UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 6659 GRANTED IN PART; CBCA 7422 GRANTED:
February 19, 2025

CBCA 6659, 7422

WISE DEVELOPMENTS, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Diana Parks Curran, Hadeel N. Masseoud, and Aseil Abu-Baker of Curran Legal Services Group, Inc., Marietta, GA, counsel for Appellant.

Justin S. Hawkins, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **O'ROURKE**, and **NEWSOM**.

O'ROURKE, Board Judge.

These consolidated appeals concern the lease of a building designed and constructed for the Social Security Administration (SSA), the tenant agency. Shortly after SSA moved in, personnel perceived an unpleasant odor in the building. Despite exhaustive efforts, no one was ever able to identify the source of the odor. Eventually, SSA vacated the building, and the leasing agency, the General Services Administration (GSA or agency), terminated the lease for default. Appellant, Wise Developments LLC (lessor or Wise), did not challenge the termination at that time. Five years later, however, Wise submitted a claim for damages based on the GSA's wrongful termination of the lease.

In a prior decision in these appeals, the Board determined that, although Wise did not appeal the termination for default within the required ninety-day period, the termination decision remained vulnerable to dispute because it lacked a notice of appeal rights. *Wise Developments, LLC v. General Services Administration*, CBCA 6659, 21-1 BCA ¶ 37,774. Attempts to resolve the surviving dispute through mediation were unsuccessful. The agency then asserted a claim for excess reprocurement costs against Wise, which Wise timely appealed before moving to dismiss the claim through summary judgment. The Board suspended consideration of the summary judgment motion, among other motions, and conducted a merits hearing focused on the propriety of the default termination.

Currently before the Board are (a) Wise's claim for unpaid rent and other damages and (b) the agency's claim for excess reprocurement costs. Implicit in both of these appeals is the question of whether the termination for default was proper. For the reasons explained below, we find that the agency has failed to establish the validity of the default termination. Accordingly, we grant a portion of Wise's requested damages. We also grant Wise's appeal of the agency's claim for excess reprocurement costs and deny as moot Wise's motions for summary judgment, declaratory judgment, and sanctions.

Findings of Fact

Contract and Build-out Requirements for the Tenant Agency

On May 26, 2011, GSA awarded Wise lease number LNC61075 (the contract) for leased facilities in Hickory, North Carolina. The contract specified a ten-year term, the first five of which were firm (the firm term), which meant that the contract could not be terminated during the first five years. Appeal File, Exhibit 11 at 1-2.[1] Rent was initially established at $36,241.29 per month for the firm term, then amended to $37,252.96 per month. *Id.*; Exhibit 13 at 1. The contract involved a "build to suit" project, designed and constructed specifically for the mission of the tenant agency, SSA. The facility, a customer service center for the local community, was a brand new, LEED certified,[2] single-story office building, with the SSA as the sole tenant. Specifications for constructing "build to suit" facilities for the SSA were detailed and extensive due to the high customer volume and public-facing nature of its day-to-day mission. For these reasons, it can take several years to complete a new SSA office. Transcript, Vol. 1 at 263-65.

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[1] All exhibits are found in the appeal file, unless otherwise indicated.

[2] Transcript, Vol. 2 at 46-47. LEED stands for Leadership in Energy and Environmental Design.

The contract required Wise to lease to GSA "[a] total of 14,950 rentable square feet (RSF) of space on the first floor of a building to be constructed on Parcel Number 370213144561 in Southgate Corporate Park" and "seventy-eight (78) onsite, surface parking spaces for the exclusive use of Government employees and patrons." Exhibit 11 at 1. In addition to providing office space and parking spaces for the tenant agency, the terms of the contract required Wise to furnish to the Government, as part of the rental consideration, the following:

> All labor, materials, equipment, design, professional fees, permit fees, inspection fees, utilities, construction drawings (including, without limitation, plans and specifications), construction costs and services and all other similar costs and expenses associated with making the space, common areas, and related facilities ready for occupancy in accordance with the requirements of this lease and the Government's final construction drawings.

Id. at 2.

Contract Requirements Related to Air Quality and Material Safety

The solicitation was expressly incorporated into the contract and contained multiple provisions relevant to this dispute. Exhibit 11 at 2. Paragraph 3.7(B)(1) required the lessor to submit to the contracting officer product information for "floor coverings, paints and wall coverings, ceiling materials, all adhesives, wood products, suite and interior doors, subdividing partitions, wall base, door hardware finishes, window coverings, millwork substrate and millwork finishes, lighting and lighting controls, and insulation." *Id.* at 17. Paragraph 4.9 addressed janitorial services for which the lessor was responsible. This provision required the lessor to perform janitorial services during tenant working hours and to "minimize the use of harsh chemicals and the release of irritating fumes." *Id*. at 22.

The contract contained detailed specifications related to air quality in the facility. Paragraph 5.12, entitled "Indoor Air Quality During Construction," which required the lessor to:

> provide to the Government Material Safety Data Sheets (MSDS) . . . prior to installation or use, for the following products: adhesives, caulking, sealants, insulating materials, fire proofing or fire stopping materials, paints, carpets, floor and wall patching or leveling materials, lubricants, clear finishes for wood surfaces, janitorial cleaning products, and pest control products. . . . All MSDS shall comply with all Occupational, Safety and Health Administration (OSHA) requirements. The Lessor and its agents shall comply with all recommended measures in the MSDS to protect the health and safety of

> personnel. To the greatest extent possible, the Lessor shall sequence the installation of finish materials, so that materials that are high emitters of volatile organic compounds (VOC) are installed and allowed to cure before installing interior finish materials, especially soft materials that are woven, fibrous, or porous in nature that may absorb contaminants and release them over time.

Exhibit 11 at 32.

To maximize air quality prior to occupancy, the contract also called for "a final flush out period," lasting at least seventy-two hours "after installation of all interior finishes and before the tenant agency's occupancy of the space." *Id*. During the flush-out period, the lessor was required to "ventilate 24 hours a day, with new filtration media at 100% outdoor air (or maximum outdoor air while achieving a relative humidity not greater than 60%)." *Id*. After the three-day flush out period concluded, the tenant agency could occupy the space. However, the contract required the flush-out to continue "for 30 days using the maximum percentage of outdoor air consistent with achieving thermal comfort and humidity control" and directed the lessor to provide "regularly occupied areas of the tenant space with new air filtration media before occupancy that provides a Minimum Efficiency Reporting Value (MERV) of 13 or better." *Id*. at 32-33.

The contract also contained a number of other directives related to the selection and use of materials in construction and landscaping, such as avoiding toxic materials, using products that are extracted and manufactured locally, minimizing fertilizers and pesticides, using native plants, ensuring that any particle wood, strawboard, and plywood materials comply with applicable standards for formaldehyde emission controls, treating all combustible materials with fire retardant chemicals "by a pressure impregnation process or other methods that treat the materials throughout, as opposed to surface treatment," and priming surfaces for painting the building shell with a low VOC primer. Exhibit 11 at 37-41. Paragraph 7.5 specifically addressed the use of adhesives and sealants, instructing the contractor that:

> all adhesives employed on this project (including, but not limited to, adhesives for carpet, carpet tile, plastic laminate, wall coverings, adhesives for wood, or sealants) shall be those with the lowest possible VOC content below 20 grams per liter and which meet the requirements of the manufacturer of the products adhered or involved. The Lessor shall use adhesives or sealants with no formaldehyde or heavy metals. Adhesives and other materials used for the installation of carpets shall be limited to those having a flashpoint of 140 degrees F or higher.

Id. at 40. Paragraph 7.12(B)(2) pertained to painting and required the lessor to provide interior paints and coatings that met specified standards for VOC off-gassing. *Id.* at 41. The provision for carpet tiles, paragraph 7.15, contained twelve individual specifications. Subparagraphs 2 and 5, entitled "Environmental Requirements" and "Secondary Back," required carpet tiles to meet the "Green Labels Plus requirements of the Carpet and Rug Institute" and "be PVC free." *Id.* at 43. The specification for insulation in paragraph 8.5 required that insulation comply with EPA recommendations on recycled content, be free of chlorofluorocarbons (CFC), and be "low emitting with not greater than .05 ppm formaldehyde emissions." *Id.* at 45.

Paragraph 8.9 required janitor closets to provide a "containment drain[] plumbed for appropriate disposal of liquid wastes in spaces where water and chemical concentrate mixing occurs for maintenance purposes." Exhibit 11 at 47. Ventilation of the building shell and restrooms was addressed in paragraph 8.11. The contract specified compliance with particular industry standards for ventilation system design and acceptable indoor air quality, as well as methods for testing ventilation, and efficiency ratings for all air filtration media. For example, exhaust systems for restrooms required a "minimum of 10 air changes per hour." *Id*. at 48.

In addition to the specifications listed above, paragraph 9.4 of the contract, entitled "OSHA Requirements," instructed the lessor to "maintain [the] buildings and space in a safe and healthful condition according to OSHA standards." Exhibit 11 at 52. A second specification for indoor air quality, paragraph 9.6, required the lessor to "control contaminants at the source and/or operate the space in such a manner that the GSA indicator levels for carbon monoxide (CO), carbon dioxide (CO2), and formaldehyde (HCHO) [were] not exceeded." *Id.* at 53. Further, the contract required the lessor to "make a reasonable attempt to apply insecticides, paints, glues, adhesives, and [heating, ventilation, and air conditioning (HVAC)] system cleaning compounds with highly volatile or irritating organic compounds, outside of working hours." *Id*. The lessor had to notify the Government seventy-two hours in advance "before applying noxious chemicals in occupied spaces" and had to "adequately ventilate those spaces during and after application." *Id*. This provision also permitted the Government to conduct random air quality inspections and repeated the mandate that the lessor provide the Government with the MSDS for the following products prior to their application: "adhesives, caulking, sealants, insulating materials, fireproofing or firestopping materials, paints, carpets, floor and wall patching or leveling materials, lubricants, clear finishes for wood surfaces, janitorial cleaning products, pesticides, rodenticides, and herbicides." Exhibit 11 at 53. And, "where hazardous gasses or chemicals . . . [were] present or used, including large-scale copying and printing rooms," the lessor was required to "segregate areas with deck-to-deck partitions with separate outside exhausting at a rate of at least 0.5 cubic feet per minute per square foot, no air recirculation." *Id*.

Finally, the contract contained detailed specifications to ensure the lessor provided a work space that was free from hazardous materials, mold, and radon. *Id*. at 53-55.

Site-Specific Requirements for the SSA Office

Paragraph 11 of the contract, entitled "Special Requirements," referenced an attachment for "SSA - Atlanta Region Office Space Specifications and Requirements dated 10/3/08, revised 3/23/09 and 3/1/10." Exhibit 11 at 59. This thirteen-page attachment contained specific requirements for the Hickory, North Carolina, SSA office (Hickory SSA office), including indoor specifications for an office space layout that accommodated forty-two personnel. *Id*. at 60-73. The specifications provided the build-out requirements for the reception area, workstations, management offices, the local area network (LAN) room, a multi-purpose room, private interview room, training room, automatic data processing (ADP) room, restrooms, storage room, and a video conference room to conduct hearings. *Id*.

