



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: July 29, 2008

CBCA 440

INVERSA, S.A.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Jason A. Levine and Ty J. Cottrill of McDermott Will & Emery LLP, Washington, DC, counsel for Appellant.

Luisa M. Alvarez and Thomas D. Dinackus, Office of the Legal Advisor, Buildings and Acquisitions, Department of State, Rosslyn, VA, counsel for Respondent.

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

BORWICK, Board Judge.

Background

This appeal involves two claims submitted together in a single request for a contracting officer's decision by appellant, Inversa, S.A., to respondent, Department of State. The first--the Cerro Corona claim--was for breach of a purported lease, evidenced by a letter of intent, for United States Embassy employee housing in the contemplated, but not built, Cerro Corona project in or near Panama City, Panama.

The second--the Torre Miramar claim--is for alleged breach of respondent's lease 1030-040003 of office space in portions of the Torre Miramar building in Panama City, Panama. As to that claim, appellant alleges that respondent failed to restore the premises as required by the lease and appellant is entitled to damages for respondent's failure, including damages arising from respondent's being a holdover tenant on the floors it failed to restore. Respondent admits that it failed to restore the premises, but maintains that it was prevented from doing so by appellant, and is therefore discharged from its restoration responsibility and all resulting damages that appellant alleges are due. Appellant also claims that respondent is a holdover tenant for certain floors, because respondent failed to give timely notice of intent to vacate those floors. Respondent defends by arguing that it gave timely notice to vacate those floors.

By decision of December 7, 2005, the contracting officer denied both claims. An appeal was originally docketed at the General Services Board of Contract Appeals (GSBCA) as GSBCA 16837-ST. On January 6, 2007, pursuant to section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136, 3393 (2006), the GSBCA was terminated and its cases, personnel, and other resources were transferred to the newly-established Civilian Board of Contract Appeals (CBCA). The appeal was re-docketed as CBCA 440.

Appellant and respondent filed motions for summary relief, respondent on the Cerro Corona claim and appellant on the Torre Miramar claim, with each motion being opposed by the other party. We granted respondent's motion for summary relief on the Cerro Corona claim and dismissed that claim for lack of jurisdiction. We concluded that the Cerro Corona claim did not involve a procurement contract as defined by the Contract Disputes Act, 41 U.S.C. §§ 601-613 (2000). We denied appellant's motion for summary relief on the Torre Miramar claim because there were presented disputed issues of fact. *Inversa, S.A. v. Department of State*, CBCA 440, 07-2 BCA ¶ 33,690. We tried the Torre Miramar claim the week of February 11, 2008, in Panama City, Panama, and the week of February 25, 2008, in Washington, D.C. The issues relating to the Torre Miramar claim have been fully briefed by the parties.

The remainder of this opinion concerns the Torre Miramar claim only. We deny the appeal on the Torre Miramar claim. We find as fact that respondent was ready, willing, and able to restore the floors it occupied within the Torre Miramar building in accordance with the terms of the lease. We find as fact that respondent was prevented from doing so by the interference and obstruction of appellant. We conclude that respondent is discharged as a matter of law from any restoration responsibility and all resulting damages claimed arising from the alleged failure to restore. We also find that respondent gave timely notice of vacating the premises. The portion of the appeal being decided in this opinion is denied.

Findings of Fact

The Torre Miramar building

1. The Torre Miramar building, constructed in 1974, is a sixteen-story office tower located at 39th Street and Balboa Avenue, Panama City, Panama. Transcript at 501, 505-06.¹ The building has a ground floor and floors one through fifteen. *Id.* at 505-06. The fifteenth floor was added separately in 1980. *Id.* at 680-81. The building is structured as a condominium with ninety separate property units. Respondent's Exhibit 10 (Appraisal Report of William Herron). A parking structure is attached to the back of the tower. Transcript at 505.

2. Inversa, S.A., a Panamanian company, was one of the six owners and helped develop the Torre Miramar building, with Inversa being the leading developer. Transcript at 500-01. Dr. Juan Arias is the president of Inversa.² *Id.* at 501. Dr. Arias held Inversa's power of attorney to represent it in any business transaction Inversa conducted. Each of the other five corporations gave Inversa its respective power of attorney to act on its behalf. *Id.* According to Dr. Arias, he possessed the authority to act on behalf of all six corporations. *Id.*

Events leading to disputed Torre Miramar lease

3. Respondent's involvement with the Torre Miramar building extends as far back as 1985. On July 3, 1985, respondent leased fifty square meters in the building for the use of the United States Agency for International Development. Appellant's Exhibit 6; Transcript at 507. On February 23, 1987, respondent leased an additional 108 square meters in the building, and on March 15, 1987, respondent leased ground floor space and the entire first through third floors for a total of 2280 square meters. Appellant's Exhibits 7, 8; Transcript at 508. Amendments to those leases added additional space on the fourth and

¹ Citations are to the multi-page version of the transcript.

² Dr. Arias is trained as a dentist, having obtained his undergraduate and professional degrees in the United States. Transcript at 495. A practicing dentist for many years, Dr. Arias also served as president and editor in chief of the largest newspaper published in Panama, *La Prensa*. *Id.* at 496-97. He started a low-cost housing building enterprise in Panama, turning that endeavor into one of the largest construction companies in Panama. *Id.* at 496. Dr. Arias is involved in many charitable organizations, including an organization to promote human rights within Panama. *Id.* at 498. It is safe to say that Dr. Arias is a member of one of the most prominent families in Panama.

sixth floors. Appellant's Exhibits 9, 14, 17; Transcript at 509-10. Before the execution of lease 1030-040003, respondent occupied the ground floor and floors one through four and six under previous agreements. Appeal File, Exhibit 359A at 2 (art. 1.B).

4. Disputes arose over allegedly delinquent rental payments which Inversa maintained were due under those leases. Transcript at 517. In January of 1990, Dr. Arias received a call from the United States Ambassador to Panama asking if the dispute could be settled. Transcript at 518. At a subsequent meeting in the chancery, Dr. Arias told the Ambassador that the dispute could be settled easily if the Ambassador could arrange a meeting for him with the President of the United States. *Id.*

5. About a week after that conversation, respondent invited Dr. Arias to visit Washington. Transcript at 518. The record does not reveal whether Dr. Arias met with the President. However, he did meet with respondent's contracting officer, Mr. Richard Natale, and agreed to settle the dispute. *Id.* The settlement agreement was finalized on August 17, 1990. Appeal File, Exhibit 11. As to the specifics of the settlement, the parties have stipulated as follows³:

On August 17, 1990, the United States Department of State, Office of Foreign Buildings Operations (FBO) entered into a settlement agreement with the owners of ten floors of the Torre Miramar Building and others ("owners") to resolve disputes regarding a pre-existing lease for space in the Torre Miramar Building, located at the corner of 39th Street and Balboa Avenue in the City of Panama, Republic of Panama.

Stipulation I, ¶ 1.

³ The parties have submitted in this appeal the document entitled "Consolidated Statement of Uncontroverted Facts Related to Count Two," introduced in related litigation in the United States Court of Federal Claims entitled *Inversa S.A. and Assembly of Co-Owners of Torre Miramar Condominium v. United States*, No. 01-220C. With the agreement of the parties, the document has been accepted in its entirety as a stipulation of facts in this appeal and has been designated Appeal File, Exhibit 365. Transcript at 491. This stipulation shall be known throughout this opinion as "Stipulation I." We quote some of the provisions of the stipulation and paraphrase others, where appropriate. The parties have also stipulated as to the restoration cost of the building and as to a trash collection claim. Respondent's Exhibit 14. That stipulation shall be known as "Stipulation II."

6. The settlement agreement included a provision for the execution of a new lease in the Torre Miramar building, which included the following provision:

3. Execution of Permanent Lease.

Simultaneously with the execution of this Agreement, FBO and the Owners shall execute the permanent lease of the ten floors of the Torre Miramar Building. The initial term of the permanent lease runs from March 15, 1990 through March 14, 1998. The rent for the first six years of the initial term of the permanent lease is the sum of Three Million Two Hundred Twenty Two Thousand Four Hundred Eighty Six Dollars (\$3,222,486.00) which amount is included in the settlement amount of \$7,853,000.00.

Stipulation I, ¶ 2.

7. The settlement agreement also included the following provision:

Occupancy and Enhancement Project. As of April 9, 1990, FBO was occupying 366.42 square meters of the ground floor and all rentable areas of floors one through four and six. As of the date of execution of the memorandum of negotiations, FBO took possession of the remaining areas as provided in the permanent lease and began installation of security and safety enhancements to the building. . . .

Stipulation I, ¶ 3.

On August 17, 1990, [appellant] Inversa S.A. and [respondent] entered into a lease agreement No. 1030-040003 ('Lease') for the lease of space in the Torre Miramar Building, including the entire ground, first, second, third, fourth, fifth, sixth, seventh, fourteenth (penthouse) and fifteenth (rooftop) floors of the building for an initial term commencing on March 15, 1990, and ending on March 14, 1998, with the exception of the fourteenth floor, which was to commence no later than December 31, 1990, and end on March 14, 1998.

Stipulation I, ¶ 5.

Terms and conditions of the leaseLease term

8. Lease 1030-040003, which was drawn up in accordance with the terms of the settlement agreement, contained the following pertinent terms and conditions. The leased space consisted of the entire ground floor of the building, comprising approximately 1278.40 square meters of floor space, the first through seventh floors, and the fourteenth and fifteenth floors. Appeal File, Exhibit 12, art. 1.A. The lease recognized that the respondent had under previous agreements, accepted and occupied a portion of the ground floor for a United States Information Service library and floors one through four and six. With respect to the remainder of the ground floor and floors five, seven, fourteen, and fifteen, the respondent “accept[ed] and occup[ied] those floors in as-is condition, i.e. in the condition of the vacating of the prior tenant.” *Id.*, art. 1.B.

9. The initial term of the lease was eight years, commencing on March 15, 1990, and ending on March 14, 1998, with the exception of the fourteenth floor. Occupancy of that floor was to occur no later than December 31, 1990, with the same ending date of March 14, 1998. Appeal File, Exhibit 12, art. 1.B.

10. The lease granted respondent an option to extend the term of the lease for three additional two-year periods on the same terms and conditions as the original lease, save for adjustment of rent in accordance with terms found elsewhere in the lease. Appeal File, Exhibit 12, art. 3.A. The lease provided in pertinent part, with respect to the Government’s exercise of options to extend the term, and also with respect to the possibility of relocation:

Each of said options shall be exercised by LESSEE giving written notice of intent as provided in Article 25 hereof at least twelve (12) calendar months before the expiration of the then existing term. LESSEE shall also provide notice of any decision on the part of LESSEE not to exercise an option to renew or to relocate its operations to other facilities within the Republic of Panama within thirty (30) days of such decision, and, when requested in writing by LESSOR, disclose any information to [sic] that respect no later than thirty (30) days after such request.

