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STATEMENT OF
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PROCUREMENT, LOGISTICS AND READINESS DIVISION
BEFORE THE
SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
HOUSE OF REPRESENTATIVES
ON THE
GENERAL SERVICES ADMINISTRATION'S
LEASE OF BUILDING SPACE
IN THE
WATERSIDE MALL BUILDING COMPLEX
WASHINGTON, D.C.

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Mr. Chairman and members of the Subcommittee:

We are pleased to appear before you to discuss our September 20, 1977, report on the General Services Administration's actions to acquire a cafeteria as part of its acquisition of leased office and storage space for Environmental Protection Agency employees at the Waterside Mall building complex in Southwest Washington, D.C. We made our review in the late 1976-1977 timeframe at the request of Representative Charlie Rose. Congressman Rose was concerned with the lessor's (Town Center Management Corporation) noncompliance with the 1971 lease requirements to provide a cafeteria. He believed a monetary recovery was in order and that a full-service cafeteria should be installed within a reasonable time to serve Federal employees' needs at the Waterside Mall complex.

BACKGROUND

In February 1971, GSA leased, from the Town Center Management Corporation, 466,000 square feet of space, with an option to lease an additional 60,000 square feet, at the Waterside Mall building complex. GSA's solicitation of offers, which became part of the lease, stated that, "A complete cafeteria facility shall be furnished by the lessor at his expense with capacity large enough to serve food to the Federal employees who will work in the leased space * * * All space occupied by the cafeteria shall be excluded from the area covered by the lease and the Lessor shall assume full control of such space without cost to the Government for rental, utilities, or other charges." Furthermore, the solicitation stated, "The Government shall have the right to install and have operated by others whom it may designate, food service facilities, or vending stands and/or vending machines, within the confines of

the space leased, if any such installations are deemed by the Government to be necessary * * *."

In a February 12 amendment to its offer, Town Center stated that, "A cafeteria or cafeterias shall be provided in accordance with * * * the offer. Said cafeteria shall be operational concurrent with or prior to occupancy of the general office space by lessee."

In its February 19 acceptance letter to Town Center, GSA stated, "A cafeteria will be placed in operation on a phased basis, concurrently with the delivery of the Waterside Mall West office space. This cafeteria operation will be expanded as additional space is delivered so as to provide adequate food service for the number of personnel occupying the space. The level of service which will be considered adequate shall be determined by consultation between the Government and the lessor." Town Center acknowledged this condition in their February 23, 1971, acceptance of the GSA letter.

EARLY YEARS OF THE LEASE--1971 AND 1972

On July 12, 1971, Town Center notified GSA that it had completed negotiations with a private firm to provide, outfit, and operate an automatic cafeteria on the first floor of the Mall and the cafeteria was to open concurrent with occupancy. Occupancy began in August 1971 and by January 1972, 600 EPA employees were at the complex with 800 more to be assigned through March 1972.

In January 1972 EPA told GSA that the lessor had said that food facilities would not be available until April or May 1972. On February 4, 1972, GSA's contracting officer notified Town Center that he was concerned about the inadequate eating facilities at the Mall complex. Again on February 28, 1972, the contracting officer wrote

to Town Center and reminded the lessor of the cafeteria requirement in the lease and advised the lessor that until such time as tangible evidence of adherence to the lease requirement is provided, all future rental payments will be held in abeyance effective March 31, 1972.

On March 2, 1972, the president of Town Center responded to the contracting officer's February 28 letter by stating that the Government had the right to install food service, or vending, facilities within the confines of the leased space. He further stated that in consultation with GSA it had been agreed that no effort would be made to provide a cafeteria-type facility within the Mall complex but if private food service operators did not choose to locate within the mall, Town Center would provide GSA space for a food facility.

Further, according to the lessor, GSA said that if the private facilities could serve EPA's needs, a Government-operated facility would not be necessary. While the lessor acknowledged that GSA had the right to insist on a Government food facility, the lessor stated that the enforcement of such a requirement would be a breach of faith with the business community and the tenants in Waterside Mall who had executed leases assuming there would be no Government facility.