Some of the information in the site-specific attachment is relevant to this dispute. The 250 square foot (sq. ft.) ADP room contained computer, electronic, and various telecommunications equipment, such as LAN racks, modems, printers, telephone controllers, and battery backup systems. Exhibit 11 at 70. Because of the heat generated by the equipment, the ADP room required a separate HVAC thermostat to regulate temperature and humidity twenty-four hours a day, seven days per week. The room also required acoustic ceiling and smooth vinyl floor tiles, as well as two sheets of exposed plywood treated with a minimum of "two coats of fire retarding paint/sealant," one for mounting the telephone control system and the other to be installed behind the LAN rack. *Id.* at 70.

The interactive video training (IVT) room was a 460-square-foot space located in the inner area of the office, away from noisy areas like the elevator shafts, restroom plumbing walls, and high traffic areas. Exhibit 11 at 66. Additional noise-reducing specifications for this room included acoustic tiles, carpet squares, low velocity equipment, walls with a sound transfer class (STC) rating of 45, and baffled duct penetrations for the separately zoned HVAC "so as not to compromise the STC requirement." *Id*. at 67.

Specifications for the office reception and interviewing areas included no-slip ceramic tile floors, plastic-laminate covered shelves and plexiglass at each reception window. Exhibit 11 at 68. Those areas also had a separately zoned HVAC system "designed to supply six complex air changes per hour" and a thermostat with a lock case. *Id*. at 69. New office furniture was not part of the contract and was procured separately by SSA. Transcript, Vol. 2 at 83. There is no information in the record about how the office furniture was made or what materials were used in the manufacturing process.

Construction Completion and Building Occupancy

Construction and build-out of the facility were completed in late September 2012—sixteen months after contract award. Nothing in the record indicates any challenges with the agency's inspection and acceptance of the building or its systems. The HVAC system was tested, adjusted, balanced, and certified as meeting or exceeding the Associated Air Balance Council National Standards on September 27, 2012. Exhibit 219 at 10-11. The facility also underwent radon testing, as required by the contract, from October 2 to 5, 2012. Exhibit 224 at 62.[3] The report, dated October 8, 2012, reflected levels below EPA action levels. *Id*. at 2.

The SSA occupied the building on October 5, 2012. Exhibit 66 at 9. After opening its doors to the public on October 10, 2012, the facility served an average of 2800 customers per month. Transcript, Vol. 1 at 254.

Complaints About an Odor in the Office

In February 2013—four months after moving into their new office—SSA employees raised concerns about an odor in the building. The record is not clear how many employees raised concerns. Over the next twelve months, the odor would come and go with no discernable pattern. It was described as "a chemical odor," "a burning wire smell," "a new plastic odor," and "a new vinyl smell, like when you first open a shower curtain." Exhibits 17, 31, 36, 83, 90 at 3-4, 95,153 at 2, 282 at 295. Other descriptions of the odor included comparisons to "dusty filters," "dirty filters," "a sanitized doctor's office," "drying concrete," "pepper," "cosmoline,"[4] "toner cartridges," and "a gas grille when it's first fired up." Exhibits 23, 31, 88, 102, 104; Transcript, Vol. 2 at 76. The onset of the odor was sudden and sporadic. Most of the time, it was a fleeting phenomenon, lasting for a few minutes before dissipating quickly, but sometimes it would linger for an hour or more.

During the seventeen months that the SSA occupied the building, SSA personnel contacted the Hickory Fire Department eight times due to concerns about the odor. In each instance, fire department personnel inspected the facility and tested for noxious chemicals

[3] In the appeal file index, the radon testing report is marked as exhibit 222, but in the appeal file, it is exhibit 224. It appears that two exhibit numbers (220, 221) were inadvertently skipped in the file, rendering the remaining count off by two.

[4] Cosmoline is a common class of wax-like petroleum-based corrosion inhibitors. Exhibit 66 at 13.

using specialized equipment, but no harmful chemicals were ever detected.[5] Exhibits 81, 95, 99, 282 at 287-99. Hickory Fire Department reports primarily contained descriptions of the odor given by others. One report, however, provided a firsthand account of the smell. The report, dated April 23, 2013, stated that "upon discovering the smell for ourselves, we advised the occupant that the smell was more of a dirty HVAC filter or mold in their system, and that they may want to contact their HVAC maintenance representative and have them come out and check the system." Exhibit 81. Employees were routinely permitted to return to work after the fire department completed its checks. Nonetheless, on multiple occasions, SSA employees were temporarily released or released early by management out of an abundance of caution. Exhibits 26, 162; Transcript, Vol. 1 at 251-52, 277-78. Sometimes, the building was closed due to the odor, frustrating the parties and members of the community conducting official business at the facility. Transcript, Vol. 1 at 253-54.

SSA personnel initially thought the odor was weather dependent, coinciding with rainy days or on days when the heat was turned on, but multiple incidents occurred on non-rainy days, and HVAC technicians could not replicate the odor when they ran heating tests. Exhibit 88. During the first full year of SSA's occupancy, the parties cooperated in their efforts to identify the source of the odor and resolve it. In addition to the air quality inspections permitted by the contract, experts from private industry and from the Occupational Health and Safety Administration (OSHA) conducted more sophisticated testing at the request of the agency and the lessor. None of the tests showed anything harmful or provided any insights regarding the cause of the odor. SSA personnel continued to experience the odor and remained concerned that the source eluded identification and, therefore, would persist.

It is not clear how many people—employees or visitors—detected the odor or found it to be anything beyond a nuisance when it occurred. No comprehensive data exists in the record that shows the number and frequency of SSA personnel who experienced adverse symptoms when the odor materialized in the building. There are only two firsthand accounts in the record of personnel who experienced adverse symptoms as a result of the odor, one from a GSA engineer and the other from a certified industrial hygienist. Neither person worked in the building, but both had visible reactions to the odor on one occasion, though they had visited the building multiple times. Their symptoms included burning watery eyes, an itchy throat, and reddening of the face and neck. Exhibits 21, 100, 153.

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[5] During one response, a monitor detected a brief fluctuation in hydrogen sulfide but did not indicate unstable levels. Exhibit 282 at 288. The building's design engineers confirmed that none of the materials used in constructing the facility created hydrogen sulfide. Exhibit 104; *see also* Transcript, Vol. 2 at 72, Vol. 1 at 282-310 (explaining how an employee sold farm fresh eggs in the break room, which can be a source of hydrogen sulfide when they rot).

The record also contains two OSHA complaints, received months apart, describing a long list of physical symptoms experienced by "SSA staff," including headaches, nausea, nosebleeds, dizziness, stomach cramps, inability to breathe normally or deeply, bad taste in the mouth, and sinus pain, among other symptoms. Exhibits 21, 82. We do not know whether a single employee filed both complaints, two different employees filed separate complaints, or a supervisor filed the complaint on behalf of several employees. When the odor materialized, some people were much more affected by it than others. Because OSHA complaints are confidential, and no SSA employees testified at the hearing (or otherwise provided statements), there is sparse evidence regarding the scope of the impact on SSA employees. *Id*.; Exhibit 250.

The on-site SSA manager eventually developed an incident log to track occurrences of the odor and any resulting office closures. Exhibit 26. According to the log, the odor was detected thirty-two times during a seventeen-month period, twenty-nine of which were detected by SSA staff. *Id*. As noted above, however, there are no contemporaneous statements from affected employees in the record, and no one from the tenant agency who worked in the building testified at the hearing. Additionally, email messages from SSA managers indicate that visiting members of the public complained of the odor, but the record is devoid of any customer complaints or incident reports to that effect, and no one from the community testified about the odor. The contracting officer (CO) testified that he detected the odor on each of his five visits to the facility but clarified that he experienced no physical symptoms from the odor. Transcript, Vol. 1 at 67. The City's risk manager said the same thing of his visits—he detected the odor but experienced no symptoms. Exhibit 102.

Not everyone could detect the odor. The on-site SSA property manager was never able to detect it nor were various technicians who serviced the building. Exhibit 279; Transcript, Vol. 1 at 296. Neither the lessor nor his property manager ever detected the odor. Transcript, Vol. 2 at 77-78. The lessor's main office was located about an hour-and-a-half's drive from Hickory. By the time that they arrived at the building after being notified of an occurrence, the odor had dissipated. The lessor directed one of his employees to work full-time in the building for a week in an effort to identify the cause of the odor and fix it. *Id.* The employee did not smell the odor once during that week. *Id*.

Testing Conducted to Identify and Remedy the Cause of the Odor

Due to the contract's strict requirements for indoor air quality, as well as the disruption to the SSA's mission, the parties began an intense course of investigating, testing, measuring, cleaning, inspecting, and analyzing all key aspects in and around the building to identify the cause of the odor and fix it—from the quality of the air and functioning of the HVAC and sewer systems to the carpet, break room appliances, soil, and cleaning products. None of these efforts identified the source of the odor or showed the presence of noxious

chemicals in the air. On the contrary, testing reports consistently showed that the air quality in the building met contract and OSHA standards—including air samples obtained while the odor was present. Summaries of these efforts and the results follow.

HVAC Work. On at least nine occasions, beginning on February 26, 2013, Wise engaged Stanley Heating and Air Conditioning (SHAC), the company that installed the HVAC system in the building, to determine whether the HVAC system was the source of the reported odor. Work performed by SHAC to address the odor included: fixing units that had a lack of fresh air flowing into them; installing a drain hub with an air gap at the elbow of the condensation drain; spraying down the Valent unit with water to replicate the smell, which they could not do; replacing an exhaust motor and cleaning a blower wheel in a restroom; cleaning, drying, and reinstalling all aluminum coils; and changing out air filters that were overdue for new filters. None of the technicians detected the odor on any of these occasions, nor did they find the HVAC system to be the source of the odor. Exhibits 72-80.

Hickory Fire Department Testing. The fire department was called eight times to the Hickory SSA office on the following dates: April 13, 2013, November 7, 2013, November 21, 2013, December 4, 2013, December 16, 2013, December 20, 2013, February 19, 2014, and March 14, 2014. Exhibits 81, 95, 139, 256, 279, 282 at 287-99. During these response visits, fire personnel tested the air in the office to assess the presence and quantity of any noxious chemicals, such as carbon monoxide, carbon dioxide, sulfide, and low oxygen levels. *Id*. None of the test results revealed any harmful odors or chemicals in the office. *Id*.[6]

Risk Management Inspection. The risk manager for the City of Hickory visited the facility at the property manager's request to ascertain whether the odor was attributable to anything for which the City was responsible. Exhibit 102. After arriving on-site on November 22, 2013, the City's risk manager noted "a faint odor in the building" and initially thought it smelled like the "rubber backing on carpet." *Id*. In a memorandum summarizing his observations and conclusions, he compared the odor to what he experienced in his own office when printer cartridges were heavily used. *Id*. "If a copier or printer is used frequently, they heat up and give off a similar odor to the one that I smelled at the Social Security Office." *Id*. The risk manager returned to the Hickory SSA office and spoke with an SSA manager and other personnel about the possibility that the toner and copiers were the source of the odor. He also suggested that SSA consult an outside air monitoring company. According to his memorandum, even though he could detect the odor, he did not experience any adverse symptoms while he was in the building. *Id*.

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[6] At least three fire department reports appear twice in the record. Duplicates include exhibits 81 and 233, exhibits 98 and 99, and exhibits 95 and 256.