Id., art. 3.B.

11. The lease provided that:

LESSEE may, for its convenience, terminate this Lease in whole or in part at any time, if it determines that such termination is in the best interest of the LESSEE by giving written notice of termination to LESSOR 180 days in advance.

Appeal File, Exhibit 12, art. 14.A.

Rental provisions

12. The lease contained an intricate formula for the determination of both the amount and the payment of rent. The lease obligated respondent to pay up-front \$3,222,486 for the period March 16, 1990, through March 14, 1996. Appeal File, Exhibit 12, art. 4.A. The monthly rates (in United States dollars) per square meter for the initial period were deemed to be as follows: \$9.00 for the first three years; \$9.27 for the fourth year, \$9.55 for the fifth year, and \$9.83 for the sixth year. *Id.*

13. The rent for the final two years of the initial eight-year term was to be negotiated and based upon then-prevailing market rates for similar properties under similar lease terms. Appeal File, Exhibit 12, art. 4.A. If negotiations were not successful, the rent was to be determined by arbitration. The basic rate established by the arbitration procedure would apply to floors one through seven. The rate for the ground floor was to be 120% of the basic rate and the rate for the penthouse and rooftop floors were to be 110% of the basic rate. *Id.*, art. 4.B. The total payable rent was to be calculated by multiplying the rates times the areas for each rented floor as set forth in an attached exhibit to the lease. *Id.*

14. In addition, the rates for the eighth year of the term and any exercised options or extensions after the eight-year term were to increase by a percentage equivalent to any increase in the wholesale price index published by the General Comptroller's Office of the Republic of Panama prior to the anniversary of the lease compared to the wholesale price index one year earlier. Appeal File, Exhibit 12, art. 4.B.

15. The rent for each exercised two-year option period was to be payable in advance in a lump sum at the beginning of each option period and at rates determined in accordance with the provisions in the lease. Appeal File, Exhibit 12, art. 4.C.

Restoration provisions

16. Of particular importance to this appeal is the restoration provision, which we set forth in substantial part:

Any fixtures, equipment, and other property transferred subsequent to the occupation of such space by the LESSEE and which are not in replacement of similar articles noted in Exhibits A, B and F appended hereto and originally installed by LESSOR, shall remain the property of the LESSEE. Unless otherwise specifically agreed in writing [ninety] days prior to the date of termination of this Lease, the LESSEE is responsible at its sole cost and expense to remove all such items installed by LESSEE and restore the Leased Space to its original condition as shown on Exhibits A, B and F.

....

Without any additional rent or other payments to the LESSOR, LESSEE shall have the right at any time, and from time to time, at LESSEE'S expense and subject to the LESSOR'S prior written approval . . . to alter, remodel and reconstruct the Leased Space for the LESSEE'S use thereof or the use of any subtenant or the Building itself, for security and safety reasons. That right shall include the installation of dehumidifiers, cables, and security measures and other devices, so long as the Leased Space and the Building of which it is a part are not lessened in value or otherwise adversely affected. Unless waived pursuant to Article 7, Paragraph B, LESSEE shall restore those areas *which have been altered, remodeled, or reconstructed hereunder to their original condition as shown in Exhibits A, B and F.*

Appeal File, Exhibit 12, arts. 7.A, 9.F(i) (emphasis added).

Other provisions

17. Appellant represented that it was lawfully in possession of the premises, that it was duly authorized and able to make this lease, that the premises were appropriately zoned for the conduct of the business that both parties contemplated by the terms of the lease, and that "there are no . . . other impediments to the execution and fulfillment of the terms of this lease." Appeal File, Exhibit 12, art. 28.A.

Law applicable to lease

18. The lease provided that it was to be “interpreted and construed” in accordance with the laws of the Republic of Panama, in which the building was situated. Appeal File, Exhibit 12, art. 22.B. The lease also provided that in case of disputes, the “party desiring resolution” may proceed to “request a Contracting Officer’s Final Decision.” *Id.*, art. 24.A. The lease provided that the landlord could exercise its rights under the Contract Disputes Act to appeal any contracting officer’s final decision to either the cognizant board of contract appeals or to the United States Claims Court. *Id.*, art. 24.E.⁴

Holdover provisions

19. The lease contained the following pertinent hold-over provisions:

LESSEE covenants, at the expiration or other termination of this Lease, to remove all goods and effects from the Leased Space and not the property of LESSOR, to comply with LESSEE’S obligations under Article 9 thereof, and to yield up to LESSOR the Leased Space . . . and other fixtures connected therewith in good repair, order and condition in all respects, excluding, however, reasonable wear and use thereof. . . .

If LESSEE shall not immediately surrender possession of the Leased Space at the termination or expiration of this Lease, LESSEE shall be deemed to have exercised an option to extend the term of this Lease for an additional two year period, provided rent shall be immediately due and payable and shall be calculated in the manner provided in Article 4, Paragraph C.

Appeal File, Exhibit 12, art. 27.A, B.

Occupancy renovations

20. Respondent’s requirements for the physical security, technical security, fire security, electrical system, electrical system safety, and mechanical system safety were set forth in handbooks published by respondent, or in applicable building codes. Stipulation I, ¶¶ 16(D), 19(D), 23(D), 28(D), 32(D). Prior to August 17, 1990, the leased premises of the

⁴ The lease also contained a permissive arbitration provision, Appeal File, Exhibit 12, art. 24, which was not utilized in this case.

Torre Miramar building were not in compliance with those requirements. *Id.* ¶¶ 17(D), 20(D), 24(D), 29(D), 33(D).

21. The renovations at the Torre Miramar building included the following features in order to comply with State Department physical security requirements.

- a. external “hardline” (i.e., concrete and steel reinforced) walls on the south and east walls of the ground floors;
- b. internal hardline walls between the leased premises and public areas of the ground floor, first floor, second floor, third floor, fourth floor, and fifth floor;
- c. a separation from the Public Affairs Section (formerly the United States Information Service) located on the west end of the ground floor;
- d. security doors and windows at all access points in the hardline walls;
- e. security doors and windows at consular interview booths and guard booths;
- f. metal mesh and other security measures on the first-floor balcony;
- g. installation of sidewalk (curb-side) bollards along the west, south, and east perimeter of the building;
- h. steel reinforced bar to block ingress at points where mechanical ductwork penetrated certain walls;
- i. dampers to protect the flow of air to certain safe haven areas;
- j. adding steel plate to walls separating office space from the garage; and
- k. the installation of guard booth and vehicle barricade systems at the garage entrance and garage exit.

Stipulation I, ¶ 18(D).

22. The renovations at the Torre Miramar building included the following features in order to comply with State Department technical security requirements:

- a. a security alarm system;

- b. vehicular and pedestrian access controls at the entrance to the garage and garage access points to the leased premises in the Torre Miramar building;
- c. a “Post 1” security command station for all closed circuit television cameras;
- d. a secondary monitoring station for all closed circuit television cameras; and
- e. a keyless access control system at each hardline door in the garage.

The purpose of improvements to technical security was to provide advance warning and/or to prevent hostile entry to the leased premises. Stipulation I, ¶ 22(D).

23. The renovations at the Torre Miramar building included the following features in order to comply with State Department fire security requirements:

- a. a new fire alarm system for the ground floor through the fifth floor; and
- b. an emergency stairway leading from the ground floor of the garage to each higher level of the garage and up to the fifth floor of the building on the north side of the building, and leading one floor from the fourth floor garage roof to the fifth floor of the building on the south side of the building.

The purpose of the fire alarm system was to provide advance warning of fires that might threaten the safety of persons in the leased premises. Stipulation I, ¶ 25(D).

24. The purpose of the emergency stairway was to provide safe egress to the garage from the ground through fifth floors in the event that a fire rendered the building’s elevators or internal stairwells unsafe. Stipulation I, ¶ 27(D).

25. The renovations of the Torre Miramar building included the following features in order to comply with State Department electrical system safety requirements:

- a. added electrical circuit wiring;
- b. additional circuit breakers; and

- c. equipment to support electrically powered security and fire safety improvements installed during the renovation.

Stipulation I, ¶ 31(D).

26. The renovations at the Torre Miramar building included the following features in order to comply with State Department mechanical system safety requirements:

- a. reinforced steel bar in all apertures where the mechanical system's ductwork penetrated hardline walls;
- b. the insertion of dampers capable of blocking the spread of smoke or fire through ductwork to safe haven areas; and
- c. various modifications to ductwork on the ground floor and on the fifth floor necessary to meet standard of the National Fire Code and the "Ventilation for Acceptable Indoor Air Quality" standards established by the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc.

Stipulation I, ¶ 34(D).

27. The renovation work was performed by Cosmopolitan, Inc., which was retained by respondent to perform the work. Cosmopolitan subcontracted much of the work to Plotosa, a Panamanian construction and design firm. Respondent's Exhibits 2, 3. The renovation work was conducted on the ground floor and floors one through five, Transcript at 284-85, and was performed between October 1995 and October 1997. *Id.* at 286-87. The Assistant General Services Officer for the United States Embassy in Panama testified at the hearing on the merits of this appeal that respondent also replaced two doors on the sixth floor. *Id.* at 284-85, 292, 323.⁵ However, the record reveals that the sixth-floor modifications were added in 1988 when the earlier leases were in effect; those modifications were not made under this lease. Appeal File, Exhibit 134. During the pendency of lease 1030-040003, floors six and seven were used as staging areas for the renovation contractor to perform the renovation. Transcript at 559-60.

⁵ Early in his testimony the witness mentioned respondent's door renovations on the seventh floor, but later corrected his testimony to limit the door renovations to the sixth floor. *Compare* Transcript at 285 *with id.* at 323.

Use of the leased space

28. For the term of the lease, respondent used the leased floors for administrative work for the Embassy. The Embassy also conducted consular, immigration, public diplomacy, and defense work in the leased space. Appellant's Supplemental Appeal File, Exhibit 72. Between 100 and 110 embassy employees worked in the leased space. *Id.*; Transcript at 836. Consular offices were on the first floor, which received heavy foot traffic from individuals requiring the consular services of the Embassy. Transcript at 837. Federal agencies other than the Department of State, including the Immigration and Naturalization Service, also used the leased space at the Torre Miramar building,. *Id.*

Alleged lack of notice of termination of tenancy for floors fourteen and fifteen

29. Between June 20, 1995, and January 3, 1996, the parties negotiated the rental rate for the final two years of the initial term of the lease. Appeal File, Exhibits 247-48; Appellant's Supplemental Appeal File, Exhibits 12, 60; Transcript at 550.

