had no knowledge of and had no reason to obtain such information; (3) any contract specification supplied misled the contractor or did not put it on notice to inquire; and (4) the Government failed to provide the relevant information. Giesler v. United States, 232 F.3d at 864, 876 (Fed. Cir. 2000); Hercules Inc. v. United States, 24 F.3d 188, 196 (Fed. Cir. 1994); GAF Corp. v. United States, 932 F.2d 947, 949 (Fed. Cir. 1991); Lopez v. United States, 858 F.2d 712, 717 (Fed. Cir. 1988), cert. denied, 491 U.S. 904 (1989); Petrochem Services, Inc. v. United States, 837 F.2d 1076, 1079 (Fed. Cir. 1988); American Ship Building Co. v. United States, 654 F.2d 75, 79 (Ct. Cl. 1981); Pia v. United States, 7 Cl. Ct. 208, 211(1985), aff'd, 818 F.2d 876 (Fed. Cir. 1987) (table).

In their post-hearing brief, counsel for appellant fault the Government for not having revealed the following facts to Mr. Norman:

> (1) that a GSA accident review board, convened after the Bell Tower fire, recommended in its final report that the next IRS offices should have state-of-the-art security and automatic sprinkler systems;
>
> (2) that following the Bell Tower fire, IRS requested that the security level of its new offices be raised from level three to level four because the Colorado area is a center of tax protestor groups and obviously a target for anti-government actions;
>
> (3) that some Government employees were aware of security threats to other IRS offices;
>
> (4) that a vulnerability assessment of Mr. Norman's Lake Plaza building identified various security risks and made recommendations which included methods for rendering the ground floor windows of the building less susceptible to attack;
>
> (5) that these security risks and recommendations were the subject of other agency reports;
>
> (6) that the requirement in the SFO for six-millimeter-thick protective window film was a specific IRS requirement;
>
> (7) that there was a bomb threat to the Lake Plaza building.

See Appellant's Post-hearing Brief at 8-9.

None of these facts listed by counsel for appellant strike us as containing the type of information which would support a valid superior knowledge claim. As already stated, such claims generally involve a situation where, first of all, the contractor has undertaken to perform without vital knowledge of a fact that affects performance costs or duration. We are not convinced that, prior to the actual fire in Mr. Norman's building, any of the facts listed above would have been considered as directly affecting either the duration of or the cost of the lease. In the final analysis, all of these facts relate in one degree or another to the risk of fire or a security incident. Had the Lake Plaza fire not occurred, there is nothing about these facts that suggests they involve information vital to Mr. Norman's successful performance under the lease. The fire itself undoubtedly affected performance costs and duration, but obviously the government officials possessed no certain knowledge that it would occur. Rather, they were concerned, as any responsible property tenant or owner would be, with the possibility of such an event.

The unfortunate circumstances surrounding these cases tend to focus one's attention on the fire which actually occurred and to view prior events in retrospect from that event. This, however, leads to a distorted view of the earlier events. To determine whether the Government's knowledge related to facts vital to contract performance, we must examine them in their contemporaneous context. When this is done, it is clear that we are dealing with nothing more than the Government's concern with the possibility of a future event which itself might impact on the contractor's ability to perform but which was by no means certain to occur.

Turning to the second requirement for a successful superior knowledge claim, we address the question of whether government officials were aware that Mr. Norman had no knowledge of these facts. Understandably, the Government kept the security recommendations of its employees and contractor on close hold. See Findings 41-42, 53. We have no reason to doubt Mr. Norman's testimony that he knew nothing of the specific recommendations contained in GSA's Accident Review Board's report or in IRS's vulnerability assessment of its Lake Plaza offices. See Findings 43, 56. However, the government employees and contractor personnel making these recommendations appear, for the most part, to have been doing little more than underlining the obvious. One need not have special fire prevention training to appreciate the value of sprinklers, nor is it necessary to have specialized training to recognize the security hazards posed by poor lighting, shrubbery, or ground-level windows. While the Government admittedly kept its reports and recommendations on close hold, we cannot conclude that officials believed that Mr. Norman had no inkling of the conditions and circumstances which gave rise to these recommendations.

In a similar vein, we have no reason to doubt Mr. Norman's statement that, prior to this litigation, he was unaware of IRS's effort to upgrade the security level for the offices in his building. See Finding 62. Nevertheless, he was undoubtedly aware of the events and circumstances which prompted the agency to seek an upgrade. We note, in this regard, that nothing in the record suggests that IRS's concern with taxpayer groups and anti-government

actions was prompted by anything other than public information and media reports – to which Mr. Norman himself presumably had ready access. See Finding 61.