Air Quality Testing. Wise hired IBS Environmental Services (IBS) to conduct air quality testing on December 13, 2013, and November 18, 2014. Exhibits 23, 25. Both tests utilized "[Toxic Organics (TO)]-15 canisters" to capture the air samples. *Id.* IBS issued separate reports based on the results of the testing. *Id*. For the first test, two air samples were collected, one from the multipurpose room and one from the hallway. Exhibit 23 at 1. On the date of the collection, investigators said they did not detect any odors that matched previously-provided descriptions, including "new grill smell, chemical grill smell, burnt wiring, dusty filters, and chlorine." *Id*. Also, both samples were analyzed by optical microscopy. *Id*. IBS's January 6, 2014, report not only concluded that no fungal anomalies were produced from the samples but also documented other notably absent items, including: 1) no ozone or VOCs near computer equipment or copiers; 2) no vehicle exhaust around the loading docks or from the closest highway; 3) no chemical emissions from outdoor construction activities; 4) no elevated levels of carbon monoxide; and 5) no anomalies due to emissions from building carpet, furnishings, and other building components such as VOCs (including formaldehyde from glues, fabric treatments, stains and varnishes). *Id.* The report noted, however, that a foul smell was emanating from the refrigerator and that cooking odors and residue were also detected in the suspect area. *Id*. Finally, the report revealed that "acetone, bug spray, and cleaning supplies were found in this area. *Id*. at 2. These chemicals could be identified as suspect for this investigation and should be removed or stored in another location." *Id*.

During the second test, one air sample was collected and analyzed from the multipurpose room. The sampling duration was one hour per canister to ensure detection of any VOCs that may be responsible for the reported odors. The IBS report, dated January 30, 2014, concluded: "The analysis for this area did not reveal concentrations above established limits set by NCDENR [North Carolina Department of Environment and Natural Resources]." Exhibit 25 at 1.

Air Flow Analysis. In addition to collecting air samples on the first test described above (December 13, 2013), IBS conducted a "simple test" to help identify the origins of the odor and understand its pathway into the office. Exhibit 23. Apple-scented air freshener was injected into one of the return air ducts located in the multi-purpose room. *Id*. The scent was then traced out and into the office hallway. *Id*. The same scent was detected in the office area. IBS's January 6, 2014, report concluded that "[t]his return air vent was acting as a vacuum and drawing any odors derived in the multi-purpose room and discharging the odors into the office area." *Id*.

Engineering Evaluation. On December 18, 2013, professional engineers from Killian Engineering drafted a list of recommendations for identifying and eliminating the odor problem at the Hickory SSA office. Exhibit 3. The list was provided to Blue Ridge Enterprises, the builder and property management company, and to GSA. The initial

paragraphs of the list explained that "no one has, as yet, identified the source of the odor," but "it is fairly certain that the rooftop outside air unit is the mechanism for spreading the odor, as all reports of the odor coincide with locations where supply air from the unit is introduced into the space." *Id*.

The report contained six recommended actions, summarized as follows: 1) changing all filters in the unit and organizing them in ascending order of MERV rating; 2) changing the control sequence of the unit to eliminate the morning purge cycle; 3) adding ultraviolet lights to the rooftop system to eliminate possible biological sources of odor; 4) adjusting the control sequence to reduce or eliminate the recirculation of air from the space; 5) adding points to the "Trane Trace controller" to pull from the outside air unit and then enable trend logging of the additional points to find possible correlations between how the unit is operating and the presence of the odor; and 6) hiring an outside consultant that specializes in identifying the causes of reoccurring building odors. Exhibit 3.

Indoor Air Quality Survey. From December 20, 2013, through January 11, 2014, OSHA conducted an indoor air quality survey in response to an employee complaint filed with OSHA. Exhibit 16. Three air samples were taken: one on December 20, 2013, when no odor was detected, one on January 10, 2014, during "an odor event," and one on January 11, 2014, the day after the odor event. *Id*. According to the report summary, "[t]he air sampling events were not successful in providing guidance as to the cause of the odor. There was nothing unusual about concentrations of tentative identified compounds," and the concentrations were "very low compared to OSHA Permissible Exposure Limits (PELs)." *Id*.

SSA's Decision to Exercise a Redeployment Plan and Vacate the Facility

The contract permitted GSA to terminate the lease for any reason after the first five-year term (the firm term). Exhibit 11 at 2. It also contained a vacation of premises clause (GSAR 552.270-16) that required the agency to notify the lessor within thirty days of any plan to vacate the premises. *Id*. at 25. In February 2014, a year after the odor was first detected in the office, the contracting officer sent Wise a letter stating that "the Government [was] exercising a redeployment plan and vacating the majority of the premises effective February 24, 2014, due to continuing problems with noxious odors." The letter also stated that a limited staff of two personnel and one security guard would remain on-site. The contracting officer stated that once the vacant square footage was measured, the agency planned to reduce operating costs consistent with its "downsizing." Exhibit 27.

When the SSA vacated the majority of the facility, the employees were assigned and bused to other SSA offices in the region to continue serving the public. At that time, the parties had not given up on identifying the source of the odor and resolving it. As soon as

most of the SSA vacated and only three employees remained on-site, Wise's project manager performed a walkthrough inspection of the office. During that inspection, he noted that the office housed multiple copy machines, printers, fax machines, and other typical office equipment such as shredders, computers, toner cartridges, and coffee machines. He also observed and photographed approximately fifteen space heaters in the employees' personal work spaces, which were prohibited. Exhibits 145, 146.[7] A toner cartridge, among other things, was found in close proximity to a space heater. The lessor's project manager informed the contracting officer of his findings in an email and suggested to the contracting officer that all of the office equipment be inspected and tested by SSA to ascertain whether the office equipment or space heaters could be the source of the odor. Exhibit 29; Transcript, Vol. 2 at 80-82. Around that same time, a GSA employee inquired about this very issue in an email to colleagues asking "Did SSA get us verification that their equipment is not the cause?" One employee recommended that OSHA revisit the office with a list of the equipment in hand just to be sure. Exhibit 142 at 2. It is unclear whether the office equipment was the focus of any subsequent testing.

Wise responded to the contracting officer's notice of redeployment on March 4, 2014, taking issue with the contracting officer's reference to "noxious odors." Wise reminded the contracting officer that multiple air quality tests and fire department inspections had been conducted, none of which produced any evidence of noxious odors. Wise also referenced the work performed, to date, to inspect, service, and clean the HVAC system by technicians and engineers to determine if the HVAC system was causing the odor and said, "No entity ha[d] found any evidence that the HVAC, building, or any building components, [were] causing the 'odor.'" Wise further noted that the building was "built on a site that underwent not only a Phase 1, but a LEED environmental investigation, both of which were negative for any harmful factors." Wise shared its observation that "the first reports of an 'odor' only occurred after the SSA had scaled their operations and fully occupied the building for several months." Exhibit 31. Wise recommended that GSA and SSA review possible causes resulting "from tenant occupancy or tenant supplied environmental factors." *Id*.

Parties' Continued Efforts to Investigate and Remedy the Odor Issue

Despite their mutual frustration, the parties continued to perform due diligence on various systems, equipment, and materials in the building to identify or eliminate them as possible odor sources. Wise hired Caldwell Appliance to investigate and resolve any potential odor coming from the refrigerator in the multi-purpose room, since that room, also referred to as the break room, was identified as a location where the smell had been detected. This investigation took place on February 28, 2014. Caldwell checked the refrigerator and

[7] Exhibits 145 and 146 appear to be identical with the exception of the font type.

other appliances in that room (e.g., the microwave) and found no standing water in the drain pans, no mold, and no foul odors coming from inside of the refrigerator. Exhibit 30.

All Country Plumbing conducted a smoke test around March 7, 2014, to check for possible sewer leaks. The vents were plugged while smoke was injected into the plumbing system under pressure. Any leaks in the sewer system could be identified by bright-colored smoke seeping through cracks or holes. The invoice from the plumbing company concluded that "no leaks were found in the plumbing system." Exhibit 32.

At the request of GSA, the Federal Occupational Health (FOH) office, a division of OSHA, conducted indoor air quality investigations at the facility on March 6 and 21, 2014, due to "recurring unpleasant odors." The investigation also included a visual inspection of the office and office equipment. FOH's April 4, 2014, report (FOH report) contained sixteen items or findings. Most relevant to this case are the findings related to the carpet tiles and the carpet adhesive. With regard to those items, the report stated, "There is a chemical, new vinyl odor in the building, which is strongest near vinyl backed carpet tiles and below the carpet tiles. Two carpet adhesives, both different in appearance from what was specified, were used to install the carpet tiles and the adhesives may not be compatible with the carpet tiles." Exhibit 36 at 1. FOH noticed that the MSDS for the carpet tile adhesive, "Chapco SS2," stated that the adhesive would appear off-white in color when applied, whereas FOH noted both blue and tan adhesive residue on the carpet tiles at the Hickory office.

As part of its investigation, FOH compared the carpet tiles and adhesives found in the Hickory SSA office with the carpet tiles and adhesive used in the SSA office in Goldsboro, North Carolina. Wise owned both properties and hired the same contractor to build the two offices. The offices were constructed nearly simultaneously and followed the same general specifications and materials. When the FOH representative visited the Goldsboro office, no odor was found in the carpet tiles or the adhesive below the tiles. The Goldsboro carpet tiles were exactly the same as the Hickory carpet tiles, "but the carpet adhesive was very different." Exhibit 36 at 4. The carpet adhesive used in Goldsboro matched the description of the MSDS for Chapco SS2 (off-white). The report advised that "chemical odors can potentially be caused by high moisture content in the concrete slab that is degrading the vinyl backing on the carpet tiles. It was indicated that the concrete slab has not been tested for moisture content." *Id*. at 5. FOH recommended that the carpet tile manufacturer evaluate the flooring in Hickory and that the carpet tiles be replaced if necessary. *Id.* at 9. In the more detailed section of the report, FOH noted, "The carpeted floor is suspected to be the source of the new vinyl odor." *Id.* at 4.

We do not know when, if at all, GSA provided a copy of this report to Wise. However, evidence in the record indicates that in mid-April 2014, the parties were coordinating testing of the carpet tiles, adhesive, and concrete slab with a flooring

representative from Foothills Flooring, the company that installed the carpet. Exhibit 161. The remaining items in the report concerned the Valent outside air unit, which brought in fresh outdoor air when carbon dioxide levels inside the office exceeded certain thresholds. Other observations and recommendations in the FOH report pertained to the carbon dioxide sensor in the reception area, as well as standing water in an indoor drain line, cracks and moisture in the concrete slab, water-stained ceiling tiles, and elevated dust levels on computer cooling fans and on the air vents of the printers and fax machine. The copy machines were not evaluated. The report noted that a commercial company tested the copy machines separately, but the results of any test were not included in the record. Exhibit 36.

As a result of the FOH investigation, the parties began addressing the list of recommendations from the FOH report. On April 30, 2014, a soil conservation technician from Catawba County's Soil and Water Conservation District performed a visual inspection of the exterior grade and drains around the building. The objective of the visit was to investigate standing water as a possible odor source. The technician observed that along the south side of the building the grade sloped toward the building, which could allow water to pond against the building on that side. The technician did not report any ponding of water but did note that a drain on the southwest corner of the building had been "blocked off." The technician captured his observations in a one-page memorandum addressed to an OSHA representative. Exhibit 39. The technician did not establish any connection between the drains and the odor.

On June 6, 2014, Wise and representatives from GSA and SSA were on-site to manage and observe "AdvantaClean" perform duct cleaning on the premises. The task included a moisture inspection using an imaging camera in the areas of concern. No elevated moisture levels were found. The company cleaned five items located above the drop ceiling, including the air handler unit, supply duct work, return duct work, and diffusers. They also cleaned the Valent system on the roof. According to the work order, all duct cleaning was performed to NADCA Standard 2013. There were no findings with the exception of light dust in the systems.[8] Exhibit 49 at 328.