30. On June 20, 1995, appellant proposed a rental rate of \$11.61 per square meter; on September 7, 1995, respondent countered with a rate of \$11.00. Appeal File, Exhibit 247. On September 20, appellant replied that respondent's proposed rate was too low in light of market conditions and insisted on the \$11.61 rate. Appellant stated:

Although our logic and figures indicate that our proposed basic rate should be higher, we have taken into consideration several important factors in your favor which, in our estimation, should be part of the fair play in our negotiations and have induced us to consider the proposed lower rate of U.S. \$11.61 per square meter. For all of the above, I consider that our proposal of a basic rate of U.S. 11.61 . . . is a fair one and respectfully insist that you reconsider it.

Id., Exhibit 248. Appellant did not specify the "important factors" resulting in the \$11.61 rate. As an afterthought, appellant stated that the possibility of extending the initial term was not addressed in respondent's letter of September 7 and requested respondent's reply on that issue. *Id.*⁶

⁶ Appellant would have us find as fact that respondent's alleged failure to provide timely notice of its intent to relinquish two of the ten leased floors deprived appellant of information that was "relevant to the parties' negotiation" of the \$11.61 lease rate. Appellant would also have us find as fact that the negotiated rate would have been higher had appellant

31. By cable dated December 19, 1995, the Embassy and respondent's Foreign Buildings Operations (FBO) discussed a draft of a proposed termination letter regarding floors fourteen and fifteen. Appeal File, Exhibit 250. By cable of January 16, 1996, the FBO in Washington: (1) authorized the embassy to handle direct communications with Inversa with guidance from the FBO, (2) directed the embassy to forward a lease amendment accepting Inversa's offered rate of \$11.61 without reference to floors to be returned to Inversa, and (3) directed the Embassy to send a termination notice for floors fourteen and fifteen to Inversa shortly after the lease amendment was signed. Appeal File, Exhibit 251.

32. On January 18, the parties signed a memorandum establishing the new lease rate of \$11.61 for the final two years--March 16, 1996, through March 14, 1998--of the initial term of the lease. Appeal File, Exhibit 252.

33. On January 31, 1996, respondent gave appellant 180-days' notice, in accordance with article 14.A of the lease, of partial termination of the lease. Respondent stated that it would return floors fourteen and fifteen to appellant as they were excess to respondent's needs, in the same condition in which they were when respondent received them. Appeal File, Exhibit 254. Respondent did not physically occupy floors fourteen and fifteen. Appellant's Supplemental Appeal File, Exhibit 71; Transcript at 999.

34. On July 29, 1996, respondent vacated the fourteenth and fifteenth floors and delivered the keys to appellant. Appeal File, Exhibit 21. However, appellant kept the full rent respondent had already paid it for the two-year period. Transcript at 713-14.

known that the number of floors would be reduced from ten to eight. Appellant's Proposed Findings of Fact 178, 179; Appellant's Brief at 47-48. These findings would be possible had appellant expressly conditioned the \$11.61 rate upon respondent's remaining on those floors and had communicated that condition to respondent. However, the contemporaneous correspondence of those negotiations in this record does not indicate that appellant conditioned the \$11.61 lease rate in its last September 20 offer upon respondent's leasing all ten floors throughout the remainder of the lease term and its option periods or that respondent understood that the rate was subject to that condition. Nor is there information in the record that respondent had decided to vacate floors fourteen and fifteen as of September 20. In any event, as far as this record shows, respondent commenced its internal discussion of the termination of the lease of floors fourteen and fifteen in mid-December 1995, three months after appellant's \$11.61 offer. Appeal File, Exhibit 251.

Termination of floors six and seven

35. On March 14, 1998, respondent vacated floors six and seven; respondent cleaned those floors and removed all government property from those floors. Appeal File, Exhibit 299. As with floors fourteen and fifteen, these floors were vacated in accordance with article 14.A of the lease. *Id.*, Exhibit 291.

Exercise of options

36. Respondent exercised its options to remain in the premises of the Torre Miramar building until March 14, 2004. Appellant's Supplemental Appeal File, Exhibit 51.

Pre-termination restoration efforts and lease termination

37. Respondent first contemplated restoration of its leased premises in the Torre Miramar building in the summer of 2003. In May and June of 2003, respondent had secured from the engineering firm Plotosa a preliminary cost estimate of \$629,852 for the restoration of the ground floor and floors one through five and a preliminary statement of work for the restoration effort. Appellant's Supplemental Appeal File, Exhibits 75, 82. Plotosa worked from construction drawings of the Torre Miramar building that the Embassy believed corresponded to lease exhibits A, B and F and which were provided to Plotosa by the Embassy's General Services Officer, Mr. Roger Street. Transcript at 302-03, 305-06.

38. On June 3, 2003, an official at the Embassy cabled an action request to the Secretary of State, noting that the government of Panama had granted clearance for a lease arrangement that would permit the Embassy to lease premises known as Building 520 at Fort Clayton for embassy offices. The official stated in that cable:

I am still hopeful that the Department will see its way clear to approve the move from [the Torre Miramar building] to 520. The security concerns reference Torre Miramar have been extensively documented and remain my primary consideration. *The costs of the move . . . have not increased since the decision to leave Torre Miramar last October.*

Appeal File, Exhibit 127 (emphasis added).

39. The Division Director, Real Estate Acquisitions and Disposals, Overseas Buildings Operations Bureau (OBO), testified that funding to move from the Torre Miramar building to another facility was granted only at the end of fiscal year 2003 and that as of June 2003, such a move was not funded. Transcript at 985. The Division Director testified that

at most the cable's reference to a move decision "last October" only represented the Embassy's wish or recommendation for such a move. The Division Director testified that not only did the move have to be funded, but also the Director of the OBO or someone at a higher level at respondent's headquarters had to approve the move. Additionally, security standards would have to be met at a new facility, or waivers of such standards would have to be obtained from different levels of the Department of State before relocation could be approved. *Id.* at 981-83.

40. On June 9, 2003, appellant, through Dr. Arias, and respondent, through Mr. Joseph Hilliard, the Embassy's Counselor for Management Affairs, and respondent's real estate team from Washington, D.C., met to discuss restoration necessary for the Torre Miramar building. Appeal File, Exhibit 24. Respondent advised appellant that restoration would require work on the Torre Miramar building to be performed by respondent; the parties also discussed the possibility of a cash payment in place of restoration. *Id.* In the event respondent restored the building, appellant requested a monitor to review the work performed by respondent. *Id.*

41. By letter of June 25, appellant advised respondent that appellant needed "to appoint some professional to supervise and guarantee that all work is performed according to Exhibits A, B, and F of the lease, in the case where [respondent] should decide to perform all of the required restoration work." Appeal File, Exhibit 25. Appellant also confirmed its willingness to consider a cash payment in place of restoration. By that letter, appellant forwarded a letter of its United States counsel, who opined that although the Government had done minimal renovation to floors six, seven, fourteen, and fifteen, the restoration obligation also applied to those floors as well as to the floors where respondent had performed the major renovation work, i.e., the ground and one through five. *Id.* That opinion was based on the assumption that the Government in lease 1030-040003 had assumed the restoration obligation of prior tenants of those floors who had vacated to allow respondent to occupy those floors. *Id.*

42. On July 10, 2003, respondent advised appellant that although its preference to settle the restoration obligation would be a cash payment, it had engaged an independent contractor, which had prepared a scope of the restoration work and an estimate to perform that work. Appeal File, Exhibit 25. Respondent noted that appellant had desired to hire its own estimator; respondent urged appellant to commence its efforts so that the two parties could coordinate the restoration effort. *Id.* On July 17, appellant responded that its president, Dr. Arias, would be "leaving for Europe" the next day and would not be able to respond until August. *Id.*, Exhibit 28. Dr. Arias had instructed his office to survey engineering companies to inquire if "they might be interested in performing the restoration work required." Dr. Arias stated that upon his return from Europe he would meet with the engineering

companies, provide them with copies of exhibits A, B, and F of the lease, and then arrange for an inspection of the premises. *Id.*

43. On August 23, 2003, appellant wrote respondent and advised it that appellant had contacted and distributed floor plans of the Torre Miramar building to four engineering companies who might be interested in bidding on the restoration job. Appeal File, Exhibit 29.

44. In early September 2003, respondent sent Plotosa's preliminary statement of the restoration work to appellant. Appeal File, Exhibit 41A.

45. On October 15, 2003, respondent acknowledged receipt of appellant's letter of August 23 and provided formal notice of the United States' intent to relocate from the leased space to another facility within Panama. The letter stated that the United States had reached a decision to relocate on September 23, 2003. Appeal File, Exhibit 30. The Acquisition Team Leader of the Real Estate and Property Management Office of respondent's OBO testified that she believed that the date of September 23, 2003, as the decision date for relocation was accurate because respondent up until the close of the preceding fiscal year was short of funding and did not know whether it would have enough funds to "conclude the lease." Transcript at 1217-18. The Division Director of the OBO testified that the announced decision date of September 23, 2003, was accurate because the funding and the necessary security waivers for the new facility would have been accomplished at that time. *Id.* at 987.

46. There is a dispute of fact as to when respondent made the decision to relocate from the Torre Miramar building. Based upon the wording of the June 2003 action request cable, Appeal File, Exhibit 127, appellant says the decision was made in October 2002. Respondent says the decision was made on or about September 23, 2003. Based upon the wording of that cable and the credible testimony of the OBO Division Director, we conclude that the Department of State decided to relocate from the Torre Miramar building on or about September 23, 2003. The cable was a request for action from the Embassy to respondent's headquarters to approve the move, not the decision to move itself. The decision to relocate from the Torre Miramar building was made after funding was obtained and after necessary approvals and security waivers from headquarters were obtained.

47. By letter of December 4, 2003, respondent advised appellant that at the completion of the lease period, respondent would return the ground floors and floors one through five to appellant. Respondent stated that consistent with the articles 7.A and 9.F of the lease, respondent would remove all fixtures, equipment, and other property installed by respondent on the ground floor and floors one through five and restore those areas that were

remodeled or reconstructed by respondent to their original configuration “when [respondent] took possession of those floors.” Appeal File, Exhibit 32. Respondent stated that it remained open to the possibility of discharging the restoration obligation by a lump sum payment to appellant, but that in lieu of agreement on such a payment, respondent would proceed with restoration. Respondent advised appellant of the need “for [appellant] to inform us within [fourteen] days from the date of this letter whether [appellant] intends to waive any part or all of the restoration work.” *Id.* Respondent also stated that it was seeking to satisfy its restoration obligation in a timely fashion and that if appellant failed to meet its contractual obligation to cooperate in good faith, then respondent’s efforts might be delayed. Respondent advised appellant that any such delay would be appellant’s responsibility. *Id.*

48. Attached to the letter was the scope of restoration work proposed by Plotosa. Appeal File, Exhibit 32. Plotosa based its restoration on the original drawings of the Torre Miramar building prepared by the architect, Altuna, and approved by the municipal offices of Panama City in June 1972, and an on-site review of the ground floor and floors one through five of the Torre Miramar building performed by Plotosa in April 2003 and drawings based upon that review. *Id.* The Altuna drawings were those that had become referenced as exhibits A, B, and F to the lease. The embassy General Services Officer had provided Plotosa with a version of exhibits A, B, and F in its possession. Respondent’s Exhibit 28; Transcript at 302-03.⁷ Thus the respondent’s letter stating that respondent was prepared to restore the building to its original configuration “when [respondent] took possession of those floors” was, by the admission of the Embassy’s Counselor for Management Affairs, inaccurate. Transcript at 864-65. The scope of work was to restore the building to its configuration as shown on exhibits A, B, and F.