On March 10, 1972, GSA's Acting Assistant Commissioner for Buildings Management stated in a memorandum to the Assistant Commissioner for Operating Programs that the lessor had stated in a meeting with GSA officials that he had eliminated the cafeteria from further consideration when negotiations with a prospective concessionaire broke down and attempts to interest another food service firm failed. The lessor also said that he had obtained GSA's approval to eliminate

the cafeteria because the other food facilities' services would be more than adequate to satisfy lease requirements.

On April 19, 1972, the Assistant Commissioner for Operating Programs told the lessor that the Government would not pursue the actions discussed in the contracting officer's February 28 letter, i.e., the withholding of rental payments, until all cafeteria requirement studies were completed.

On June 20, 1972, GSA's Project Coordinator, Special Projects Division, stated that following an agreement between GSA's Assistant Commissioner for Operating Programs, the lessor, and EPA, GSA would give the lessor until September 1 to provide three restaurants before taking action.

On July 31 an EPA official wrote GSA about the totally inadequate eating facilities at the mall. He noted that at a July 25 meeting of EPA and GSA officials, and the lessor, it had become apparent that the September 1 opening date for three eating facilities could not be met. The EPA official asked GSA to implement the lease requirements for a cafeteria. GSA replied that its General Counsel was investigating what legal course was available, that firm recommendations would be available shortly, and that a course of action would then be taken.

After studying the cafeteria situation, GSA's legal staff reported in August 1972 that (1) the lease required the lessor to furnish a cafeteria-type facility and (2) GSA could refuse to accept and occupy any more finished space until the cafeteria was constructed and operational. The Acting Commissioner, Public Buildings Service, recommended that GSA defer to the requirements and needs of EPA and continue to increase occupancy regardless of the cafeteria issue.

It was recommended that GSA:

- Notify the lessor, by letter from the contracting officer, that the available and proposed eating facilities did not meet the lease contract requirements.
- Direct the lessor to furnish a cafeteria, in accordance with the lease, in the shortest time possible and to install interim facilities immediately.
- Advise the lessor that failure to respond positively would result in the Government taking action, including withholding rental payments, to protect its interest.

On September 6, 1972, the Project Coordinator, Special Projects Division, noted that the lessor still had not provided GSA with support for his claim that the cafeteria requirement had been waived. The contracting officer was to have informed the lessor by letter of GSA's final decision and its course of action as listed above. This notification, however, was apparently never mailed to the lessor; we could not determine why.

INACTIVITY--SEPTEMBER 1972 TO AUGUST 1975

GSA's project files contained no further correspondence, either internal or external, pertaining to the cafeteria requirement from September 6, 1972, to August 1, 1975, when a Federal Times reporter questioned the entire Waterside Mall lease situation. The only GSA action concerning food facilities during this period occurred when GSA made followup surveys of restaurant facilities and acted on EPA's request for a blind-operated concession.

During that 3-year period, EPA began to occupy space on the second floor mall area. A 1971 floor plan of the mall, qualified

by the statement that locations and categories of spaces were subject to change, showed a cafeteria location at the south end of the second floor of the Mall West. GSA records of a June 18, 1971, meeting state that the lessor assured GSA and EPA officials that a cafeteria would be provided and located in that area. We believe that space is the area originally designated for the cafeteria. Apparently, GSA leased, through supplemental agreements, and EPA occupied, the space initially intended for the cafeteria.

LATER EVENTS--AUGUST 1975 TO SEPTEMBER 1977

On August 19, 1975, GSA's Region III Administrator provided the Federal Times reporter with information requested under the provisions of the Freedom of Information Act. The Regional Administrator told the reporter that the cafeteria requirement had been orally deleted since the lessor had met GSA's food facility requirements in the mall. We could find no evidence in support of that statement.