On June 20, 2014, an addendum to FOH's April 4, 2014, indoor air quality survey was completed. The initial report did not provide information related to the air sampling activities that took place on March 21 or the results of this testing. The finding, as

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[8] Twenty-four pictures were attached to Exhibit 49, the duct cleaning report. One of the pictures showed a green plastic Mountain Dew bottle with a small amount of a dark substance in it, like a bottle used to chew and spit tobacco. Although the report provided no explanation for the bottle, the FOH inspector noted in a separate report that it was found above a ceiling tile outside of the ducts and was ruled out as the odor source. Exhibit 56 at 3.

documented in the addendum stated, "The VOCs found on March 21st *do not exceed any published standards* and *do not raise any concerns for occupancy.*" Exhibit 46 at 6 (emphasis added).

Events Preceding the Default Termination

GSA's Initial Position on Termination. Although SSA management raised the possibility of terminating the lease between GSA and Wise in February 2014, GSA personnel had concerns about pursuing a default termination in light of the odor's sporadic occurrence and Wise's willingness to do whatever was needed to resolve the issue. Exhibits 109, 130. After SSA personnel vacated most of the facility that same month, GSA and SSA worked together to identify alternate space while Wise continued to investigate the odor.

CO's Letter to Wise About Rent Reduction. On June 17, 2014, the contracting officer followed up with Wise on the issue of rent reduction now that the agency had vacated much of the building. The letter informed Wise that, consistent with the terms of the lease, "the operating rent is subject to a $5 [per sq. ft. (psf)] reduction in rent should the agency not use a portion of the floor plan . . . SSA will not be using 10,416 [sq.ft.] . . . that works out to $52,080 per annum, or $4,340 per month. This amount will be reduced from the operating rent until such time as SSA *re-occupies* that area." Exhibit 45 at 1 (emphasis added).

CO's Open Items Letter to Wise. A week later, on June 24, 2014, the contracting officer sent another letter to Wise under the subject: "Outstanding Items Needed." The letter listed ten "open items regarding the odor and general property management . . . that have either not been closed out or have not received the needed follow-up." Exhibit 48 at 1. These included: a range of items such as janitorial and preventive maintenance schedules and security clearances for contractor personnel; a second concrete moisture test due to "procedural issues" with the first one; "identification of problem and correction of vinyl odor in [the personal interview room (PIR)]"; sealing a crack outside of a window; producing a mastic and carpet test report, as well as a report on the "south side grade clearance"; fixing the two-toned paint interior office walls due to touch-up paint not matching; and determining the cause of two stained ceiling tiles. *Id.* at 1-2. In the letter, the contracting officer instructed the lessor to "address all these concerns with an action plan by [the] end of business July 3, 2014," and also requested "firm dates and times of when the open issues w[ould] be closed and completed in accordance with the lease and appropriate procedures." *Id*. at 1. Correcting the "vinyl odor in the PIR" appeared fourth on the open items list.

CO's Notice of Lease Overpayments. On July 8, 2014, the contracting officer sent Wise a letter regarding "Notification of Pro-Rated Vacant Space Reduction - Hickory, NC, LNC61074." The contracting officer informed Wise that "[a]fter careful review of the Lease, we have determined there was an overpayment for the months of March (pro-rated), April,

May, and June." Exhibit 51 at 1. He asserted that, since he first notified Wise in mid-February 2014 of the agency's intent to exercise the vacant space provision under the lease, the agency was entitled to an adjustment thirty days after notification. *Id.* He recalculated the amount of the rental credit to account for the overpayments and stated that a credit of $15,540 would be applied to the following month's rental payment. *Id.*

CO's Follow-up Letter to Wise on Open Items. On July 10, 2014, the contracting officer issued Wise a follow-up letter on open items entitled "Outstanding Items Needed." Exhibit 54. In this letter, the contracting officer stated that "[w]e recently received your response to the 10 open items outlined in a letter from this office June 24, 2014. After review of your responses, we have the following comments and needs to address." *Id.* at 1. The letter acknowledged some progress and closed out one action item but also identified items not yet completed and requested more specific information on other items.

The letter also cautioned Wise that if corrective action was not taken on the outstanding items by July 31, 2014, GSA might exercise its right, pursuant to the terms of the lease, to "correct the deficiencies and deduct the cost, including administrative costs, from rental payments." Exhibit 54 at 2. The letter included a copy of clause 552.270-10, entitled "Failure in Performance," which confirmed the aforementioned right. Notably, the contracting officer did not style the letter as a "cure notice" yet subsequently referred to it as exactly that. The only reference to "a cure notice" in the letter appeared in the middle of a bullet under item number three, Concrete Moisture Test. The referenced phrase stated, "GSA would not proceed with contracting a company [to perform the concrete moisture test] without issuance of a cure notice per paragraph 15 of the 3517."[9] Exhibits 11 at 79, 54 at 1. This part of the letter is confusing, not solely due to the wording, but also because the cited clause does not mention a cure notice. Nor did the letter contain any warning of a possible default termination should Wise fail to correct the open items by the deadline. Finally, the letter permitted extensions to the deadline, but they had to be approved by the contracting officer. *Id*. at 3.

Wise's Continued Efforts to Identify and Remedy the Cause of the Odor. Wise secured a representative from Blue Ridge Enterprises, the construction company that built the facility, to assist with "the situation in Hickory." By email dated July 15, 2014, Wise introduced the GSA contracting officer and project manager to the representative and explained: "He will be providing services and respon[d] to the ongoing issue surrounding the building." The Blue Ridge representative was copied on the email. Wise told the representative that the contracting officer "can answer your questions about the list we

[9] Paragraph 15 is the "Failure in Performance" clause (552.270-10), and "the 3517" is a reference to GSA Form 3517, which is the "General Clauses" section of the contract.

provided to you." Exhibit 55. The contracting officer replied to the email, directing his response to the representative, and stated that "[w]hat we really need to know is the plan of action going forward to address the lingering odor in the site." *Id*. The contracting officer asked the Blue Ridge representative for "a written outline of all the steps your group is planning to take to solve the problem - as well as dates that you plan to complete each step." *Id*.

Wise's Response to the Open Items Letter and Extension Request. By letter dated July 21, 2014, Wise responded to the contracting officer's "open items letter" of July 10. In its response, Wise addressed all ten open items. Wise closed one item, established a deadline of July 25 for six items, and requested an extension for two items (the concrete moisture test and the report for the mastic and carpet test). With regard to item number four (the odor), Wise stated that "[w]e continue to search for a cause, but have not found anything with the building or any part that is under our control." Exhibit 58.

Wise submitted a separate request for an extension of the deadline for item numbers three and six. That request was also submitted in writing on July 21, 2014. Exhibit 57. Although Wise did not request an extension to item number four (the odor), Wise provided a status update on the issue, which stated, "As of today we still do not believe 'the odor' is caused by the building or anything under our control." *Id*. Wise acknowledged that certain personnel may have smelled a localized odor for brief periods of time but continued to express doubt that the odor was associated with anything beyond the normal smells of a fairly new LEED certified construction project—especially in light of the many air quality tests, inspections, and reports. *Id*.

Contracting Officer's Representative Letter to Wise About Inspection Results. The contracting officer's representative (COR) issued Wise a letter dated July 22, 2014. No subject line or topic was identified, just a reference to the lease number. In the letter, the COR listed a number of deficiencies that she found during a recent facility inspection. The deficiencies included the following: a lack of seasonal mulching; cove base molding loose on a corner of the employee entrance; cracked brick along the exterior south side window; debris on the employee entry doormat; stains on the break room floor; a loose toilet seat in a handicap stall; three stained ceiling tiles and one broken ceiling tile; two-tone paint where touch-ups were done; the Valent unit was not operational; and a vinyl odor was present. Exhibit 47. The COR noted that some of the deficiencies have been ongoing without being fixed and instructed the lessor to take corrective action by August 21, 2014, in order to be in compliance with the lease. The letter also warned of enforcement actions if the items were not corrected. *Id*.

Wise's Response to COR's Letter. Wise responded to the COR's inspection report by email on July 24, 2014. The response addressed all of the deficiencies identified in the

inspection. Specifically, Wise stated that it had replaced the cracked brick, secured the loose molding, tightened all of the toilet seats, completed the painting, removed the debris on the doormat, and scheduled the replacement of HVAC filters. Wise further stated that it scheduled a visit from the HVAC manufacturer (Trane) to reactivate the Valent unit[10] and run the system through all of its cycles to make sure it was working correctly. With regard to the vinyl odor, Wise's property manager stated, "[S]till looking into a possible cause of this. I feel that with the Valent unit being in service it will introduce more fresh air into the building and remove this smell." Exhibit 59.

Test Results for Carpet Tile and Concrete Slab. Wise hired LGM and Associates (LGM) of Dalton, Georgia, to analyze the carpet from the Hickory SSA office. LGM examined three carpet tiles. Two of the tiles were new and still in the original packaging. The third tile had been removed from the floor of the office. The results of the technician's findings were communicated by email to Wise:

> I examined each of the three samples on several occasions . . . I observed the same type and level of odor from all three samples. I would characterize the odor detected as the normal odor I would expect from a PVC backed carpet tile. The odor was very slight and would not typically create an issue. I did not observe or detect the characteristic bloom of organic alcohols that would be indicative of the plasticizer hydrolysis . . . on any of the three samples.
>
> In my opinion, this finding greatly reduces the probability that you might be dealing with the plasticizer hydrolysis issue at the SSA there in Hickory. Based on my observation, it would be my opinion that whatever odor is being detected at this project is not originating with the carpet.

Exhibit 287 at 2.

In one of the air quality surveys conducted by FOH, the inspector—a certified industrial hygienist—noticed some cracking of the concrete slab beneath the carpet tiles but no evidence of moisture. Exhibit 36 at 8-9. As a result, a concrete moisture test was performed, which reflected a higher than usual moisture level, the effect of which is usually a loss of adhesion of carpet tiles to the concrete slab. At that time, however, there were no issues with the carpet tiles sticking to the concrete slab. Exhibits 198, 287 at 1.

Wise's Proposed Solutions for Carpet and Slab. Despite the results of the carpet test and concrete slab inspection, Wise emailed GSA on July 30, 2014, and proposed the

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[10] The parties agreed to turn off the Valent unit earlier in the year to determine whether it was introducing the odor into the space.

following two solutions to address the moisture in the concrete slab and any concerns with carpet tile adhesion:

> If you would like, we can seal the concrete with a penetrating concrete sealer. This would require us to remove the carpet, scrap [sic] off the glue, apply the sealer, and reinstall the carpet with new glue. We would be willing to install new carpet at this time if this would meet the requirement of replacing the carpet after 5 years.

Exhibit 287 at 1.

Wise's Follow-up Inquiry Regarding Its Proposed Solutions. The agency *did not* respond to Wise's proposals. There is evidence in the record that GSA internally acknowledged the options that Wise presented but rejected them for two reasons: 1) because the solutions only applied to the carpeted area rather than to the whole slab, which also consisted of tiled areas and 2) because the test lacked detailed information and was not performed consistent with any identified industry standard.[11] Exhibit 208 at 3-4. There is no evidence that GSA shared these concerns with Wise. Wise followed up on its proposals by email on August 22, 2014, asking the contracting officer if he had "heard any news or responses to [Wise's] options?" The contracting officer responded a few minutes later stating that "yes, you will be getting our response via UPS Monday." The response did not address Wise's proposals. The response turned out to be a termination for default letter.