Neither are we convinced that government officials were expected to know that Mr. Norman was unaware of security incidents regarding IRS offices or even of the bomb threat to his own building. Bomb threats to IRS offices elsewhere and the fire in the Bell Tower building in Colorado Springs were certainly not kept confidential. Findings 1-2, 61, 64. As to the bomb threat to Mr. Norman's building, the telephone call from the individual making the threat was received by a local TV station and involved the evacuation of the entire building – both government employees and private sector employees. Finding 63. We find it difficult to believe that Mr. Norman did not learn of it promptly in view of his claim that he was in his building frequently and personally involved in the resolution of tenant problems and complaints. See Findings 65-66.

As to the fact that the SFO requirement for six-millimeter-thick protective window film was an IRS requirement, we can see no reason why government officials should have been expected to know that Mr. Norman was not aware of this fact. The SFO expressly noted that the space was intended for the use of IRS. Finding 6. The probability was high, therefore, that this and other requirements emanated from the prospective tenant. See Finding 36.

The second requisite for a successful superior knowledge claim, however, demands not only that the Government be aware that the contractor is without knowledge of vital facts relating to performance costs and duration, but also that the Government be aware that the contractor had no reason to obtain such information. This brings us to the issue of Mr. Norman's perception of threat to his property at the time he was negotiating the permanent lease. He has testified that, based upon his discussion with the IRS CID official and after reading the AP release regarding the grand jury questioning of two suspects, he was satisfied that there was no continued threat of arson to the IRS space already under temporary lease or to the space which might be the subject of a more permanent lease. Finding 31.

We have no reason to doubt Mr. Norman's account of his discussion with the IRS CID official. The official himself, although not recalling the conversation, has not denied that it took place. It is somewhat surprising to us, however, that, in Mr. Norman's mind, this conversation and the information in the AP press release were enough to banish any further concern over the continued threat of arson. In any event, we would certainly not expect government officials to conclude that Mr. Norman no longer had any reason to make inquiry regarding the threat of arson based solely on their knowledge of the fact that he had discussed the Bell Tower fire with an IRS CID official. Indeed, Mr. Norman's subsequent inquiry into security issues on behalf of his other tenants would have suggested the opposite to government representatives. See Finding 32. As to the assurance given to Mr. Norman regarding the planned installation of an intrusion alarm, this hardly should be viewed as sending a message that there was no longer any threat of arson or break-in.

Mr. Norman complains that subsequent events such as the suspension of guard service, the waiver of the requirement of projectile-inhibitive vinyl coating on windows, and the lack of interest in the installation of sprinklers or in the integration of the prior tenant's

glass-breaking detectors into the planned intrusion alarm system all served to lull him into a state of unjustified complacence. See Findings 33-35, 38, 43. Were the Government's actions in these instances driven solely by security considerations, the inference Mr. Norman claims to have drawn from them might be justified and could arguably have put the Government on notice that it had provided him with false assurance.

In this case, however, we reject the suggestion on appellant's part that the Government should have anticipated that its decision not to pursue these additional security measures sent a clear signal to appellant that he need not be further concerned about the security of the premises. From the record, we know that with the possible exception of Mr. Norman's offer to integrate glass-breaking detectors into the alarm system (which he himself recognized as possibly redundant in view of the Government's own plans), the Government's decisions regarding these other security measures were affected not solely by security considerations but by cost considerations as well – not an unusual factor in any normal business decision-making. We would expect Mr. Norman, as an experienced businessman, to be keenly sensitive to this possibility. See Findings 3, 33, 35, 38-39, 42-43, 52.

In commenting on the seminal decision enunciating the superior knowledge doctrine, Helene Curtis Industries, Inc. v. United States, 312 F.2d 774 (Ct. Cl. 1963), the United States Court of Claims stated that a corollary of the Curtis rule is that the Government is under no duty to volunteer information in its files if the contractor can reasonably be expected to seek and obtain the facts elsewhere. H. N. Bailey and Associates v. United States, 449 F.2d 376, 383 (Ct. Cl. 1971). We find the observation particularly apt in the present case. The GSA fire protection engineer called by the Government testified that she saw no need to share the Accident Review Board's report with Mr. Norman since it was for GSA's internal use in formulating its own policy. She then observed that, in her opinion, it was incumbent on Mr. Norman to develop his own policies in this regard. Finding 41.