49. Plotosa proposed to demolish “every division and wall constructed by [respondent] from the ground to the [fifth] floor.” All the ceiling except where indicated on the drawings, and all lighting and electrical conduits, were to be removed. All carpet was to be removed, with the replacement rug to be selected by the owner. All new bathroom tiles,

⁷ Mr. Hilliard testified that he believed that exhibits A, B, and F to the lease were not the Altuna documents mentioned in Plotosa’s statement of work, but as-built drawings. Transcript at 865-66. However, exhibit A to the lease is indeed a set of drawings prepared by the firm of Altuna Asociados, S.A. and dated May 1972. Various municipal approvals on the drawings are also dated June 1972, the date referenced in Plotosa’s proposed statement of work. *See, e.g.*, Respondent’s Exhibit 28 (containing the Altuna and municipal seals and the dates). The witness’s later testimony in the hearing on this point was tentative. Transcript at 959. We conclude that Mr. Hilliard’s testimony regarding the identity of the drawings that Plotosa used is erroneous.

artifacts, and accessories would be equal or similar to the original tiles, artifacts, and accessories still existing in the building. Appeal File, Exhibit 32.

50. For each floor, new walls were to be erected as indicated on the original drawings. Appeal File, Exhibit 32. For example, the scope of work for the second floor stated, “erect new walls as the original drawings.” *Id.* On the ground floor, Plotosa proposed to “erect new walls indicated in the drawings to restore [to the] original condition.” *Id.*

51. Replacement glass doors and aluminum frames were to be the same or equal to those elements in the original drawings, with samples being submitted to the owner for approval. Plywood doors with integral frames were to be of the dimensions indicated on the original drawings with color selected by the owner. Appeal File, Exhibit 32.

52. For the air conditioning system, Plotosa proposed to rearrange the branch ducts and diffusers to their original condition in accordance with the original drawings. Appeal File, Exhibit 32. New duct branches of the same dimensions and material indicated in the original drawings were to be installed. *Id.*; *see also* Appellant’s Supplemental Appeal File, Exhibit 92 at 4.

53. Plotosa proposed to replace all lighting fixtures shown in the original drawings with new fluorescent fixtures and to install new conduit to the fixtures from the electrical panels. Appeal File, Exhibit 32. All broken or damaged receptacles would be replaced. *Id.*

54. On the exterior of the Torre Miramar building, Plotosa proposed to remove the bollards around the building that respondent had installed as a security barrier. Appellant’s Supplemental Appeal File, Exhibit 92 at 3.

55. By letter of December 17, 2003, appellant answered respondent’s letter of December 4. Appeal File, Exhibit 33B. Appellant stated that it would not waive restoration work except replacement of some partitions on the first, second, and third floors. Appellant stated that respondent’s restoration obligation extended beyond the fifth floor, to the sixth and seventh floors and the penthouse and rooftop. *Id.* Appellant stated that it was unable to give approval to respondent’s requested fourteen-day approval window because:

As for the scope of work indicated by Plotosa, I am afraid this is something for which we must hire professional help in order to determine if everything required is included. I, therefore, very seriously doubt if we can have a final

reply in [fourteen] days as you request. This is something that is not only going to be out of our hands, but, in addition, considering all of the coming holiday events, will make it even harder to comply in such short notice.

Id.

56. Appellant also sent to respondent a separate letter dated December 17, 2003, in which appellant forwarded its own contractor's estimate of restoration of the ground floor, floors one through seven, the penthouse, and rooftop at an estimated cost of \$1,016,528.49. Appeal File, Exhibit 33A.

57. In reply to those two letters, by letter of December 23, 2003, respondent offered appellant a cash payment to satisfy respondent's restoration obligation conditioned upon appellant's waiving all possible claims under the lease. Appeal File, Exhibit 34. Respondent asked for a reply within seven days and stated that lack of an agreement would cause it to commence the restoration work. *Id.* On December 29, appellant requested further negotiations and stated that it could not respond within the seven-day period set forth in respondent's letter. *Id.*, Exhibit 35. In response, on December 31, respondent advised appellant that it would proceed with restoration work but that as restoration work proceeded, respondent would be amenable to further negotiations concerning a cash-based settlement. Respondent, moreover, was amenable to an early meeting between the parties. *Id.*, Exhibit 36. Dr. Arias agreed to a meeting. *Id.*, Exhibit 37.

58. The parties met on January 2, 2004. At the meeting, Dr. Arias told respondent for the first time that respondent would have to secure condominium association approval before proceeding with the restoration. Appeal File, Exhibit 38; Transcript at 875. Appellant also demanded that respondent pay \$700,000 as holdover rent for the time it would take respondent to perform the restoration. Transcript at 875.

59. By letter of January 7, 2004, respondent, citing article 28 of the lease, objected to appellant's demand that it secure condominium association approval of its restoration plans. Respondent noted that the lease did not require respondent to obtain the prior approval of the condominium association before restoring the premises. Appeal File, Exhibit 38. Respondent advised appellant that it would engage a contractor and start restoration before the end of that week. *Id.*

60. By return correspondence of the same date, appellant stated that Dr. Arias had convened, apparently on that day, an extraordinary meeting of the condominium association. Appellant advised respondent that one hundred percent of the condominium owners attended the meeting and that it was unanimously agreed that respondent had to present a set of

architectural plans for approval by the condominium association before restoration could commence. Appellant also stated that before the condominium association would approve the renovation, the renovation plans needed approval by municipal authorities. Appeal File, Exhibit 39. Appellant, through Dr. Arias, then stated:

Therefore, I regret to inform you, no construction work will be allowed [that] you have announced you will commence before the end of this week, until you comply with both the Torre Miramar condominium bylaws and local municipal and government authorities.

*Id.*⁸ Dr. Arias then announced that he would be unavailable for the next ten days because of a pending business trip to Europe and referred respondent to his lawyers. *Id.*

61. On January 9, respondent, through its headquarters in Washington, awarded a renovation contract in the amount of \$1,200,000, to Plotosa for restoration of the ground floor and floors one through five of the Torre Miramar building, restoration of a garage attached to the building and removal of the chain link fence around the building.⁹ Appellant's Supplemental Appeal File, Exhibit 105. The completion date was sixty days after issuance of the notice to proceed. *Id.* Mr. Hilliard testified that the awarded contract contained an incentive payment of \$126,626.90 for early completion and that Plotosa was prepared to work "24/7" in order to complete the job. Appeal File, Exhibit 105; Transcript at 883-84, 897-98. Mr. Hilliard was convinced that if allowed to proceed, Plotosa could have completed the restoration in a timely manner. Transcript at 884.

62. By letter of January 13 to appellant, respondent noted appellant's restoration conditions and advised appellant that municipal approval of the restoration had been factored into the restoration schedule, but compliance with condominium association procedures "[is] not mentioned in the lease or contract." Respondent maintained that to the extent such a procedure was required, articles 28.A and 26.A of the lease placed fulfillment of that

⁸ Appellant would have us find that Dr. Arias convened an extraordinary meeting of the condominium association in order to expedite respondent's restoration plans. Appellant Proposed Findings of Fact 101; Appellant's Brief at 29. However, the convening of the condominium association achieved exactly the opposite result, i.e., further hindrance to respondent's restoration effort.

⁹ Respondent leased portions of the garage and the roof of the Torre Miramar building under separate lease, number S-132-FBO-189, which contained its own restoration provision. Appellant's Supplemental Appeal File, Exhibit 95. Restoration of the leased garage area is not in issue in this case.

responsibility on appellant, not respondent. Appeal File, Exhibit 41 (second letter). Respondent advised appellant that it would immediately seek municipal government approval of the restoration and follow condominium procedures, although following condominium procedures was appellant's responsibility. *Id.* Respondent then stated:

It is difficult to resist the conclusion that [appellant] is seeking to delay the [respondent's] efforts to complete the restoration. You appear to believe that your obstruction can create an obligation for the [respondent] to pay rent after the expiration of the Lease/Contract period, which ends on March 14, 2004, in addition to bearing our restoration responsibility. You are mistaken. Furthermore, your obstruction may cause damage to the United States.

We urge you to abandon your obstructionist tactics, which are already delaying our ability to meet our restoration obligations. We of course remain committed to meeting our obligations to the extent you permit us to do so.

Id.

63. Respondent called Mr. John Gartland as its expert architectural witness. Transcript at 1027. Mr. Gartland, a Department of State employee, received a graduate degree in architecture from the University of Houston. *Id.* at 1028-29. He then attended University of Navarro in Spain and obtained his equivalency degree in architecture. *Id.* at 1028. He is accredited by the National Architectural Records Board. *Id.* at 1011-12. He is also licensed in Virginia and Spain. *Id.* at 1033. The latter license is good throughout the twenty-five nation membership of the European Union. *Id.* In addition, Mr. Gartland holds an inactive license in Texas. *Id.* Mr. Gartland is an award-winning international architect, having received design awards, along with other colleagues, for the design of a hospital in Salzburg, Austria; for a bridge in Gratz, Austria; and for a geriatric clinic in Strasswalchen, Austria. *Id.* at 1034. In the last twenty years, Mr. Gartland has concentrated on international projects, having served as a senior project manager. Mr. Gartland has worked on medical, commercial retail, and high-rise projects. *Id.* at 1033. He speaks Spanish. *Id.* at 1125. The Board found Mr. Gartland to be a highly credible witness.

64. Mr. Gartland testified that Plotosa could have completed the restoration within sixty days. Transcript at 1122. Demolition would have been the most time-consuming job, which Plotosa could have completed working "24/7." *Id.* Plotosa could have demolished in the daytime, brought the material down in the early evening and hauled away the material at night. *Id.* The heaviest restoration work would have been in the lobby area. *Id.* at 1123. Restoring the building to its 1972 condition would have been relatively simple because the

plans indicated large open areas on the upper floors. *Id.* at 1123-24. The mechanical work consisted of reconstructing the main ductwork. *Id.* at 1124.