GSA's Termination of the Contract for Default

By letter dated August 22, 2014, GSA terminated the lease for default stating, "After review of your responses to the deficiency letter . . . and the cure notice . . . the Government has decided to pursue the default language in the lease and seeks to vacate the space as soon as practical." Exhibit 60 at 1. The contracting officer further stated, "This action is due to the lack of a sufficient proposal and actions to correct the odor in the space—which was verified as still present in the vast majority of the space on August 4, 2014." *Id*. According to the letter, the Government's right to terminate the lease for default was outlined in lease clause 552.270-22, "Default By Lessor During the Term," which identified two categories of default and found the following category applicable in these circumstances:

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[11] LGM did not provide any details about the tests it conducted beyond a visual inspection and a simple smell test, and we have no information regarding the qualifications of the technician who performed the analysis. It is not clear whether the email constituted the report that was required by the contracting officer's July 10 "Outstanding Items Needed" letter.

> [F]ailure to maintain, repair, operate, or service the premises as and when specified in this lease, or failure to perform any other requirement of this lease as and when required provided any such failure shall remain uncured for a period of thirty (30) days next following Lessor's receipt of notice thereof from the Contracting Officer or any authorized representative.[12]

Id.; *see* Exhibit 11 at 103.

The contracting officer also described the impact that the odor occurrences had on SSA's operations and concluded by saying that "due to the repeated, persistent disturbances and inability for the Government to enjoy the space as planned, I am hereby terminating the lease under the default clause." Exhibit 60 at 2. The letter, signed by the contracting officer, did not identify itself as a contracting officer's final decision, nor did it contain a notice of appeal rights. *Id.*

Wise was surprised to receive a default termination letter. Wise had anticipated a response to the carpet and slab offer since this aspect was an outstanding item identified by the contracting officer and one of the few remaining possibilities to either identify the source of the odor or rule it out. Wise had the flooring contractor standing by to perform the work. Wise was waiting for a response to one of the two offers when the default letter arrived. Transcript, Vol. 2 at 121-22. In mid-September 2014, Wise emailed the contracting officer regarding whether SSA employees and office furniture remained in the building. Wise also asked whether it should proceed with the concrete sealer. The contracting officer responded that no personnel were in the building but that GSA was working to remove the furniture and other items of SSA. The contracting officer also stated that no additional actions needed to be taken regarding the facility since the lease was terminated. Wise then asked the contracting officer "would you please forward to me the information for the person who will be handling our appeal?" At that time, Wise was still well within the appeal period. Yet, instead of providing Wise with the correct appeal information, the contracting officer responded with contact information for GSA's senior regional counsel. Exhibit 206.

Wise hired local counsel to assist with a response to the termination. Despite having numerous leases with the government, Wise had never submitted a claim or been the recipient of a government claim, including a default termination. Transcript, Vol. 2 at 41-44. After reviewing the terms of the lease, counsel for Wise sent a letter to the contracting officer and GSA counsel on September 30, 2014, regarding Wise's "relentless efforts" to resolve the odor, stating that, in light of those efforts and Wise's compliance with the terms of the lease, the termination was "unfounded and inequitable." Counsel acknowledged Wise's right to

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[12] This language falls under paragraph 16(a)(1) of the lease, not 16(a)(2), which the contracting officer cited in the termination letter.

submit a certified claim under the lease but expressed Wise's strong preference for an informal resolution of the dispute. Exhibit 61. Though still within the appeal window, neither the contracting officer nor agency counsel provided Wise with the information required by the Federal Acquisition Regulation (FAR) to appeal the termination decision. Wise never appealed the termination of its contract for default. 48 CFR 33.211(a)(4)(v) (2013).

GSA's Reprocurement of New Space for SSA and Wise's Search for a New Tenant

The SSA completely vacated Wise's facility on October 22, 2014, though GSA continued to pay rent at a reduced rate through the end of 2014. The lessor testified that, after termination, rent payments from GSA continued on and off for about four months. While trying to make sense of the payments at that time, the lessor was advised that:

> legally, they probably are still responsible for the lease for at least the firm period, so we just went on with our business. We [kept] the units going. We probably cleaned it once a month . . . and kept the lights and heat on low levels . . . [t]hen the payments stopped and I talked to my attorney again . . . that's when we started having conversations with . . . their legal department.

Transcript, Vol. 2 at 128-29. After the SSA removed its furniture and equipment and handed the keys back, Wise took the opportunity to conduct further air quality testing of the facility in December 2014. The owner testified that he thought he would identify the problem—that is, the cause of the odor—and that GSA would come back. *Id*. at 129. The facility was empty of personnel as well as furniture and equipment, but the shell of the building was exactly the same as it was during previous tests. Wise did not replace the carpet or make any other changes to the building's systems or structure. According to the air quality report following the December 2014 testing, "[t]he analysis . . . did not reveal concentrations above established limits set by OSHA or [the State]." Exhibit 13 at 1.[13] While Wise was busy testing the now-empty building, GSA leased temporary space in Hickory, North Carolina, for SSA personnel to resume serving the public locally. Exhibit 3. SSA would remain in temporary space until the renovations in another facility were completed. In March 2017, SSA permanently relocated to the renovated facility in Hickory, where it continues to operate. Exhibit 14.

The record contains little to no contemporaneous information regarding Wise's efforts to find a new tenant for the building. The only information known to the Board was provided

[13] This exhibit appears twice in the appeal file, once as exhibit 25 and also as exhibit 213. The only distinction between these reports is that exhibit 25 cites to NCDENR only, whereas exhibit 213 cites to NCDENR *and* OSHA.

through hearing testimony. Wise's owner, Mr. Dean Bray, testified that Wise continued to keep the building in good condition with monthly cleaning and the systems running. In response to questions from counsel, Mr. Bray testified that he had two real estate brokers in Charlotte who "knew the area, knew the building, and had the specs on [the building]" but did not have any prospective tenants in Hickory or elsewhere that needed a building in Hickory. Transcript, Vol. 2 at 133. Between February 2015 and mid-2017, the property was shown a few times but, according to Mr. Bray, securing a new tenant proved challenging for multiple reasons, the biggest of which was the layout of the building. Mr. Bray explained that the building was designed for a single tenant. There was one electrical service going into the building and one HVAC system and, therefore, no cost-efficient way to split it up to accommodate multiple tenants interested in smaller spaces. Mr. Bray testified that larger tenants, such as furniture manufacturers, were closing down and moving overseas. Finally, when asked whether the local press coverage about the odor hampered his ability to find a new tenant for the space, he replied, "Yeah, there were a lot of people that knew about it and shied away." *Id*. at 29-133, 167-168.

The first tenant that was genuinely interested in renting the entire building was a pediatric therapy practice that offered physical therapy, occupational therapy, and speech therapy to children, some of whom were medically fragile or hypersensitive to sound, smells, and light. Mr. Landry, who represented the new tenant, testified that he drove by the building on multiple occasions and decided to check it out before moving forward with his own plan to construct a new building nearby. He did not see a sign advertising that the building was available for lease. He found the owner's contact information through real estate records and arranged to meet with Wise at the building.

Prior to leasing the space, Mr. Landry was aware of the odor complaints, and Wise was transparent about what had happened with the previous tenant. Before making a final decision, Mr. Landry spent time in the building to determine if there was an ongoing issue that would prevent him from signing a lease. While in the building, he did not notice any odors. At that point, the original paint, carpet, mechanical systems, and modular walls remained in place. The only material difference was that SSA had removed its furniture and equipment from the building. Mr. Landry invited several contractors and environmental inspectors to visit the site, inspect the facility, and test the systems. "None of them actually came back with anything negative that said it would be concerning for me to move forward on the lease." Transcript, Vol. 2 at 18-25. Mr. Landry also reviewed the previous air quality reports which reflected no adverse air quality issues. On July 26, 2017, Wise signed a lease with the pediatric practice. Exhibit 218.

With regard to the odor, Mr. Landry testified that during the five years that the pediatric practice occupied the building, there was only one odor issue, which was when a janitor closet backed up and caused an unpleasant odor. A plumbing company responded

and cleared it up, and "it was fine after that." Transcript, Vol. 2 at 19. Mr. Landry further testified that "the premises [was] so suitable for [its] medical practice" that the company "exercised an option to purchase th[e] building" from Wise. *Id*. at 19-20.

Wise's 2019 Claim Submission and GSA's Response

On August 2, 2019—five years after the default termination—Wise, through new counsel, submitted a request for equitable adjustment (REA) to the contracting officer in the amount of $1,233,423.41. Exhibit 66 at 8. The REA stated that the termination was wrongful and that Wise was entitled to costs that Wise incurred under the lease, including the remaining balance for rent for the first five-year term (totaling $1,039,818.65), funds expended to identify and remedy the odor ($51,744.42), and REA preparation costs ($141,860.34). Wise also invited the contracting officer to engage in settlement discussions to address the REA rather than pursue formal litigation. Exhibit 67. The contracting officer declined the offer and did not respond to the REA, so Wise resubmitted the REA as a certified claim in late August 2019. *Id*.; Exhibit 217. Attached to the claim was an affidavit by Wise's Managing Member explaining that "[b]ecause the Termination Letter neither identified itself as a contracting officer's final decision, nor contained any language as to appeal rights, I was unaware of the appeal rights of the Lessor, and relied upon this uninformative Termination Letter on [sic] to the detriment of the Lessor." Exhibit 71. The affidavit also stated that, had the required notice of appeal rights been included, Wise would have appealed the decision within ninety days. *Id*.

Six weeks later, on October 15, 2019, the contracting officer replied, "My August 22, 2014 notice of termination for default . . . was a contracting officer's final decision. The deadline for appeal of this action has passed and my termination for default stands." Exhibit 64. The contracting officer refused to consider the merits of Wise's recent claim and added, "I am not reconsidering my final decision to terminate the lease. This letter is not a final decision." *Id*. Wise again tried to engage the contracting officer in negotiations, explaining why the termination for default notice was defective and asking the contracting officer to reconsider. On November 12, 2019, the contracting officer declined to reconsider the termination and reemphasized that their recent communications did not constitute a final decision. Exhibit 65.

Wise's Appeals to the Board

Wise appealed the deemed denial of its claim on November 21, 2019, which the Board docketed as CBCA 6659. In early 2020, GSA filed a motion to dismiss the appeal, arguing that Wise had constructive notice of its appeal rights but failed to timely exercise them. This failure, GSA argued, divested the Board of jurisdiction to consider Wise's monetary claim because it depended upon the invalidation of the default termination, which Wise did not

appeal. In January 2021, the Board denied the motion after finding that the 2014 letter issued to Wise "by the contracting officer was not a 'final decision' that would bar Wise from challenging the merits of the default termination." *Wise Developments*, 21-1 BCA at 184,344. After months of discovery and two separate attempts at mediating their dispute, the parties resumed formal litigation.

On May 27, 2022, the contracting officer issued a final decision regarding a claim for excess reprocurement costs against Wise, which GSA said it incurred as a result of Wise's 2014 default. After SSA personnel completely vacated Wise's facility on October 22, 2014, GSA signed two replacement leases to accommodate SSA's operations in Hickory—one for temporary space commencing on January 27, 2015, and a second one for permanent space beginning on March 8, 2017. The claim, which was a contracting officer's final decision, sought damages against Wise in the amount of $449,347.96.