The fire protection engineer's point is well taken. In signing the lease, Mr. Norman certainly did not relinquish totally his own responsibility for the continued well-being of his building. To safeguard his own continuing interest in the premises, he could himself readily have engaged a security consultant, just as IRS did, to assess the building's security vulnerabilities. Indeed, given the actual recommendations made by GSA's Accident Review Board and IRS's own consultant, we are not convinced that Mr. Norman himself, given his obvious intelligence, personal knowledge of the building and its surrounding property, and concern for building safety, could not have made equally perceptive observations. See Finding 3. Consequently, if there is any residual concern over whether the closely-held reports of the vulnerability assessment or the Accident Review Board should have been shared with Mr. Norman, we conclude that the Government was under no duty to do so since, in our opinion, appellant could reasonably have been expected to seek and obtain the same basic analysis elsewhere.

In considering what the Government should reasonably have concluded that Mr. Norman knew about the security of his building, we are reminded of the situation described by the Court in Lopez. In that case, various suppliers of asbestos products to the Government complained that the Government knew far more about the hazards of asbestos than they themselves did and should have made this information available to them. The

Court saw no obligation under the superior knowledge doctrine for the Government to advise its suppliers of the risks associated with their products. Rather it concluded that it was reasonable for the Government to suppose that the suppliers knew enough about asbestos and its perils not to need to learn more about it from the Government. Lopez, 858 F.2d at 717; accord GAF Corp., 932 F.2d at 949 (superior knowledge doctrine does not impose on buyer an affirmative duty to inquire into the knowledge of an experienced seller). So, likewise, we conclude in this case that it was entirely reasonable for the Government to assume that Mr. Norman, as an experienced property owner, was well aware of the security risks to his Lake Plaza building and would take whatever steps necessary to protect his long-term interests.

In summary, appellant's claim based upon superior knowledge fails for several reasons. As stated, we are not convinced that all of the facts allegedly withheld from him were, in fact, inaccessible to him. More importantly, however, these facts did not directly bear either on contract performance costs or duration. Further, appellant has not convinced us that the Government had good reason to believe that he was unaware of the information allegedly withheld from him and saw no reason to pursue it.

The Government's Duty to Cooperate

There is in every contract an implied duty on the part of both parties to cooperate and not to interfere negligently or willfully with the performance of the other party. C. Sanchez & Son, Inc. v. United States, 6 F.3d 1539, 1542 (Fed. Cir. 1993); Peter Kiewit Sons' Co. v. United States, 151 F. Supp. 726, 731 (Ct. Cl. 1957); Kehm Corp. v. United States, 93 F. Supp. 620, 623 (Ct. Cl. 1950); George A. Fuller Co. v. United States, 69 F. Supp. 409, 411-12 (Ct. Cl. 1947). In situations where the Government may not have strictly run afoul of the superior knowledge doctrine, claimants have on occasion turned instead to a theory of recovery based upon an alleged breach of this duty to cooperate – the duty in such cases being to provide information necessary or essential for performance. E.g., SEB Engineering, Inc., ASBCA 39728, 94-2 BCA ¶ 26,810. The theory has also been used in situations where, during performance, the Government is reasonably aware of the contractor's need for information in its possession, even in the absence of a contractor's request for the information, yet fails to convey it to the contractor. E.g., T&G Aviation, Inc., ASBCA 40428, 00-2 BCA ¶ 31,147. Appellant apparently believes that, in the instant case, such a breach has occurred.

It is well settled that where the Government's continued duty to cooperate is involved, a determination of whether that duty has been breached requires an inquiry into the reasonableness of the Government's action or inaction. The Government clearly has an obligation of reasonable cooperation. "The nature and scope of that responsibility is to be gathered from the particular contract, its context, and its surrounding circumstances." Commerce International Co. v. United States, 338 F.2d 81, 86 (Ct. Cl. 1964).