65. On January 16, respondent advised appellant that it had received preliminary approval by municipal authorities for the restoration of the Torre Miramar building and that, on the basis of that approval, respondent expected to obtain a temporary permit to commence the restoration by the first part of the next week. Appeal File, Exhibit 41A. Respondent forwarded the restoration plans, and requested that appellant obtain all necessary condominium board approval that may be required in order for respondent and its contractor to perform the restoration. *Id.* Respondent also requested that appellant sign the plans so that it could obtain a final permit from municipal authorities. *Id.* By later letter, respondent asked for a copy of the condominium association by-laws. *Id.*, Exhibit 41B.

66. On January 21, Inversa, through Dr. Arias, responded to respondent's January 16, letter. Inversa stated that Dr. Arias had returned from a twelve-day trip abroad, and that the issues raised by respondent's letter would require "some research and investigation." Appeal File, Exhibit 42. However, Inversa explained that its investigation to date had "found far too many errors in what your plans propose to build and what the original plans referred to in our lease as exhibits A, B and F, demonstrate." *Id.* Inversa stated that Dr. Arias had turned over the plans to an architect and an engineer for a professional opinion. *Id.* Inversa refused to turn over the condominium association by-laws to respondent because the by-laws were "private and confidential belonging to condominium owners only." *Id.* Inversa did offer to provide the minutes of the most recent condominium association meeting which maintained the requirement for condominium association approval of plans and specifications. *Id.* Inversa also requested a construction schedule from the proposed relocation contractor. *Id.*

67. Appellant's letter of January 21 was the first time respondent had been made aware of appellant's position that there were errors in the proposed restoration plans. Transcript at 893. Appellant provided no details of the alleged errors. *Id.*

68. On January 26, respondent forwarded to appellant the temporary permit granted by municipal authorities, and a Gant chart showing commencement of the restoration work on or about January 28, with the work complete on or about March 13. Appeal File, Exhibit 43 (attachments). Respondent requested again that appellant secure any condominium board approval necessary for the start of the work, and again requested copies of the condominium by-laws. Respondent also requested that appellant sign the restoration plans so that respondent could obtain a permanent permit from the municipal authorities for completion of the restoration work. *Id.*, Exhibit 44.

69. On January 30, 2004, appellant replied to respondent with a letter that Dr. Arias testified summarized appellant's position. Appeal File, Exhibit 45; Transcript at 600-01. Inversa refused to approve the restoration plans submitted by respondent. Appeal File, Exhibit 45.

70. Inversa stated that the professionals engaged by Inversa had identified numerous deficiencies in the restoration plans, including the construction of bathrooms where there were none; construction of partitions that never existed; erroneous architectural notes "of a different nature; serious differences in both ceiling and lamp layout; discrepancies in the proposed construction of the air conditioning ducts; [and] architectural notes and details in the English language, which demonstrated to appellant that the plans were not prepared by a Panamanian architect." Appeal File, Exhibit 45. Inversa, however, did not in that letter include its professionals' analysis of those alleged discrepancies for consideration, either by respondent or respondent's contractor, Plotosa. *Id.*

71. Appellant questioned the validity of the temporary permit, stating that Dr. Arias had earlier spoken with the Mayor of Panama City, who was "surprised as I, that something so irregular could happen." Appeal File, Exhibit 45. Dr. Arias was said to have been provided "the highest assurances" that there "could be no way" that Plotosa could be given a temporary permit "under existing circumstances." *Id.*

72. When the temporary permit did arrive, Dr. Arrias called the Office of the Municipal Engineer for an explanation. Dr. Arias testified that office's first reaction was one of "disdain, embarrassment, and disbelief." Appeal File, Exhibit 45. The office of the Municipal Engineer promised an investigation of the circumstances concerning the issuance of the temporary permit. Dr. Arias stated that "[s]omething, somewhere, is obviously wrong." *Id.*

73. Inversa, through Dr. Arias, stated its "sincere regret" that it could not be more cooperative under the present circumstances. It opined that "there are an infinite number of details [regarding the restoration] that need to be worked out among ourselves and we have just not given the required time to do so." Appeal File, Exhibit 45. Inversa also said that Plotosa could not work "24/7" because "we are not prepared for this kind of continuous endeavor." *Id.*

74. Appellant forwarded to respondent the original incorporation minutes of the Torre Miramar condominium. Appellant stated that the original minutes of incorporation plus the minutes of the extraordinary meeting of the condominium association of January 7 both required respondent to submit architectural restoration plans approved by municipal authorities for the condominium association's approval. Appeal File, Exhibit 45.

75. On February 6 respondent replied with a point-by-point rebuttal of the positions in appellant's letter. Appeal File, Exhibit 46. Respondent noted that appellant's architectural comments on respondent's proposed restoration were the first comments received from appellant although respondent had sent appellant a set of restoration plans in September 2003. Respondent considered the comments to be vague and without merit. *Id.* Respondent disputed appellant's position that the temporary construction permit was invalid. *Id.*

76. Regarding appellant's position that there was not enough time to come to agreement on restoration, respondent noted that it had been communicating with appellant since June 2003 about restoration. Respondent recited the history of its communications with appellant concerning restoration and stated that the Government "afforded [appellant] more than enough time, and showed more than enough flexibility, to satisfy its contractual obligations if it were dealing with a reasonable landlord acting in good faith." Appeal File, Exhibit 46. As to appellant's statement that it was not prepared to accommodate a "24/7" work schedule, respondent reminded appellant that nothing in the lease prevented restoration work beyond working hours. *Id.* Finally, respondent stated that the original minutes (which respondent says were issued in 1974) contain no requirement for condominium association approval of architectural plans and that the extraordinary minutes amounted to post hoc ratification of appellant's delaying tactics. *Id.*

77. Respondent met with Plotosa on February 9 concerning appellant's letter. Plotosa advised respondent that it had secured the temporary permit in a regular manner through the proper channels. Appeal File, Exhibit 47. The only additional information the municipal authorities requested was structural engineering approval for the restoration of the parking garage. That additional information had been provided. *Id.* Plotosa disagreed with appellant's comments about defects in the architectural plans, since Plotosa had used as a reference the original construction drawings as well as plans from 1979 and 1982. The plans were prepared in English because that was an embassy requirement and Plotosa translated the plans into Spanish later to obtain the construction permit. Concerning working hours, Plotosa said that whenever it had worked at the Torre Miramar building it had worked at night or on weekends, without objection from appellant, to avoid disruption of work during the day. *Id.*

78. Between February 10 and March 8, the parties engaged in correspondence in a fruitless attempt to arrange a meeting to discuss restoration. Appeal File, Exhibits 48-50. On February 10, appellant stated that Dr. Arias would not be available for a meeting from February 12 through February 20. Appellant stated that it would only approve respondent's restoration plans if all the alleged errors in those plans were corrected. *Id.*, Exhibit 48. Plotosa called appellant to propose a technical meeting on restoration with appellant, but

according to what Plotosa told respondent, Inversa told Plotosa that it was unprepared for a technical meeting. *Id.*, Exhibit 50.

79. On March 8, Inversa told respondent that Dr. Arias had located the architect Altuna, who sent Dr. Arias “new Van Dyke” copies of the original plans, which he had received in his office the previous Sunday. Appeal File, Exhibit 51. Appellant stated that with those original plans which are referred to as exhibits A, B, and F of the lease, “we can determine with absolute certainty, how the occupied spaces are to be restored.” *Id.* Respondent replied that since those drawings were not attached to the lease as exhibits A, B, and F, it considered those drawings to be irrelevant. *Id.*, Exhibit 52.

80. On March 12, appellant acknowledged disagreements between the parties on the extent of respondent’s responsibility for restoration, the scope of restoration, the necessity for respondent to comply with the condominium associations by-laws, the procedures necessary under Panamanian law to complete restoration, and which versions of the original construction documents were exhibits A, B, and F to the lease. Appeal File, Exhibit 53. The lease expired by its terms on March 14, 2004. *Id.*, Exhibit 12, arts. 2, 3. Respondent vacated the premises without restoring them. *Id.*, Exhibit 54.

81. Upon vacating the building, respondent removed all government property from floors one through five, cleared the exterior of all government property, and left the lobby empty with the exception of a security guard post. Appeal File, Exhibit 351.

Exhibits A, B, and F; and appellant’s objections to proposed termination efforts and post-lease termination activities

82. On March 19, 2004, Inversa sent respondent a six-page list of alleged deficiencies in respondent’s proposed restoration plan. Appeal File, Exhibit 350. The deficiency noted on the first page was that the restoration plan did not show the existence of a fire alarm system. *Id.* The absence of a structural engineer’s signature was noted, as was the absence of plumbing plans. *Id.* Floor-by-floor alleged deficiencies were briefly described. For example, the list described a deficiency on Plotosa plan 5/28 as: “WALL A: behind trench 2, not on original drawing.” *Id.* at 2. The list Inversa submitted contained no design suggestions as to how the alleged deficiencies might have been corrected. The author of the list, Mr. Carlos Fernandez, testified at the hearing on the merits of the appeal. He testified that the list of discrepancies was “important” and that “[a] lot of work was missing on [Plotosa’s plan],” but did not provide specifics. Transcript at 71. To compile his list, Mr. Fernandez compared Plotosa’s drawings against the version of lease exhibits A, B, and F that Inversa had provided him. *Id.* at 74-75, 77.

83. Dr. Arias, on behalf of Inversa, admitted that respondent's restoration plan would have removed the internal security barriers, the steel doors, the reinforced walls within the building, the blocked exits, and the security barriers that surrounded the building. Transcript at 629-30. Inversa's objections went to what was supposedly left out of respondent's restoration plans, i.e., floors six, seven, fourteen, and fifteen. *Id.* at 631. Dr. Arias summarized Inversa's other objection, that the restoration was not being done in accordance with the work shown on exhibits A, B, and F of the lease. *Id.* at 631-32.

84. Exhibits A, B, and F to the lease were the design drawings for the main office tower and the office and parking structure, and the allocation of parking spaces. Transcript at 529. In this litigation, the parties agree on the identity of exhibits B and F, but each party has presented its own version of exhibit A that each party maintains should have guided the restoration effort. *Id.* at 530-31. Appellant's objections to respondent's restoration were based upon its version of exhibit A. *Id.* at 77.¹⁰

85. Respondent's expert architect, Mr. Gartland, examined the different versions of lease exhibit A presented by both parties. Transcript at 1059-85. He also evaluated the Plotosa drawings against appellant's alleged list of deficiencies and the respondent's version of lease exhibit A. *Id.* at 1100-09.