Wise appealed the decision to the Board, which was docketed as CBCA 7422, and, upon motion, the Board consolidated CBCA 7422 with CBCA 6659. Wise filed various dispositive motions to address both appeals. The Board suspended consideration of the motions and held the hearing as scheduled.

The Board's decision herein is based on testimonial evidence from witnesses captured in the hearing transcripts, documentary evidence in the appeal file, and the briefs from the parties regarding Wise's monetary claim, the agency's claim for excess reprocurement costs, and the three pending motions.

Discussion

In this case, the Board must decide two issues: first, Wise's claim for unpaid rent and other damages, and, second, the government's claim for excess reprocurement costs. For reasons already explained, these appeals now encompass the propriety of the default termination. Since both monetary claims depend upon the validity of the termination, we evaluate that issue first. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987) ("Only after the default issue is resolved, does the Board turn to any 'claim' by the government or the contractor for monetary compensation.").

I. The Validity of the Default Termination

A. Standard of Review and Burden of Proof

"A default termination is a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence." *Lisbon Contractors, Inc.,* 828 F.2d at 765; *see Product Engineering Corp. v. General Services Administration*, GSBCA 12503,

98-2 BCA ¶ 29,851, at 147,758. The Board reviews contracting officer decisions de novo under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018). *Department of Transportation v. Eagle Peak Rock & Paving, Inc.*, 69 F.4th 1367, 1377 (Fed. Cir. 2023). "[O]nce an action is brought following a contracting officer's decision, the parties start in court or before the [B]oard with a clean slate." *Id*. at 1376 (quoting *Wilner v. United States*, 24 F.3d 1397, 1402 (Fed. Cir. 1994)).

The question of which party bears the burden of proof in such matters is well settled. "[I]t is long established government contract law . . . that the government bears the burden of proof on the issue of the correctness of its actions in terminating a contractor for default." *Lisbon Contractors, Inc.,* 828 F.2d at 764 (citing *Air-O-Plastik Corp*., GSBCA 4802, et al., 81-2 BCA ¶ 15,338, at 75,965-68). A termination for default is a *government* claim. As such, it falls to the Government to prove its own claim. *Id.* "If the Government is able to establish a prima facie case to support the default termination, the contractor then bears the burden of proof of establishing that its failure to perform should be excused." *MLJ Brookside, LLC v. General Services Administration*, CBCA 3041, 15-1 BCA ¶ 35,935, at 175,623; *see DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996). "[T]hese principles apply with equal force where the Government has *terminated a lease*." *5860 Chicago Ridge, LLC v. United States*, 104 Fed. Cl. 740, 755 (2012) (emphasis added) (quoting *Moreland Corp. v. United States*, 76 Fed. Cl. 268, 284 (2007)).

B. The Government Failed to Prove that Wise Violated a Term of the Contract

The default termination letter cited two reasons for terminating Wise's contract. The first reason was due to a "lack of a sufficient proposal and actions to correct the odor in the space." "[A] reasonable basis for termination must be both 'contract-related' and maintain a close nexus to a 'clear violation of contract terms.'" *Schneider Electric Buildings Americas, Inc. v. United States,* 163 Fed. Cl. 708, 718 (2023) (quoting *Keeter Trading Co. v. United States,* 79 Fed. Cl. 243, 253 (2007)). The agency terminated Wise's contract under lease clause 552.270-22, "Default By Lessor During the Term." According to the clause, if the lessor failed "to maintain, repair, operate or service the premises *as and when specified in th[e] lease*, or [failed] to perform *any other requirement of th[e] lease as and when required*, provided any such failure . . . remain[ed] uncured for a period of thirty (30) days next following Lessor's receipt of notice thereof from the Contracting Officer or an authorized representative," the lease can be terminated for default. 48 CFR 552.270-22 (2011) (emphasis added). This clause compels the agency to identify the failure at issue to the defaulting party—that is, the particular act or omission required by the lease, which the lessor failed to perform. According to the cited clause, it is *that* failure which gives rise to the Government's right to terminate the lease for default. Yet, here, the agency failed to point to any term of the contract that Wise failed to perform to justify its termination of the lease.

Our review of the record fares no better. The contract does not require an odor-free building. It does, however, specify terms related to air quality, health, and safety which, if breached, could substantiate a default termination. We scoured the record for any information that Wise violated these terms but found none. For example, the lease's extensive requirements pertaining to indoor air quality fall under section 9.6 of the contract. At various points during the term of the lease, air quality testing was performed as a result of the odor complaints. All of the test results showed that Wise repeatedly met the contract's strict requirements for air quality—even for air sampled during an odor event. Indeed, the results, over and over, demonstrated that the building was safe for occupancy. Therefore, based on the thorough and contemporaneous documentation of air quality testing conducted by representatives from Federal Occupational Health, private industry, and the local fire department, we find no violation of the contract's section 9.6 air quality standards.

Section 9.4 of the contract required Wise to "maintain [the] buildings and space in a safe and healthful condition according to OSHA standards." The agency presented two OSHA complaints that described adverse symptoms experienced by employees due to the odor. Even if we accept the statements in the complaints as true, there is no evidence linking the odor to a requirement of the contract which Wise failed to perform. The agency attempts to circumvent its burden of proof by presuming that Wise was responsible for the odor. However, some of the evidence suggests that SSA activities may have caused the odor, including the City Manager's description of the odor similar to the smell of a toner cartridge when it heats up during copying or printing activities.

There were also more than a dozen space heaters in the office, each of which was placed in the personal spaces of the employees on the carpet and near other equipment and personal items. Wise repeatedly asked the agency to test the equipment. The contracting officer and other GSA personnel were also eager to test the equipment—to either identify the carpet as the source of the odor or rule it out. Yet, there are no test results in the record pertaining to the SSA's equipment, only an email asserting that the equipment was tested and disqualified as the cause of the odor. We reject this assertion as conclusory and accord it no weight. This glaring deficiency, coupled with the fact that there was no evidence of an odor in the building before the SSA fully scaled up its operations—or after the SSA vacated the building—lends support to the argument that the agency's equipment and the employee space heaters could have caused the odor. The agency offered no evidence to the contrary, although testing was allegedly conducted. Moreover, the fact that a pediatric practice moved into the building without changing the carpet or modifying the shell and did not experience the odors complained of by SSA staff further defeats any claim that Wise violated section 9.4 of the contract.

C. Wise Did Not Constructively Evict The Agency

Turning to the second basis for default raised in the termination letter, which was the "repeated, persistent disturbances and inability for the Government to enjoy the space as planned," we construe this as an assertion of "constructive eviction," which can occur when a tenant vacates a facility due to a lessor's repeated failures to maintain the leased premises in a tenantable condition. *David Kwok*, GSBCA 7933, 90-1 BCA ¶ 22,292, at 111,961 (1989), *aff'd*, 918 F.2d 187 (Fed. Cir. 1990) (table). Respondent argues that, even if there was no default under the lease, GSA's termination was proper under the common law doctrine of constructive eviction.

One of our predecessor boards recognized the application of this common law principle under the following two circumstances:

> [W]here the conduct of a landlord has either (1) rendered the leased premises unfit for the purposes leased or (2) has deprived the tenant of the beneficial enjoyment of the premises. Similarly, a finding of constructive eviction may also be predicated on a landlord's failure to act whereby the leased premises are rendered unfit for habitation.

David Kwok, 90-1 BCA at 111,961. To establish constructive eviction, the conduct must demonstrate "something of a grave and permanent nature." *J.H. Millstein,* GSBCA 7665, et al., 86-3 BCA ¶ 19,025, at 96,084. When relying upon a theory of constructive eviction to justify termination of a lease, the Government must show that the "living or operating conditions were so egregious as to constitute substantial interference with the tenant's beneficial use and enjoyment of the leased premises." *Moreland Corp. v. United States*, 76 Fed. Cl. 268, 288 (citing *Oscar Narvaez Venegas,* ASBCA 49291, 98-1 BCA ¶ 29,690, at 147,142).

For example, in *David Kwok*, GSA negotiated a lease renewal that included a requirement to replace the roof due to pervasive leaks that impacted all aspects of the tenant's operations. When it rained, personnel had to catch water in buckets and move desks and files. Carpets were soaked and ceiling tiles were saturated and dripping with rainwater from a faulty repair done by a contractor without a permit. Water puddled around electric service equipment, which was dangerous to service and made the building unsafe to occupy. In addition, a perilous gas leak occurred, which left the tenant without heat during the winter. The agency had to close the building and cease operations until it was repaired. Tenants also reported frequent toilet blockages "resulting in water with urine and fecal matter flowing throughout the offices." *David Kwok*, 90-1 BCA at 111,959. These conditions led to other problems, including infestations of fleas, roaches, and vermin, resulting in a constructive eviction.

In *5860 Chicago Ridge, LLC v. United States*, 104 Fed. Cl. 740 (2012), water leaked from the roof, ceiling, windows, walls, and building systems of a facility occupied by a government tenant. The carpets were soaked, walls and ceiling tiles were wet and stained, and the wallpaper was peeling off of the walls. Puddles formed on desks and equipment. Problems with heating and cooling also plagued the building in the winter and summer, but the leaks were the primary issue. The tenant agency's work was continuously disrupted, yet the lessor took a patchwork approach to repairing the defects and maintaining the facility. Continuous years of this patchwork approach proved ineffective. When finally confronted with the possibility of a default termination unless a complete remediation of the roof leaks was conducted, the lessor responded that a new roof system was impossible to complete before the GSA-established deadline. Ultimately, it was the contractor's repudiation of the required cure that resulted in its contract being terminated for default. *Id.* at 758-59.

In urging the Board to uphold the termination of Wise's contract based on a theory of constructive eviction, respondent argues that the situation in the Hickory SSA office bore a striking resemblance to the conditions in the above cases. We disagree. In *David Kwok*, the lessor completely and repeatedly failed to maintain the premises consistent with the terms of the lease and admitted that he never planned to replace the roof. Here, the Government has not established that Wise caused the building to be unfit for conducting SSA business or that some action or inaction by Wise deprived the SSA of the beneficial enjoyment of the premises. Not only did the contracting officer testify that the building was "well-maintained," but the agency's own inspectors also deemed the building safe for occupancy—each separately vanquishing any charge that Wise rendered the building uninhabitable. Moreover, the odor was an intermittent phenomenon that dissipated quickly, did not violate any air quality standards in the contract, and could have been caused by the tenant agency itself, all facts that undermine a theory of constructive eviction.

In *5860 Chicago Ridge*, the lessor's spotty repairs failed to address the leaks, and when faced with the necessity of a new roof system, the lessor immediately rejected the solution based on the timeline. There was no question that the lessor was responsible for repairing the water leaks but refused to take the necessary steps to fix them. Wise, on the other hand, offered to replace the adhesive and carpet tiles at its own expense in case either (or both) ended up being the source of the odor. The agency did not pursue this option, even though a government report suspected the carpet or adhesive to be the source of the odor.

Two additional facts upend the Government's constructive eviction argument. The first is that a handful of SSA employees agreed to remain in the building after the others vacated. Those employees continued to work in the building for an additional six months, a fact that belies any assertion that the facility was unsafe for continued SSA operations. Second—and even more compelling—is that when the SSA fully vacated the facility, the

odor disappeared with it. These facts bear no resemblance to those in *5860 Chicago Ridge* or *David Kwok*.