Given what we have already written regarding the superior knowledge doctrine, we remain convinced that, in this case, the Government has acted reasonably. As already noted, any information the Government may have had relative to the security of appellant's building was not in and of itself necessary or essential to the performance of the lease. Further, given

the facts here, even if the information possessed by the Government was essential to appellant's performance, we cannot reasonably conclude that the Government was aware that Mr. Norman lacked this information or at least the basic information underlying it and thus saw no need to pursue it. Accordingly, we find no breach here of the Government's implied duty of continued cooperation.[10]

The Government's Duty to Deal Fairly and in Good Faith with the Contractor

Closely allied to the Government's duty to cooperate with the contractor and, to a limited extent overlapping with it, is the Government's continuing duty to deal fairly and in good faith with the contractor. Every party to a contract has a duty of good faith and fair dealing in its performance and its enforcement. See Restatement (Second) of Contracts § 205 (1981) (Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement, and subterfuges and evasions violate that obligation, as do lack of diligence and interference with or failure to cooperate in the other party's performance.). It is well settled that this obligation is "no less required in contracts to which the Government is a party, than in any other commercial arrangement." Maxima Corp. v. United States, 847 F.2d 1549, 1556 (Fed. Cir. 1988); accord Malone v. United States, 849 F.2d 1441, 1445 (Fed. Cir.), modified, 857 F.2d 787 (Fed. Cir. 1988).

The implied duty of good faith and fair dealing does not, however, confer on a party any rights or grounds for recovery other than those that are contractually based. It has been pointed out that, in considering this duty, courts should be careful since it does not imply "an everflowing cornucopia of wished-for legal duties." United States v. Basin Electric Power Cooperative, 248 F.3d 781, 796 (8th Cir. 2001) (citing Comprehensive Care Corp. v. RehabCare Corp., 98 F.3d 1063, 1066 (8th Cir. 1996)). In other words, good faith should not be construed to "give rise to new obligations not otherwise contained in the contract's express terms." Id. From this it logically follows that the implied duty of good faith and fair dealing "must attach to a specific substantive obligation mutually assented to by the parties." State of Alaska v. United States, 35 Fed. Cl. 685, 704 (1996), aff'd, 119 F.3d 16 (Fed. Cir. 1997) (table), cert. denied, 522 U.S. 1108 (1998); accord Schweiger Construction Co. v. United States, 49 Fed. Cl. 188, 203 (2001); Price v. United States, 46 Fed. Cl. 640, 651(2000); Allstates Air Cargo, Inc. v. United States, 42 Fed. Cl. 118, 124 (1998).

We find nothing in appellant's lease with GSA which indicates any agreement on the part of the Government to share with the property owner any speculation on the part of

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[10] In their post-hearing brief, counsel for appellant also contend that Mr. Norman is entitled to recover based on an alleged breach of the Government's duty of continued communication. In the past, we have looked upon this particular duty as nothing more than an alternative description of what is more frequently referred to in case law as the Government's duty of cooperation. See, e.g., Aspen Helicopters, Inc., v. Department of Commerce, GSBCA 13258-COM, 99-2 BCA ¶ 30,581, at 7933; Automated Services, Inc., GSBCA EEOC-2, et al., 81-2 BCA ¶ 15,303, at 133,185. For purposes of our discussion here, therefore, we will assume that what is said regarding the duty of cooperation applies equally to the duty of continued communication.

government officials or their consultants as to the possible threat of harm to the leased premises. As already noted in our discussion of appellant's claim for relief based upon the theory of superior knowledge, the information which the Government allegedly withheld from Mr. Norman did not bear directly either on the cost or duration of contract performance. Rather it related solely to the possibility of a future event which might or might not occur. We cannot say with certainty whether some of that information which was admittedly closely held was actually known by appellant. As already noted, we suspect that much, if not all, of it could have been deduced from known facts. Nevertheless, even assuming that this closely-held information was not known to appellant, we cannot conclude that the Government was obliged to divulge it based upon its implied duty of good faith and fair dealing.

Even if appellant were able to demonstrate in this case that there is a specific contractual obligation to which the implied duty of good faith and fair dealing attaches, his task would not finish there. To demonstrate that there has been a breach of the implied duty of good faith and fair dealing, a claimant must also show that the traditional presumption of good faith on the part of government employees has, in fact, been overcome. It is well settled that government officials are presumed to act conscientiously and in good faith in the discharge of their duties. Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1224, 1238 (Fed. Cir. 2002); T&M Distributors, Inc. v. United States, 185 F.3d 1279, 1285 (Fed. Cir. 1999); Spezzaferro v. Federal Aviation Administration, 807 F.2d 169, 173 (Fed. Cir. 1986); Torncello v. United States, 681 F.2d 756, 770 (Ct. Cl. 1982); Kalvar Corp. v. United States, 543 F.2d 1298, 1301 (Ct. Cl. 1976).