86. Mr. Gartland found that the respondent's version of lease exhibit A contained fewer remaining partitions and walls than shown on appellant's version. Respondent's Exhibit 28; Transcript at 1064-65. Rooms that were shown on appellant's version of lease exhibit A were not shown on respondent's version. Respondent's Exhibit 28; Transcript at 1065-66. For example, appellant's version of exhibit A shows deposit and reception rooms on the ground floor not shown on respondent's version. *Id.* Furthermore, the electrical and mechanical layout on appellant's version of lease exhibit A were coordinated with the architectural layout in respondent's version, rather than appellant's version. Respondent's Exhibit 28; Transcript at 1068, 1080-81, 1083-86. Mr. Gartland testified:

¹⁰ We emphasize that neither party has submitted the actual drawings designated lease exhibit A that were attached to the lease at its execution. The drawings that were attached to the lease were signed by Dr. Arias and Mr. Richard Natale. Transcript at 535. Those documents apparently have disappeared, since neither party's version of lease exhibit A contains those signatures. *Compare* Respondent's Exhibit 15 *with* Appellant's Exhibit 2. While for the purpose of this litigation the parties agree on the version of exhibits B and F, each party has submitted into evidence its version of exhibit A that the respective party believes must have been attached to the lease upon its execution.

I can't see [appellant's version of the drawings] as Exhibit A because there's just too much conflict between [the] architectural, mechanical, electrical and other drawings. First of all . . . it's just a complete[ly] different layout of what the floors should be, and, for instance, if you take the mechanical, they're designed to a specific layout. If you reconfigure the floor plan, you're not going to be getting sufficient cool or warm air in there. You're not going to get air regenerated. . . . The same goes for the lighting, because, as I pointed out on some of the drawings, the partitions on the architectural could easily fall underneath a light fixture.

Transcript at 1098-99.

87. There is a dispute of fact whether appellant or respondent's version of lease exhibit A is the version that would have been attached and referenced in the lease. We find as fact that respondent's version of lease exhibit A was the proper version that was referenced in the lease, since respondent's version is the one in which the architectural layout is coordinated with the mechanical and electrical portions of that exhibit. We conclude that it is highly unlikely that the design condition of the building as it existed in 1972, the state to which the building was to be restored under the terms of the lease, would have been based on a set of uncoordinated design documents, such as appellant's version of lease exhibit A.

88. Mr. Gartland also testified that both appellant's and respondent's versions of drawings designated as lease exhibit A were not fully developed design drawings, but rather design intent drawings showing between sixty-five and seventy-five percent of the design. Transcript at 1097. The drawings were not accompanied by specifications. *Id.* The drawings lacked sufficient detail so that much was left to the renovation contractor's discretion. *Id.* at 1091.

89. The Board has compared respondent's version of exhibit A--Respondent's Exhibit 15--with the restoration plans presented by Plotosa. Appellant's Supplemental Appeal File, Exhibit 76, Drawings on Disk. Plotosa's architectural, mechanical, and electrical restoration drawings conformed to the space layout as shown on respondent's version of exhibit A. *Compare, e.g.,* Respondent's Exhibit 15 *with* Appellant's Supplemental Appeal File, Exhibit 76, Drawings on Disk for Architectural, Mechanical, and Electrical for the ground floor. For example, Plotosa restoration drawings show the mechanical and electrical restoration serving the relatively open space layout of the ground floor as it existed as shown in the 1972 design drawings, which conformed with respondent's version of exhibit A. Plotosa's mechanical restoration drawing also conformed to the mechanical drawings in respondent's version of exhibit A. *Compare, e.g.,* Respondent's Exhibit 15, Mechanical

Drawing *with* Appellant's Supplemental Appeal File, Exhibit 76, Drawings on Disk, Mechanical Drawing.

90. Mr. Gartland examined Inversa's objections to respondent's restoration plans. He found that many of the objections were incorrect. For example, Mr. Fernandez's criticism of Plotosa's plans because they lacked a structural engineer's signature was not correct because the restoration effort did not involve structural work. Transcript at 1102. Similarly, his criticism of Plotosa for not showing a fire alarm system was wrong because lease exhibit A did not show a fire alarm system. *Id.* at 1101. Mr. Gartland testified that many of the floor-specific problems Mr. Fernandez identified resulted from his reliance upon architectural plans--Inversa's version of lease exhibit A--that differed from the architectural plans--respondent's version of lease exhibit A--that respondent had provided Plotosa. *Id.* at 1109.

91. Mr. Gartland reported that many of the interior problems Mr. Fernandez identified, such as direction of door swings, exact wall locations, or wall alignments, were minor and could have been corrected on an "approved as noted basis." Respondent's Exhibit 11 at 5. That is, Inversa could have approved the restoration plans, with requested changes noted on the approved drawings, accompanied by a description of the recommended change to be made in a drawing note. Transcript at 1107, 1137-38. That procedure is standard in the United States, Europe, and Mr. Gartland believes, in Panama, based upon his consultation with Panamanian contractors. *Id.* at 1138. The one noteworthy error in Plotosa's plans that Mr. Fernandez did find, an omission of a restroom in a corner of the building, could have been incorporated into the restoration without holding up the restoration project. Respondent's Exhibit 11 at 6.

92. We found Mr. Gartland to be a highly credible witness on these matters, as well as in general (see Finding 63). Based upon his testimony and our examination of exhibits A, B, and F to the lease as well as Plotosa's statement of work and its restoration drawings, we find as fact that Plotosa could have completed the restoration on schedule had it been permitted to do so. We also find that Plotosa's contemplated restoration work would have restored the building to the condition as shown in respondent's correct version of lease exhibit A, had Plotosa and respondent received cooperation from appellant.

93. In response to appellant's letter of March 12, 2004, by letter of April 14, respondent advised appellant that it was ready to move forward with restoration if appellant ceased its "obstructionist tactics" and to discuss any modifications to the restoration plans as long as those modifications did not increase the time, scope, or budget of the restoration project. Appeal File, Exhibit 56. By letter of April 26, appellant responded that further negotiations on restoration would be futile and that it considered respondent in breach of the

lease. *Id.*, Exhibit 57. Appellant implied that it would restore the premises upon approval of restoration plans by municipal authorities and the condominium association. *Id.*

94. By letter of May 4 to appellant, respondent denied it was in breach of the lease and restated its readiness to perform restoration. Respondent urged appellant to change its position on its refusal to allow respondent to perform restoration; respondent stated that it considered appellant's refusal to allow respondent to perform restoration to be a breach of the lease. Appeal File, Exhibit 58.

95. Appellant did not respond to respondent's May 4 letter until December 29, 2004. Appeal File, Exhibit 59. Although the parties had planned to meet that summer, one meeting was canceled due to the death of President Reagan, and the time between May 4 and December 29 was spent with both sides conferring with their lawyers. *Id.* Appellant did state in its letter that it had not proceeded with its own restoration of the premises because it had desired to give respondent the opportunity and courtesy of reviewing the restoration plans for which appellant had contracted. *Id.* Appellant attached its counsel's opinion that respondent breached the lease by its failure to restore and that appellant was entitled to restoration costs and rent for the resulting holdover tenancy created by respondent's failure to restore. *Id.*, Attachment. In response, on January 28, 2005, respondent denied all liability. *Id.*, Exhibit 62.

The claim

96. On November 3, 2005, appellant submitted a request for a contracting officer's decision (the claim) to the contracting officer. Regarding the Torre Miramar building, appellant claimed that respondent breached the lease by failing to restore the ground floor, and floors one through five, six, seven, fourteen, and fifteen, to their original condition as shown on exhibits A, B, and F to the lease, and that respondent failed to remove its property from the premises. Claim at 9. Appellant claimed that respondent's plans for restoration were:

demonstrably defective, if not illegal, only two of which are that they failed both to provide for the conditions shown in Exhibits A, B and F and to include other floors other than the ground floor and floors one through five.

Id. at 9-10. Appellant claimed that because of respondent's failure to restore, respondent left its fixtures on the floors respondent had occupied. Appellant claimed that the consequence of that breach is that respondent must be deemed a holdover tenant, with two years of rent being immediately due and payable under the payment terms of the lease. *Id.* at 10. Appellant also maintained that respondent's failure to restore during each two-year holdover

period also constituted a breach, creating a holdover tenancy for an additional two-year period. *Id.* at 13.

97. Appellant also claimed that respondent breached the lease by failing to provide thirty-days' notice of its intention to vacate the fourteenth and fifteenth floors of the building, allegedly required by the lease, and by failing to provide that notice as to floors six and seven. Claim at 13. Appellant stated that had it known that respondent would release the floors it would not have agreed to the rate it agreed to for the next term. *Id.* Appellant claimed respondent breached the lease provision requiring respondent to provide thirty-days' notice before deciding to relocate from the Torre Miramar building. *Id.*

98. Finally, appellant claimed damages for respondent's alleged breach of the trash removal provision in the lease. Claim at 16.

99. Appellant claimed the following damages from respondent relating to the alleged breach of the lease: (1) \$1,016,528.40 for the cost of restoration; (2) \$1,364,661.81 for holdover rent from March 2000 through March 2004 for floors six, seven, fourteen, and fifteen; (3) \$2,029,095.48 for holdover rent for all floors for the period March 2004 through March 2006; (4) \$3,400,000 for lost rental opportunity arising from breach of the thirty-day notification provision for alleged premature termination of floors fourteen and fifteen; (5) \$1,500,000 for breach of the thirty-day notice provision regarding respondent's relocation from the Torre Miramar building; and (6) \$15,000 for alleged breach of the trash removal provision. Claim at 18-20.¹¹ Appellant did not seek damages for alleged breach of the thirty-day notification provision for floors six and seven. *Id.* The claimed damages total \$9,325,285.69.

100. By letter of December 7, 2007, the contracting officer denied the claim. In his decision, the contracting officer stated that respondent was ready to restore the premises but was prevented from doing so by appellant and that respondent gave timely notice of relocation.

Discussion

The parties' contentions regarding the law to apply

The lease provided that it was to be "interpreted and construed" in accordance with the laws of the Republic of Panama. Finding 18. The lease also provided that disputes under

¹¹ Appellant has abandoned its trash collection claim. Stipulation II, ¶ 6.

the lease were to be resolved by the issuance of a contracting officer's final decision and that further redress was to be as provided in the Contract Disputes Act, i.e., an appeal to the cognizant board of contract appeals or to the United States Claims Court (now the Court of Federal Claims). *Id.*

Appellant argues that the contract provision requiring the lease to be interpreted and construed in accordance with Panamanian law should be given a narrow construction, and that United States substantive law should apply to the consequences of that construction. If such is the case, the Panamanian statute of limitations would not apply to portions of the failure to give notice claim; only the ninety-days Contract Disputes Act filing deadline, which was met here, would apply. *See* Appellant's Brief at 53-54.