Finally, we note that the agency failed to timely assert constructive eviction as a defense and, therefore, has waived it. In fact, GSA raised this affirmative defense for the first time in its response to appellant's post-hearing brief. That is simply too late. The Board's rules required the agency to file an answer to Wise's complaint and include in that answer its defenses to the claims and "any affirmative defenses it cho[se] to assert." Rule 6(b) (48 CFR 6101.6(b) (2024)). The rationale behind the rule is that it puts the opposing party on notice of the affirmative defenses being pursued and gives that party an opportunity to respond to them. *Ultra Precision Manufacturing, Ltd. v. Ford Motor Co.*, 411 F.3d 1369, 1376 (Fed. Cir. 2005). Failure to timely plead an affirmative defense can lead to a waiver of that defense. *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15- BCA ¶ 35,976, at 175,789; *see* Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 1278, at 644-45 (3d ed. 2004). Although not an absolute bar, the Board has permitted a late assertion of an affirmative defense as long as it presents no prejudice to the opposing party. *A-Son's Construction, Inc. v. Department of Housing and Urban Development*, CBCA 3491, 15-1 BCA ¶ 36,089, at 176,206 (citing *Ball, Ball & Brosamer, Inc*., IBCA 2841, 97-1 BCA ¶ 28,897, at 144,088). For all of the above reasons, we find that the agency's defense of constructive eviction was procedurally and substantively deficient.

Based on the evidence in the record, we also find that the agency failed to establish a prima facie case for a default termination. In the event the cumulative odor incidents could sustain a prima facie case, GSA's justification for the termination is ultimately derailed by (1) the results of extensive air quality testing and other investigative activities, and (2) the agency's failure to respond to Wise's offer to replace the carpet or share any test results relating to the office equipment as a possible odor source. GSA has identified no viable basis for terminating this contract for default.

II. Respondent's Claim for Excess Reprocurement Costs (CBCA 7422)

Excess reprocurement costs provide the Government with a remedy when a contract is properly terminated for default. *Cascade Pacific International v. United States,* 773 F.2d 287, 293-94 (Fed. Cir. 1985). However, the Government's right to recover such costs depends upon the validity of the default termination. There can be no assessment of excess reprocurement costs where the underlying decision to terminate a contractor for default was improper. "Following a proper termination for default, defendant is entitled to reimbursement of the costs of completing the project from the defaulted contractor." *Mega Construction Co. v. United States,* 29 Fed. Cl. 396, 483 (1993). Since we determined that

the termination for default could not be sustained, the agency's claim for excess reprocurement costs must also fail.

III. Wise's Motions for Summary Judgment, Declaratory Judgment, and Sanctions

Appellant's motion for summary judgment, which sought, as a matter of law, a decision in its favor on respondent's claim for excess reprocurement costs, is subsumed by our decision on the merits of GSA's default termination. Having found the termination for default to be wrongful, we are granting Wise's appeal of the agency's claim for excess reprocurement costs against Wise. As such, appellant's motion for summary judgment, which sought an inferior result, is denied as moot.

In connection with its summary judgment motion, Wise filed two additional motions–one for declaratory relief and the other for sanctions. The motion for declaratory relief seeks the Board's judgment on the measure of damages that should be applied in CBCA 6659 should it prevail in its appeal of the same. A declaratory judgment is appropriate when a party requires an early resolution of a legal question. *Alliant Tech Systems, Inc. v. United States*, 178 F.3d 1260, 1271 (Fed. Cir. 1999); *Kiewit-Turner v. Department of Veterans Affairs,* CBCA 3450, 14-1 BCA ¶ 35,705, at 174,846. Here, we have already resolved the merits of the issue raised in the motion, rendering it superfluous. We deny the motion as moot.

In its third motion, Wise asked the Board to impose sanctions against the agency for failing to timely supplement the appeal file with documents for CBCA 7422, which involved documents wholly different from those in CBCA 6659. Despite multiple Board orders and appellant's email messages and phone calls to the respondent, Wise contends that the respondent repeatedly failed to produce them. Wise argues that the respondent's dilatory conduct prejudiced Wise's ability to meet the Board's initial deadline for filing dispositive motions. Wise further argues that the agency's failures caused Wise to expend additional resources to obtain documents and revise its statement of undisputed facts after receiving the documents.

In its request for relief, Wise asked the Board to impose the following sanctions against respondent pursuant to Rule 35: (1) accepting as true appellant's statement of undisputed facts in support of its motion for partial summary judgment; (2) granting appellant's motion for summary judgment and dismissing GSA's claim for damages under CBCA 7422; and (3) any other sanctions the Board deems appropriate.

As we previously noted, the Board ultimately suspended consideration of Wise's summary judgment motion since there was insufficient time to brief and decide it prior to the hearing. Any harm to Wise as a result of that suspension is nullified by our decision in the

underlying appeal. See *Tesco Corp. v. National Oilwell Varco, L.P.*, 804 F.3d 1367, 1376 (Fed. Cir. 2015) (where a dispute over sanctions persisted after resolution of a case, the Court found that "an intervening settlement can abrogate . . . the controversy justifying appellate jurisdiction."). Here, any legal harm to appellant is extinguished by the Board's decision to grant the appeal, thus rendering the issue of the requested sanctions moot.

As to the matter of any financial harm brought to bear on Wise as a result of the conduct alleged, the Board's authority to sanction parties does not include the imposition of monetary penalties. *Brasfield & Gorrie, LLC, v. Department of Veterans Affairs*, CBCA 3300, et al., 14-1 BCA ¶ 35,806, at 175,117; *A&B Limited Partnership v. General Services Administration*, GSBCA 15208, et al., 05-1 BCA ¶ 32,832, at 162,445 (2004). To the extent that Wise expended additional resources due to respondent's delays in producing a compliant appeal file, Wise, if eligible, is free to pursue recovery of those costs, as permitted, pursuant to Rule 30. For all of these reasons, we deny Wise's motion for sanctions as moot.

IV. Appellant's Claim for Damages

Appellant seeks $1,233,423.41 in damages for (1) the balance of the rent for the firm term ($1,039,818.65), (2) funds expended to identify and remediate the odor ($51,744.42), and (3) REA preparation costs ($141,860.34). We evaluate and decide each category of damages below.

A. The Balance of the Rent and Wise's Duty to Mitigate Damages

Since we determined that the default termination was wrongful, we find that Wise is entitled to damages for unpaid rent during the firm term. The amount of rent damages, however, must be calculated in light of Wise's duty to mitigate its damages. Relevant to this calculation are the following facts. Annual rent was established under supplemental lease amendment (SLA) 2 in the amount of $447,035.47. The firm term of the lease began in October 2012 and ended in October 2017. GSA began paying rent at a reduced rate when it partially vacated the facility in February 2014. The last reduced rent payment that Wise received from GSA was in January 2015 but that payment was for rent in December 2014, since rent was paid in arrears. Wise received no rent for the firm term period from January 2015 through October 2017. Even though Wise signed a new lease in July 2017, the leasing period for the new lease began on January 1, 2018, which was beyond the firm term of Wise's lease with GSA. Wise argues that it is entitled to the full amount of the unpaid rent for the firm term. The agency, on the other hand, contends that Wise had a duty to mitigate its damages but failed in that duty and now seeks to recover those damages from the Government.

We agree that Wise had a duty to attempt to mitigate its damages. "As a general rule, a party cannot recover damages for loss [from a breach of contract] that he could have avoided by reasonable efforts." *Robinson v. United States*, 305 F.3d 1330, 1333 (Fed. Cir. 2002) (quoting Restatement (Second) of Contracts § 350 cmt. b (1981)). The non-breaching party "is expected to take such affirmative steps as are appropriate in the circumstances to avoid loss by making substitute arrangements or otherwise." *Id.* (quoting Restatement (Second) of Contracts § 350 cmt. b). That is, the non-breaching party must act as a "reasonable man under the circumstances" in attempting to mitigate its damages. *Datronics Engineers, Inc. v. United States*, 418 F.2d 1371, 1379 (Ct. Cl. 1969). "[T]here is no compelling reason for applying a different standard to lease contracts than would apply for all other contracts." *Sun Cal, Inc. v. United States*, 25 Cl. Ct. 426, 434 (1992); *see Robinson*, 305 F.3d at 1332-33 (applying doctrine to breach of real estate contract); *Diamond Plaza, Inc.*, PSBCA 3846, 97-1 BCA ¶ 28,737, at 143,449 (reducing appellant's recovery for failure to mitigate damages for breach of lease contract), *appeal dismissed*, 135 F.3d 772 (Fed. Cir. 1997). Accordingly, "lessors [must] take reasonable steps to mitigate damages resulting from the repudiation of a lease contract." *Sun Cal*, 25 Cl. Ct. at 434. "Reletting and selling property are two of the most direct ways for a lessor to mitigate damages." *Id.* at 433. We review the record to determine whether Wise's mitigation efforts were reasonable in the circumstances here.

In considering breach of lease damages, different courts have applied somewhat different approaches to the allocation of each party's respective burden of proof as to the reasonableness of mitigation efforts. Some courts have held that the breaching party bears the burden of showing that the lessor failed to mitigate its damages. *See, e.g.*, *Vesta Liberty Street, LLC v. ELX, LLC*, No. 3:21-CV-1719, 2024 WL 4653024, at *5 (D. Conn. Nov. 1, 2024); *In re Merry-Go-Round Enterprises*, 241 B.R. 124, 132-33 (Bankr. D. Md. 1999) (identifying several states that place the burden on the breaching party). Other courts, like the Court of Appeals for the Seventh Circuit, have found that when a tenant vacates a leased property too soon and without proper cause, the *lessor*, as part of its obligation to prove the extent of its actual damage, "has the burden of proving mitigation of damages as a prerequisite to recovering damages," *St. Louis North Joint Venture v. P&L Enterprises, Inc.*, 116 F.3d 262, 265 (7th Cir. 1997), meaning that "the lessor not only has a duty to mitigate, [but] also has the burden to prove that it made a reasonable effort to find a suitable tenant." *In re Engle*, No. 05-64571-FRA7, 2006 WL 4528533, at *2 (Bankr. D. Or. June 13, 2006) (quoting *Portland General Electric v. Hershiser, Mitchell, Mowery & Davis*, 738 P.2d 593, 595 (Or. Ct. App. 1987)).

We have not found any decisions binding on the Board that treat the burden of proof for mitigation any differently in a lease contract than any other type of contract. The Court of Claims, whose decisions constitute binding precedent for the United States Court of Appeals for the Federal Circuit, has held that, generally, "the burden of proof with respect

to a [non-breaching party's] asserted failure to mitigate damages rests upon the [breaching party] who asserts it." *T.C. Bateson Construction Co. v. United States*, 319 F.2d 135, 160 (Ct. Cl. 1963) (citing 134 A.L.R. 242). That being said, different tribunals have structured elements of that burden in different ways. At least one court has recognized a shifting burden, placing the initial burden on the defaulting party to establish a prima facie case that the non-defaulting party's mitigation efforts were inadequate, after which the burden shifts to the non-defaulting party to rebut that showing and demonstrate that its mitigation efforts were reasonable. *Forest Environmental Services Co. v. United States*, 5 Cl. Ct. 774, 780 (1984) (citing *Miller v. United States*, 106 Ct. Cl. 239 (1946), in support). Conversely, other tribunals, including the Court of Claims in *Datronics*, have required the non-breaching party, as a condition of establishing the amount of recoverable damages, to present evidence of its reasonable efforts to mitigate before shifting the burden to the breaching party to establish that those mitigation efforts were inadequate. *See, e.g.*, *Datronics*, 418 F.2d at 1379 (rejecting the argument that "it was [the defaulting party's] burden to show that the [non-defaulting party] could have reduced the expense of reprocurement below that incurred in fact" and requiring the non-defaulting party to show the reasonableness of its mitigation efforts); *Mega Construction Co.*, 29 Fed. Cl. at 483 (placing the initial burden on the non-defaulting party to establish the reasonableness of its response to the breach before shifting the rebuttal burden to the breaching party); *Daubert Chemical Co.*, ASBCA 46752, 94-2 BCA ¶ 26,741, at 133,057 (finding that the non-defaulting party "met its burden" of establishing that it "acted reasonably in mitigating its damages"); *American & Federal Identification Co.*, ASBCA 14225, 70-1 BCA ¶ 8299, at 38,553 ("Once a prima facie showing has been made [by the non-defaulting party] of a reasonable effort to repurchase at minimum cost, the burden of rebutting such a case by showing a failure of mitigation would naturally rest with [the defaulting party].").