The burden to overcome this presumption of good faith is substantial. The Court of Appeals for the Federal Circuit in its recent Am-Pro decision describes the burden as "clear and convincing" and describes the type of proof as what traditionally is said to be "well-nigh irrefragable proof." Am-Pro, 281 F.3d at 1239. As examples of such proof, the Court refers to past decisions in which it has accepted, as evidence of bad faith, evidence of specific intent to injure the plaintiff, evidence of action motivated alone by malice, evidence of a conspiracy to get rid of plaintiff, or evidence of a designedly oppressive course of government conduct. Id.

At the hearing for these appeals, Mr. Norman stated:

> I'm finding out more and more that people were covering up. . . . I'm finding out more and more through our discovery that there were a lot of things that were left unsaid, perhaps by mistake, perhaps by negligence, perhaps by incompetence, perhaps on purpose.

Transcript at 132. In referring to his discussions with some government representatives, Mr. Norman observed: "I believed them and I find now that I was lied to, I was misled, and it's awfully damn tough to take." Id. at 134-35.

We can of course understand, at least to some degree, the regret, anger, and frustration Mr. Norman has experienced as a result of the Lake Plaza fire. The contracting officer's position regarding the Government's right to terminate the lease undoubtedly was

a source of extreme frustration. Nevertheless, we have determined that the termination of the lease was in accordance with an applicable contract provision and we find nothing in the record that would suggest bad faith on the part of government officials in taking that action. As to Mr. Norman's inquiries and personal observations during the course of contract negotiations and performance, they apparently led him to draw certain conclusions as to building security which later events proved to be unjustified or incorrect. Nothing, however, that he was told or not told by government officials suggests to us that he was deliberately lied to or misled. In this regard we note that the information Mr. Norman claims to have received from the local IRS CID official was hardly definitive. It concerned only "suspects." Finding 29. In addition, putting aside for the moment the reasonableness of his conclusion, Mr. Norman tells us his conclusion that there was no continued threat of arson was based not just on information provided by the Government but also on information obtained from a non-governmental source as well, namely, an AP release regarding the grand jury questioning of possible suspects. See Findings 30-31.

In retrospect, Mr. Norman expresses regrets for not having taken several actions which he now contends he would have taken had he known prior to the Lake Plaza fire all that the Government knew regarding this procurement and possible risks to his building. See Findings 37, 44, 57, 62. We cannot say with certainty whether this is true or not. Such statements are readily made in hindsight. It may well be that, if the parties had worked more closely in concert on the issue of building security, the fire might have been avoided. The chairperson of the GSA's Accident Review Board, for example, testified that she would have expected a potential lessor to be advised of the Board's recommendations. Finding 41. It is difficult to say at this point in time what the result would have been if her expectation had been met. Nevertheless, we find nothing in the failure of government officials to work more closely with Mr. Norman on security matters which would suggest a lack of good faith on their part.

The record does suggest, so far as the security of Mr. Norman's building is concerned, that there were systemic problems in the working relations between IRS and FPS. See Finding 67. While this may indicate a lack of efficiency or poor contract administration, it certainly does not evince bad faith.

In short, we find the conduct of the government officials in this case to have been reasonable under the circumstances and in no way in conflict with any of the Government's obligations under the contract. We, therefore, have no reason to question the strong presumption that these officials were acting at all times in good faith. Our conclusion in this regard is no less certain in view of the WHAT'S-THE-DEAL note attached to the title page of IRS's site survey report of March 1999. The agency's chief of security testified credibly and in an entirely satisfactory manner regarding the origin of this note. See Findings 54-55.

It has been suggested that in certain cases, a showing of bad faith is not always necessary to prove that there has been a breach of the Government's implied duties of good faith, fair dealing, and cooperation. Instead, it has been said that a claimant can satisfy its burden simply by proving a lack of diligence or failure to cooperate in the other party's performance. Abcon Associates, Inc. v. United States, 49 Fed. Cl. 678, 688 (2001). The

decision of Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988) is cited in support of this position.