Respondent argues that Panamanian substantive law should govern the result, not just be applied to the interpretation and construction of the lease provisions. In this regard, respondent says that Panamanian Civil Code, Article 985 contains the civil law equivalent of the common law defense of prevention. Respondent also argues that under Panamanian law, the Panamanian statute of limitations is considered substantive law and that it should be applied here to bar the failure to give notice claim relating to respondent's terminating the lease for the fourteenth and fifteenth floors. *See* Respondent's Brief at 101-05.

A tribunal will apply foreign law where the contract provides that foreign law governs the transaction and the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to such issue. Even where the issue is one which the parties could not have resolved by explicit provision in their agreement directed to such issue, foreign law will be applied unless either the foreign jurisdiction has no substantial relationship to the parties or to the transaction, or application of the law of the foreign jurisdiction would be contrary to the fundamental policy of a jurisdiction that has a materially greater interest than the chosen state in the determination of the particular issue, and which would be the state of the applicable law in the absence of an effective choice of law by either party. Restatement (Second) of Conflict of Laws § 187 (1971).

In this lease, however, the parties did not agree to be "governed by" Panamanian law in resolving this lease dispute; rather, the parties agreed that the lease was to be "interpreted and construed" under Panamanian law. Finding 18. In such a case, courts are split as to whether the provision should be construed "broadly" or "narrowly." Some courts have held that the provision is to be construed narrowly so that only claims implicating the construction and interpretation of the contract are to be determined with reference to foreign law, and that the general rights and liabilities of the parties are not. *America's Favorite Chicken Co., v. Cajun Enterprises, Inc.*, 130 F.3d 180, 182 (5th Cir. 1997); *Dollar Systems, Inc. v. Avcar Leasing Systems, Inc.*, 890 F.2d 165, 171 (9th Cir. 1989); *Lincoln General Insurance Co. v.*

Access Claims Administrators, Inc., No. CIV. S-07-1015, 2007 WL 2492436 (E.D. Cal. Aug. 30, 2007); *Texas Taco Cabana, L.P. v. Taco Cabana of New Mexico, Inc.*, 304 F. Supp. 2d 903, 908 (W.D. Tex. 2003).

Other courts take a contrary, “broad” view, i.e., that a provision that a contract is to be interpreted and construed according to foreign law means that the substantive law of the foreign jurisdiction is to be applied in resolving the dispute. *See Kiplin Industries, Inc. v. Van Deilen International, Inc.*, 182 F.3d 490 (6th Cir. 1999); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 557 F.2d 1163 (5th Cir. 1977); *Hammel v. Zeigler Financing Corp.*, 334 N.W.2d 913 (Wis. Ct. App. 1983).

Since the parties failed to include in their lease a provision that would have unmistakably specified Panamanian law as governing the rights and liabilities of the parties, we adapt the narrow view of the “interpret and construe” clause. We will apply Panamanian law in interpreting the lease terms, but that leaves the question open as to what substantive law to apply in resolving the dispute.

In this regard, respondent argues that even if the Board chooses the narrow construction of the “interpret and construe” provision of the lease, we should choose the substantive law of Panama to resolve the dispute because the country of Panama had the most significant relationship to the transaction. Respondent’s Brief at 104.

Our research has not produced a ruling by our appellate authority on this precise point, although our appellate authority did grant comity to a decision of a French court as to patent ownership rendered under a choice of forum clause in a development contract. *International Nutrition Co. v. Horphag Research Ltd.*, 257 F.3d 1324, 1329-30 (Fed. Cir. 2001).

We agree with respondent that we should apply the most significant relationship test, which is the standard articulated in the Restatement (Second) of Conflict of Laws § 188 and applied by the best of modern decisions. In *Sam Grey Enterprises v. United States*, 43 Fed. Cl. 596 (1999), *aff’d*, 250 F.3d 755 (Fed. Cir. 2000), for example, the court applied the substantive law of the United States in a dispute over a Bahamian lease entered into by the Department of State in view of the desirability of uniform rules of public contract law. *See also Clearfield Trust v. United States*, 318 U.S. 363, 367 (1943); *TAS Group, Inc. v. Department of Justice*, CBCA 52, 08-1 BCA ¶ 33,866, at 167,629 (in construing government liability clause in contract, Board applied United States negligence law involving airplane accident occurring in foreign country).

The significant relationship test tells us to consider (a) the place of contracting, (b) the place of negotiations of the contract, (c) the place of performance, (d) the location of the

contract's subject matter, and (e) the domicile, nationality, place of incorporation, and place of business of the parties. Restatement (Second) of Conflict of Laws § 188. Here, although the lease was made by a Panamanian national for a facility within Panama, Findings 1, 2, the lease was negotiated in Washington, D.C., between appellant's president and respondent's contracting officer. Findings 5-7. The very genesis of the lease was a settlement agreement negotiated in Washington between appellant and that contracting officer. *Id.* Much of the lease administration, particularly as to the termination of floors and the award of the restoration contract, was either under instructions from respondent's headquarters in Washington or accomplished in Washington. Findings 32, 39, 40, 63. In the lease, the parties explicitly referenced the Contract Disputes Act as the vehicle for resolving disputes. Finding 18. Weighing all the significant relationships, and cognizant of the desirability of maintaining uniform rules of public contract law, save for contract interpretation, we shall apply United States substantive law in determining the rights and liabilities of the parties.

The parties' contentions regarding the claims

As noted earlier, this case is an appeal from the contracting officer's denial of a claim, totaling \$9,325,285.69, regarding a lease. Appellant leased several floors of the Torre Miramar building in Panama City, Panama, to respondent. Respondent used the leased floors in the Torre Miramar building for office space for many years before the consolidation of its facilities at its new Embassy in Panama City. Findings 3, 9, 28-32, 36.

The leased building was constructed in 1974. Finding 1. With respondent's exercise of the lease options, the lease term ran from August 17, 1990, through March 14, 2004. Finding 36. As allowed by the lease, Finding 16, respondent made changes to the exterior, the common areas of the building, and the ground through fifth floors it occupied, necessitated by respondent's security and use requirements. Findings 20-26. Appellant claims that respondent breached the lease by failing to restore the premises to the condition specified by the lease, specifically to the condition shown in lease exhibits A, B, and F. Finding 96.

Appellant seeks damages for the alleged breaches, including the cost of restoration and at least two-years' rent for the holdover tenancy that appellant alleges resulted from respondent's alleged failure to restore. The restoration claim actually involves claimed rental for successive two-year periods, since appellant maintains that rent was due for every two-year period of non-restoration holding over beyond the initial two-year extension caused by the alleged holdover.

Appellant alleges that respondent failed to provide proper notice of the termination of its tenancy on certain floors, and that appellant is entitled to damages for the alleged

failure to give the proper notice. Appellant alleges that as to the termination of the lease, respondent was obliged to give thirty-days' notice after it decided to terminate the tenancy and that respondent did not give the requisite notice thirty days after an unspecified date in October 2002, when appellant says respondent decided to terminate the lease. Respondent defends this claim by arguing that it decided to terminate the lease on September 23, 2003, and gave timely notice by letter of October 15, 2003.

Appellant also argues that respondent failed to provide proper thirty-days' notice due under the lease for respondent's early termination of its occupancy of floors fourteen and fifteen in 1996. As to that portion of the claim, respondent argues that it is barred by the Panamanian statute of limitations that should be applied in this case, and that, in any event, its damages arising from the failure to give notice is speculative.

As to the restoration claim, appellant argues that respondent underestimated the extent of the necessary restoration by limiting its restoration efforts to the ground floor and floors one through five, when respondent was obligated to restore the ground floor, floors one through seven, and the fourteenth floor and penthouse portions of the building. Moreover, appellant argues that in any event respondent's restoration plan was filled with errors.

Respondent's defense to the restoration claim is that it was willing and able to restore the premises it was obligated to restore--the ground floor and floors one through five-- under the lease to the condition specified in the lease, as shown by lease exhibits A, B, and F, but was prevented from doing so by appellant. As to the notice claim, respondent maintains that it gave proper notice under the lease.

The restoration claim

The scope of the restoration obligation

We first turn to the merits of the restoration claim. Article 976 of the Civil Code of Panama provides:

Obligations arising from contracts have the force of law between the contracting parties and must be complied with according to their terms.

Joint Exhibit 1.¹² Article 1132 of the Civil Code of Panama provides:

¹² The parties have submitted translations of the applicable provisions of the Panama Civil and Commercial codes, which the Board admitted as Joint Exhibit 1.

If the terms of the contract are clear and leave no doubt with respect to the intent of the contracting parties, the literal meaning of the clauses of the contract shall apply. If the words appear to be contrary to the obvious intent of the contracting parties, the intent shall prevail over the words.

The parties disagree as to the scope of respondent's restoration duties. Article 9.F(i) of the lease gave respondent the right "to alter, remodel and reconstruct the leased space" for respondent's use or for security reasons. Finding 16. Later, the article provides that respondent was to restore "those areas which have been *altered, remodeled, or reconstructed hereunder* to their original condition as shown in Exhibits A, B and F." Finding 16 (emphasis added). The word *hereunder* refers to the leased space that was altered, remodeled or reconstructed under the right granted to respondent earlier in that article. Under this lease, respondent altered the exterior, and the ground floor and floors one through five. Findings 20, 23, 26.

Appellant argues that respondent's restoration obligation extended to floors seven, fourteen, and fifteen, floors "it did not itself alter including those [floors] it assumed in 'as is' condition." Appellant's Brief at 57. Appellant argues that respondent agreed to assume the restoration obligations of prior tenants who vacated those floors for the convenience of the respondent and that this understanding is reflected in article 1.B of the lease. *Id.*, Exhibit 58. Dr. Arias testified at the hearing that he entered into a verbal agreement so committing the respondent with the embassy's former Administrative Officer, Mr. John Ivie. Transcript at 515-16.

Appellant's argument on this issue fails in light of the totality of the language of article 9.F(i), Finding 16. Appellant's argument ignores that the term "hereunder" in article 9.F(i) limits the restoration obligation to the space that was actually altered, remodeled, or reconstructed under the earlier provision of that same article. Moreover, we fail to see how the acceptance of space by respondent in "as-is" condition from former tenants, Finding 8, leads to the conclusion that respondent assumed those tenants' separate restoration obligations. Significantly, appellant did not specify exactly what the restoration obligation of those prior tenants had been that respondent supposedly assumed. Furthermore, there is no evidence in the record that respondent's contracting officer, Mr. Natale, who negotiated the lease with Dr. Arias, was even aware of the alleged oral agreement. In short, the lease clearly provides that the restoration obligation only applies to those areas that the respondent altered, remodeled, or reconstructed under the right granted respondent by article 9.F(i)--the ground floor and floors one through five. There is no evidence that the terms of the restoration clause, read in conjunction with the remainder of article 9.F(i), are contrary to the obvious intent of the parties in accordance with Panamanian Civil Code

Article 1132. Consequently, we decline to expand the scope of respondent's restoration obligation beyond that clearly set forth in the lease.