We need not attempt to determine which of those differing approaches is correct. Even if we impose the burden on the Government to present a prima facie case challenging the reasonableness of Wise's mitigation, GSA satisfied that burden. GSA showed that Wise failed to take even the most basic steps to re-let the building, such as having a sign on the outside of the building or on the property that was easily visible to the public and contained the lessor's contact information or the broker's information. In order to find out any information about the building and its owner, the eventual tenant testified that he researched real estate property records. He also said that he drove by the building many times before stopping and taking a look at it from the outside. Apparently, leasing information was not posted on or near the building, so he looked up the property records. Because Wise failed to take the most fundamental steps to find a new tenant for the property, we find that the Government has established a prima facie case that Wise's mitigation efforts were inadequate.

In response to the Government's evidence, Wise needed to demonstrate that, despite the lack of a "for rent" sign, it took reasonable efforts to mitigate its damages. "When mitigation is appropriate, the test to be applied to the [non-breaching party's] conduct is whether the conduct taken in response to the [other party's] breach was reasonable." *Toyota Industrial Trucks U.S.A., Inc. v. Citizens National Bank of Evans City*, 611 F.2d 465, 471 (3d Cir. 1979). "Reasonable conduct 'is to be determined from all the facts and circumstances of each case, and must be judged in the light of one viewing the situation at the time the problem was presented.'" *Id.* (quoting *In re Kellett Aircraft Corp.*, 186 F.2d 197, 198 (3d Cir. 1951)). We cannot discern when exactly the building became available for lease. In the period of time that immediately followed the SSA's departure, Wise conducted further air quality testing in the facility not only to ascertain whether the SSA, through its operations, caused the odor but also to demonstrate to future tenants that the building remained safe for occupancy. This course of action was justifiable in light of the very public allegations that an odor in the building made employees ill. Where the record falls short regarding mitigation efforts is the period from January 2015 to July 2017, which is the time between GSA's last rent payment and the date that Wise signed a new lease.

Wise did not rebut the statement that there was no sign on the property or the fact that there was no information about the lessor or broker posted on the building. Moreover, Wise's owner provided very few details about what steps he took to re-lease the building. He made general statements about having a broker in Charlotte and showing the property a few times to prospective tenants but shared no specifics such as how the broker advertised the property or what meaningful efforts the lessor or property manager took to conclude that reconfiguring the facility to accommodate several smaller tenants was cost prohibitive. While we acknowledge statements regarding a slow economy, the local news about an odor in the building, and the suitability of the building for one tenant, we find that Wise did not present sufficient evidence of mitigation to award the full damages that Wise seeks. This is especially the case given Wise's mistaken belief that GSA likely would continue to pay rent during the firm term because it was obligated to pay it.

"[A] failure to mitigate damages may *decrease* the amount of recoverable damages but does not *necessarily* preclude recovery of damages altogether." *NCO Financial Systems, Inc. v. Montgomery Park, LLC*, 918 F.3d 388, 395 (4th Cir. 2019); *see Manufacturers Life Insurance Co. (USA) v. Mascon Information Technologies Ltd.*, 270 F. Supp. 2d 1009, 1014 (N.D. Ill. 2003) ("[A]lthough the landlord has the burden of presenting evidence that it took reasonable measures to mitigate, a failure to do so will not completely bar recovery."); *In re Cornwall Paper Mills Co.*, 169 B.R. 844, 852 (Bankr. D.N.J. 1994) (If lessor fails to attempt to mitigate, "the lessor's recovery for unpaid rent will be reduced by the sum which the lessor would have received had damages been mitigated."); *Engle Investors v. United States*, 21 Cl. Ct. 543, 549 (1989) ("Accepting at face value plaintiff's contention that the Forest Service failed to mitigate damages does not mean . . . [it] cannot collect any damages.").

B. Reasonable Mitigation Period and Calculation of Damages for Unpaid Rent

In light of the above contract principles and the facts related to Wise's mitigation efforts, we find that a twelve-month period was a reasonable amount of time for Wise to re-lease the building. We calculate damages as follows. GSA owes rent to Wise for the period of January through December 2015, which amounts to one year of annual rent at $447,035.47. In addition, in 2014, GSA paid Wise a reduced rate for rent based on the vacant space provision in the lease, which provides for a $5 psf reduction in rent. However, since GSA maintained a small staff in the building, along with *all* of its furniture and equipment, the space was not vacated at all until late October 2014. Therefore, GSA owes Wise the difference between: (a) the reduced rate that GSA was paying Wise from February through October 2014 and (b) the full amount it was owed for each of those months.

To calculate the full monthly rent for the firm term, we divide the annual rent ($447,035.47) by twelve, which amounts to $37,252.96, per month. In 2014, GSA paid one month of rent (January) at the full rate. For the month of February, GSA paid Wise $34,732.96 in rent, a reduction of $2520. For the months of March through October, GSA paid Wise $32,912.96 per month in rent, a reduction of $4340 a month. The total amount of rent that was improperly deducted in 2014 was $37,240. Wise is entitled to recover that underpayment. Adding that amount to the rent for January through December 2015 to which we find that Wise is entitled ($447,035.47), the total amount of damages for unpaid rent that GSA owes to Wise is $484,275.47.

C. Costs Related to Identifying and Remediating the Odor

We deny Wise's request for the costs of identifying and remediating the odor. Even if the agency failed to prove that Wise was ultimately responsible for the odor, the terms of the contract required certain duties from Wise as the lessor. We find that Wise's efforts to address the odor were in keeping with those duties and should not be paid. We further find that the air quality testing that Wise conducted and funded, among other investigative efforts, served other purposes, such as mitigating losses and supporting litigation. The test results also supplied Wise with persuasive evidence that the building was safe for occupancy, a fact that undoubtedly helped Wise secure a new tenant in the building. Accordingly, we deny Wise's request for costs to identify and remediate the odor in the building.

D. REA Preparation Costs

Finally, Wise seeks to recover its REA preparation costs. It is well settled that once a litigant assumes a litigation posture, REA costs are not recoverable. *Grumman Aerospace Corp. v. England*, 34 F. App'x 710, 713-14 (Fed. Cir. 2002). In a typical default termination case, a party arguably assumes such a posture when it appeals the termination decision.

Here, however, neither Wise nor its counsel understood the termination letter to signal the commencement of litigation, especially given the defects in that letter. The letter from Wise's initial counsel to the contracting officer and agency counsel further demonstrated Wise's preference to pursue informal negotiations rather than file a claim under the Disputes clause of the contract. Despite Wise's various attempts to engage in discussions with the agency and reach an agreement, the agency refused to entertain such discussions.

Wise hired new counsel who assisted Wise with preparing and submitting an REA to the contracting officer on August 2, 2019. Over the next twenty-eight days, Wise was bounced around among various agency representatives with little to no progress, prompting Wise to resubmit the REA as a certified claim on August 30, 2019. To make a determination about entitlement to REA preparation costs, we must decide when, in this timeline, Wise assumed a litigation posture.

The certification and submission of Wise's claim pursuant to the contract's Disputes clause, 52.233-1, is the clearest indication of the commencement of litigation. However, the Board recently found that an REA, despite its title, was a claim from which the contractor began the appeal process. *ELA Group, Inc. v. Department of Labor*, CBCA 8235, 24-1 BCA ¶ 38,702, at 188,180-81. Using the Federal Circuit's test articulated in *Zafer Construction Co. v. United States*, 40 F.4th 1326 (Fed. Cir. 2022), the Board explained that the inquiry should "focus[] on whether, objectively, the document's content and the context surrounding the document's submission put the contracting officer on notice that the document is a claim requesting a final decision." *Id.* at 188,179-80 (quoting *Zafer Construction*, 40 F.4th at 1368). This test is also useful for identifying when the REA proposal became a dispute rather than mere negotiations. Citing *Bill Strong Enterprises v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995), *overruled in part on other grounds*, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995), Wise acknowledged this distinction in its own REA proposal, filed as an exhibit in the appeal file:

> [W]hether a contractor's settlement costs are allowable [turns] on . . . how the disputed claim is being pursued. In other words, is it being pursued in hopes of settlement as part of contract negotiation or is it being pursued to by-pass the contract administration process and prepare for the resolution of the issue before a judicial forum or administrative board. In the case of the former, the costs are allowable. In the case of the latter, the costs are unallowable.

Exhibit 66 at 48.

We agree with this distinction but do not agree that Wise's REA preparation costs are allowable. Wise's REA, entitled "proposal for unpaid rent and a contract change," presents a comprehensive case for its entitlement to $1,233,423.41 for unpaid rent, the costs of

identifying and remediating the odor, and the costs of preparing the REA. The proposal also cited to contract provisions and clauses, as well as exhibits and case law. Moreover, Wise's claim for unpaid rent does not seek an adjustment for a contract change regardless of how it was presented. Rather, Wise seeks to recover funds that it believes it was entitled to under the contract but was denied when the agency vacated the building and terminated the lease.

Regarding the context surrounding submission of the REA, Wise's contract had been terminated for default five years prior to the REA proposal submission, a termination that Wise described in the REA as wrongful, and one that precludes any finding that the REA, despite being submitted within the Dispute clause's six-year statutory time-frame, was an act of contract administration. *Grumman Aerospace Corp.*, ASBCA 50090, 01-1 BCA ¶ 31,316, at 154,674 (citing *Bill Strong*, 49 F.3d at 1550). Contract performance had long since ceased due to the termination, precluding the necessity of any routine contract administration activities. Characterizing the termination as "wrongful" makes the dispute plain.

Finally, the fact that Wise simply added a certification to the proposal less than a month after submitting the REA demonstrates, in the circumstances here, that Wise was already prepared for litigation on August 2, 2019, particularly since proving its REA necessitated a challenge to the already-issued default termination decision. For these reasons, we find that Wise assumed a litigation posture when it began preparing the REA. Accordingly, we deny Wise's request for REA preparation costs as they are unallowable.

Decision

We **GRANT IN PART** Wise's appeal for costs in the amount of $484,275.47, plus CDA interest to run from the date of Wise's submission of its certified claim.

We **GRANT** Wise's appeal challenging the agency's claim for excess reprocurement costs against Wise.

We **DENY AS MOOT** Wise's motions for summary judgment, declaratory judgment, and sanctions.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

Elizabeth W. Newsom
ELIZABETH W. NEWSOM
Board Judge