In Malone, the Court concluded that the Government had breached its duty of good faith and fair dealing because the contracting officer had been evasive with the contractor and misled the contractor in several respects. Id. at 1445. Quoting the Restatement, the Court pointed out that subterfuges and evasions as well as lack of diligence and interference with or failure to cooperate in the other party's performance violate the obligation of good faith. Id. It may be that the Court in Malone did not make an express finding of bad faith as such. Nevertheless, we find nothing in that decision which would suggest that, in cases of this type, the burden of proof required to rebut the presumption of good faith on the part of government employees is anything less than that which has been traditionally required. Cf. Am-Pro, 281 F.3d at 1239.

Equitable Estoppel

Counsel for appellant also contend that, in this case, the Government breached its duty to maintain a consistent position when relied upon by the contractor and that the Government is, therefore, estopped from arguing that appellant is not entitled to the relief now sought. Appellant's Pre-hearing Brief at 6-7.

In deciding whether to equitably estop the Government, the Court of Appeals for the Federal Circuit has traditionally held that, when estoppel is asserted against the Government in the context of a contract dispute, four requirements must be met. The first requirement is that the true facts in question must be known by the Government. The second requirement is that the Government must intend that its conduct which allegedly induced the contractor to continue performance would be acted on by the contractor – or at least the contractor had the right to believe that the conduct was so intended by the Government. The third requirement is that the contractor must not be aware of the true facts. Finally, the fourth requirement is that the contractor must in fact have relied on the Government's conduct. JANA, Inc. v. United States, 936 F.2d 1265, 1270 (Fed. Cir. 1991), cert. denied, 502 U.S. 1030 (1992); American Electronic Laboratories, Inc. v. United States, 774 F.2d 1110, 1113 (Fed. Cir. 1985); Emeco Industries, Inc. v. United States, 485 F.2d 652, 657 (Ct. Cl. 1973).

Because counsel do not deal with appellant's estoppel argument separately, it is not entirely clear just what behavior on the Government's part was alleged to be inconsistent. Looking at the argument in terms of the traditional requirements for estoppel, however, we conclude that, in the opinion of appellant, the Government's apparent lack of specific concern over the risk of harm to Mr. Norman's Lake Plaza building was in sharp contrast with the truth of the situation, namely that certain government officials and outside consultants believed there was a real risk of harm to the IRS offices located in the building. In such a case, the Government's silence on this issue in its dealings with Mr. Norman would, allegedly, constitute a false or misleading inducement to continue performance notwithstanding this risk of harm. Mr. Norman contends that because he relied upon this deceptive course of conduct to his detriment, the Government should now be estopped from refusing to pay any claim on his part for damages which he says resulted from this reliance.

We turn initially to the first and third requirements for a successful estoppel argument, namely, that the Government, but not the contractor, must know the "true facts." Presumably, the true facts which the Government allegedly knew here are those listed by appellant for his superior knowledge argument, namely: recommendations of the GSA Accident Review Board, IRS's request to FPS for a security level upgrade for the new IRS offices, the awareness of some government officials of security threats to other IRS offices, the findings and recommendations of IRS's vulnerability assessment of the Colorado Springs office, the repetition of these findings and recommendations in other agency reports, the fact that the SFO requirement for six-millimeter-thick protective window film was in actuality an IRS requirement, and the fact that there was a bomb threat to the Lake Plaza building. The first requirement for a claim based upon estoppel was met. The Government certainly knew these facts. What, however, of the third requirement that the contractor be unaware of these true facts?

We have already discussed these items in detail. We recognized that some were unknown to Mr. Norman because they were part of internal agency operations which normally are not made available to the public. We found nothing unique, however, about the recommendations of GSA's Accident Review Board or IRS's vulnerability assessment. The conclusions reached by the GSA employees and IRS consultants could presumably have been reached by any reasonable observer and were based on publicly known or readily observable facts.[11] Similarly, IRS's desire to raise the security level of its new offices was said to stem from information contained in the media and not from any special intelligence. It should not have come as a great surprise to anyone that, after the Bell Tower fire, IRS considered itself to be a target for anti-government action and wanted to upgrade the security level of its offices in Colorado Springs. As for the knowledge of bomb threats to IRS facilities in Colorado Springs and elsewhere, as we have already noted, we believe that it is likely that Mr. Norman knew or should have known of them. There certainly does not appear to have been any effort made to treat these incidents as confidential.

In short, although we recognize that the first requirement for the successful use of estoppel against the Government has been met, we find that the third requirement has not. We are far from convinced that the true facts which the Government is said to have known in this case were entirely unknown to appellant. Rather, we believe that these facts were known, should have been known, or could readily have been deduced by appellant from other known or knowable facts.