Restoration

It is undisputed that respondent did not restore the leased areas before it vacated those premises. Finding 80. We have found as fact that respondent would have restored the premises to the condition as shown on respondent's proper version of lease exhibits A, B, and F before the end of the lease term, had respondent received reasonable cooperation from appellant. Findings 85, 92. Respondent's renovation contractor had developed a renovation plan that would have restored the premises to the condition shown on respondent's version of Lease Exhibit A. Findings 49-54. We also find that, upon vacating, respondent removed its property from the premises. Finding 81.

As indicated in our findings of fact, appellant, chiefly through Dr. Arias, thwarted respondent's restoration efforts at every turn. Respondent first advised appellant of the contemplated restoration in June of 2003. Finding 40. Appellant then introduced confusion into the incipient restoration process by suggesting that appellant would either hire contractors to supervise the restoration or hire contractors to perform the restoration, when such restoration was respondent's sole responsibility under the lease. Findings 41-43. Dr. Arias's trip to Europe in mid-July prevented further consultation between respondent and appellant. Finding 42.

It was not until September, therefore, that respondent forwarded Plotosa's restoration plans to appellant. Finding 43. Respondent's restoration efforts started in earnest in the fall of 2003, after respondent provided formal notice of its intent to vacate the premises. Finding 45. On December 4, respondent asked appellant whether it intended to waive any part of the restoration and asked for a response from appellant within two weeks so that respondent could proceed with restoration. Finding 47. Two weeks later, appellant refused to waive most of the restoration work and demanded time to hire its own contractors, Finding 55, although it had told respondent the previous summer that it would hire the contractors for possible review of the restoration plans. Findings 41-43. Then, in January 2004, appellant placed another obstacle to respondent's restoration--appellant demanded that respondent secure condominium approval of the restoration plans. Finding 58.

Replying to respondent's subsequent correspondence that respondent was ready to restore the premises, on January 7, 2004, appellant refused to allow restoration until respondent had secured municipal approval and condominium authority approval for the restoration. Finding 60. Indeed, Dr. Arias had gone so far as to convene an emergency meeting of the condominium association which purported to veto the restoration. This veto

then became the pretext for appellant's refusal to allow restoration to begin. *Id.* However, approval by the condominium association and municipal authorities were not conditions of restoration that the lease required respondent to meet. Indeed, article 28 of the lease provided that there were no impediments to either party carrying out its responsibilities under the lease. Since restoration was one of respondent's major responsibilities under the lease, respondent properly read that provision as a commitment that it would be able to restore free from conditions not explicitly mentioned in the lease.

Then, in late January 2004, appellant found supposed errors in respondent's restoration plans. However, appellant based the alleged errors on an incorrect version of lease exhibit A. Findings 84, 87. Had appellant evaluated the proposed restoration in light of the correct version of Lease Exhibit A, many of the floor-specific errors would not have been identified. Finding 90. Additionally, the major errors identified by Mr. Fernandez, i.e., lack of structural restoration and lack of a fire alarm system, were simply not errors at all. *Id.* Other design errors, such as direction of door swings and wall alignment, could have been corrected during the restoration on an "approved as noted" basis. Finding 91. Appellant did not even bother to advise respondent of the errors it did find until March 19, five days after the lease had terminated. Finding 82. Appellant thus deprived respondent of the opportunity to timely correct any legitimate design errors appellant did find in respondent's restoration plan and to complete the restoration before the end of the lease.

Also, in January 2004, much to appellant's surprise, respondent secured from Panamanian municipal authorities a temporary construction permit which allowed respondent to at least commence the restoration. Findings 65, 71. Appellant used Dr. Arias's influence to attempt to thwart it. Findings 71, 72. Throughout the winter and early spring of 2004, Inversa blocked respondent's access to the Torre Miramar building to perform restoration. Findings 55, 58, 60, 73.

A party who prevents the fulfillment of performance under a contract may not rely on or avail itself of that non-performance. 13 Richard A. Lord, *Williston on Contracts* § 39:6 (4th ed. 2000). As stated in the Restatement of Contracts: "Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." *See* Restatement (Second) of Contracts § 245. This is known as the prevention doctrine.¹³

¹³ The Panamanian Civil Code has a similar doctrine: "In reciprocal obligations neither party incurs in default if the other does not comply or does not agree to comply with his obligation." Panamanian Civil Code 985; Transcript at 180, 366.

If the one party is the cause of the failure of the other party to perform, then the other party's failure is excused. *Precision Pine & Timber, Inc. v. United States*, 75 Fed. Cl. 80, 92 (2006) (contractor delay in furnishing responsibility information excused government duty of resale within one year as specified by timber sale contract; thus, Government not required to recalculate interest due Government). The prevention doctrine also applies when a party breaches the implied agreement in every contract not to hinder the other party's performance. *Park Properties Associates, L.P. v. United States*, 82 Fed. Cl. 162, 170-72 (2008). The prevention doctrine has been applied when a landlord hinders a tenant's restoration. See *Solow Building Co. v. Morgan Guaranty Trust Co. of New York*, 754 N.Y.S.2d 8 (N.Y. App. Div. 2003); *Chemical Bank v. Stahl*, 712 N.Y.S.2d 452 (N.Y. App. Div. 2000) (tenant relieved of required "exit work" due to landlord's obstruction). The record here establishes a blatant attempt by appellant to hinder and prevent respondent's restoration of the premises.

The lease imposed substantial liability upon respondent for failure to restore the premises. Under article 27 of the lease, upon failure to restore, respondent would be deemed a holdover tenant responsible for at least two years' rent payable immediately. Finding 19. It may have been that imposition of that liability on respondent was more attractive to appellant than restoration of the thirty-year old Torre Miramar building's six floors--ground floor and floors one through five--to their design condition in 1972 would have been. Whatever the motive, it is clear that appellant improperly hindered respondent's effort, thereby relieving respondent of all liability arising from its failure to restore the premises. Appellant's claims for restoration and its related holdover are denied. Respondent also removed its property that could be removed from the premises. Finding 81. That portion of the claim is also denied.

Lack of notice claim

Lease termination

Article 3.B of the lease required respondent to provide appellant notice of its intent not to exercise an option to renew or to relocate its operations to other facilities "within thirty days of such decision." Finding 10. Respondent provided notice of lease termination on October 15, 2003. Finding 45. Appellant claims that respondent did not provide thirty-days' notice of the lease termination because respondent actually decided to terminate the lease in October 2002. This claim involves the factual question of when a bureaucracy such as the Department of State actually makes a decision. Appellant's claim is bottomed on the factual premise that respondent made the relocation decision in October 2002. That premise is based on the Embassy's action request cable of June 2003, which references a termination decision made the previous October. *Id.* We have found as fact, however, the respondent did not make the move decision until September 23, 2003, when funding and security waivers for

the new facility were in place. Finding 46. Any preliminary decision in October 2002 by the Embassy alone that relocation would be desirable was only one of many steps necessary in the complex process of relocating embassy facilities and in moving the Department of State to make all necessary arrangements to ensure that the relocation could be accomplished. Appellant's claim in this regard is not valid.

Early termination of floors

Respondent argues that the early termination claim is barred by the five-year Panamanian statute of limitations. However, as stated earlier, we apply United States law in resolving the rights and liabilities of the parties. The Contract Disputes Act provides a six-year statute of limitations for all claims submitted by contractors. 41 U.S.C. § 605(a) (2000). However, that limitation period only applies to contracts awarded after October 1, 1995. 48 CFR 33.206(b) (2007). Since the lease for the Torre Miramar building was awarded on August 17, 1990, Finding 7, the six-year limitation period does not apply.

The claim as to the early termination of floors six, seven, fourteen, and fifteen is bottomed on lack of thirty-days' notice which appellant says was required by article 3.B of the lease. Finding 97. Article 3.B, however, applies to the exercise of options to extend the term and relocation to other facilities within Panama from the Torre Miramar building. Finding 8. Respondent vacated floors fourteen and fifteen, which it did not occupy, because the space was excess to its needs. Finding 33. Article 3.B provided for twelve-month's notice "before the expiration of the then existing term" and thirty-days' notice of any decision "not to exercise an option to renew." *Id.* The early termination of those floors is not a decision to forego the exercise of an option at the end of the term, the situation contemplated by article 3.B.¹⁴ Nor does the record establish that respondent relocated people or physical assets on those floors to other facilities within Panama. There is a fundamental difference between a decision whether or not to commit to an additional lease term and a decision to partially terminate the lease of floors for convenience. Article 14.A is an example of the latter, and that clause contained a separate 180-days' notice provision. Respondent provided that notice to appellant. Finding 33. The thirty-days' notice provision is simply not applicable to partial terminations for convenience under article 14.A of the lease. Our reasoning is also applicable to respondent's vacating the sixth and seventh floors.

¹⁴ A decision whether or not to exercise an option has been characterized as a decision whether or not to enter into a second contract. *Dynamics Corp. of America v. United States*, 389 F.2d. 424, 431 (Ct. Cl. 1968), citing 1A Arthur L. Corbin, *Corbin on Contracts*, § 259 at 464 (1963); see also *International Telephone & Telegraph v. United States*, 453 F.2d 1283, 1291-92 (Ct. Cl. 1972).

Even if the thirty-days' notice provision were applicable, appellant has not established it was damaged by the lack of such notice. Appellant's claim is based upon the notion that had it received thirty-days' notice of the termination, it would have negotiated a higher rental rate than the \$11.61 per square meter rate it negotiated with respondent for the next rental term of the lease. Findings 97, 99. However, we have found as fact that appellant's offer of the \$11.61 rate came well before respondent contemplated release of the fourteenth and fifteenth floors. In any event, that rate was not conditioned upon respondent's continued leasing of those floors. Finding 30. Appellant has not established a nexus between the alleged violations and the damages claimed.

Decision

Appellant has not established entitlement to its disputed claims concerning the Torre Miramar building. Previously, the Board dismissed the Cerro Corona portion of the claim for lack of jurisdiction. *Inversa, S.A. v. Department of State*, CBCA 440, 07-2 BCA ¶ 33,690. The remaining portion of the appeal is **DENIED**.

ANTHONY S. BORWICK
Board Judge

We concur:

MARTHA H. DeGRAFF
Board Judge

ALLAN H. GOODMAN
Board Judge