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[11] Mr. Norman disagrees with our assessment of the significance of the Accident Review Board's recommendations. He testified that, in his mind, the report evidenced a much higher degree of risk than he assumed to exist based on his earlier discussions with GSA and IRS security personnel. He further stated that, if he had known of this higher degree of risk, he would not have offered to lease. See Finding 44. We find his statements unpersuasive. In our opinion, Mr. Norman grossly exaggerates the significance of the Board's recommendations and, in the absence of an indictment or conviction of any suspects in the Bell Tower fire, clearly attached an unjustified weight to the assurances allegedly given to him by GSA and IRS security personnel.

If the contractor was or should have been aware of the true facts, then the second requirement for a successful estoppel argument likewise is not met. Under existing case law, the Government must intend that its conduct induce the unsuspecting contractor to continue performance. Obviously, a contractor alert to the true facts is far from an unsuspecting contractor and can hardly rely on the Government's failure or reluctance to discuss these facts with him.

Finally, even the fourth element for estoppel remains unmet. We find it impossible to conclude that appellant relied on the Government's silence to his detriment. Further, if Mr. Norman did rely on this alleged silence, the reliance was far from reasonable. While Mr. Norman may not have had access to all of the information developed by GSA and/or IRS relative to the risk of harm to his facility, he still had good reason to be concerned. He obviously knew of the Bell Tower fire and that arson was suspected. He knew that the ground-floor windows of his building did not have the protection originally called for in the SFO. He also knew that his building did not have sprinklers. Finding 39. He knew or should have known that there was anti-government sentiment in Colorado Springs and elsewhere. We found the testimony of government employees regarding the existence and public knowledge of this sentiment convincing. Findings 61, 64. We also cannot ignore the inescapable facts that, prior to the award of either the temporary or the permanent lease to Mr. Norman, the IRS offices in Colorado Springs were the target of incendiary attack. Further, the destruction of the Alfred Murrah Federal Building in Oklahoma City in 1995 was a well-publicized fact. While Mr. Norman may not have known at the time that this prompted the President to direct DOJ to prepare an assessment of the vulnerability to such attacks on all federal office buildings throughout the country, he nonetheless should have been aware of the nationwide concern which prompted the President to call for this study. Anti-government sentiment in Colorado and elsewhere in the country was most definitely a fact to be reckoned with at the time.[12] To accept the Bell Tower fire as little more than an isolated event most likely perpetrated by a small group of inept fanatics was to underestimate gravely the significance of the event. See Findings 1, 29, 31, 47. Mr. Norman also knew that certain individuals were under suspicion for having set the Bell Tower fire, but this information did not indicate that any suspect had been indicted, much less convicted, of the earlier arson. We simply cannot credit that, knowing these facts, Mr. Norman would reasonably conclude, based upon the Government's failure or reluctance to discuss the risks of harm to his Lake Plaza building, that the IRS offices located there were not at risk.

In conclusion, we are unconvinced that the Government breached its implied duty of good faith and fair dealing as that duty may be recognized in any one of the various legal

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[12] During his testimony, IRS's Chief of Safety and Security stated that, even after the Bell Tower fire and before the fire in Mr. Norman's building, he did not consider the local IRS offices to be subject to more violence or hostility than any other government agency. See Finding 52. We do not interpret this statement as in conflict with our conclusion that there was anti-government sentiment in the area at that time. The witness's words appear to have been carefully chosen. He did not deny the existence of anti-government sentiment but only expressed the opinion that IRS was no more a target for it than any other government agency in the area.

theories relied upon by appellant. Accordingly, appellant's appeal of the contracting officer's decision of January 19, 2000, is denied.

Decision

Mr. Norman's appeal, under GSBCA 15070, challenging the contracting officer's decision to terminate the lease is **DENIED**. His appeal, under GSBCA 15189, from the deemed denial of his claim for reimbursement of the costs incurred in making tenant improvements is also **DENIED**. Finally, Mr. Norman's appeal, under GSBCA 15252, of the contracting officer's decision denying a claim based on the Government's alleged breach of its implied duty of good faith and fair dealing is likewise **DENIED**.

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EDWIN B. NEILL
Board Judge

We concur:

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MARTHA H. DeGRAFF
Board Judge

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ALLAN H. GOODMAN
Board Judge