In a January 6, 1976, meeting with the lessor, GSA again stated its position that the lessor had not satisfied the lease requirements for a cafeteria. The lessor stated, among other things, that he would not consent to installing a single large cafeteria and that there was no available space for a cafeteria at the mall.

After more correspondence between GSA and the lessor, the contracting officer, on March 17, 1976, rendered a decision that the lessor was not in compliance with the lease agreement and directed the lessor either give GSA a schedule of construction and occupancy dates or appeal the decision. The lessor appealed the decision to the Board of Contract Appeals. The lessor claimed that:

--GSA had orally deleted the cafeteria requirement.

- The lease solicitation stated only that the Government had the right to install a food service or vending area, and a new page to the solicitation was submitted by GSA during negotiating sessions.
- The offer amendment submitted to GSA on February 12, 1971, regarding cafeterias was intended to mean private food facilities.
- Correspondence and meetings between the lessor and GSA officials from April 1972 through September 1972 about the sufficiency of private food facilities ended with the lessor being told that the facilities were sufficient to service the agency's needs and met all the lease requirements.

While the lessor's appeal was before the Board, additional correspondence and meetings occurred between the lessor and GSA. In a June 9, 1976, meeting the lessor presented a space and equipment layout for a food facility and indicated that the operator would be the proprietor of the existing Greek Subway restaurant at the mall. After some further correspondence on the proposed facility, the lessor, on August 16, 1976, gave GSA and EPA authorization to discuss the proposed facility directly with the operator of the Greek Subway restaurant. On that same date the Board of Contract Appeals acted on a GSA motion to dismiss the lessor's appeal of the contracting officer's March 17, 1976, decision. The appeal was dismissed without prejudice to the right of either party to have the appeal reinstated upon written request.

On September 2, 1976, the contracting officer wrote to the lessor indicating that the proposed facility would meet the lease requirements but only while the facility was in operation. However, disagreement then arose between the lessor and GSA as to who must pay for the installation of the proposed facility. The lessor felt that GSA must pay and GSA felt that no funds could or would be allocated for the cafeteria because the lease specified that the lessor was to assume full control of the space without cost to the Government. At the time we completed our audit in May 1977, GSA and the lessor were corresponding on the sizing of the proposed facility and the schedule for completing the facility.

REPORT CONCLUSIONS AND RECOMMENDATIONS

Although GSA was negotiating with the lessor to have the lessor install a cafeteria, we felt the matter was not being properly resolved and EPA employees would not have a cafeteria available for some time.

We recommended that the Administrator of General Services establish a firm opening date for the operation of a lessor-installed cafeteria in non-Government leased space. If that date was not met, we recommended that the Administrator have a cafeteria established in Government-leased space.

In view of its position that the lease terms require lessor installation of a cafeteria, we also recommended that General Services proceed to withhold rent for damages pending resolution of the Board of Contract Appeals case. The amount of damages should be determined from the time the cafeteria was required until the effective opening date of an acceptable cafeteria. If General Services

had to establish a cafeteria in Government-leased space, we recommended that its withheld rent also cover the rental value of the space used for the cafeteria and all installation costs.

In response to our recommendations, GSA said it believed our report was somewhat optimistic about GSA's legal rights to obtain a cafeteria and damages, but it was reinstating the matter before the Board of Contract Appeals.

SUBSEQUENT EVENTS

The Board of Contract Appeals held hearings on the cafeteria situation during July 1978. The hearings involved the issue of whether the lease required a cafeteria and, if it did, whether the Government waived, or the lessor satisfied, the requirement. Further, if the requirement existed and was not waived or satisfied, the Board was to decide which party bore the risk of any costs not borne by others for installing the cafeteria.

On March 20, 1980, the Board ruled that the lease required a cafeteria but that the lessor was discharged from its obligation to install a cafeteria through governmental conduct. The Board noted that the Government never withheld rent or refused to take occupancy of any space after being informed by the lessor that it would not install a cafeteria. Further, the Government took positive steps indicating it did not intend to require the installation of a cafeteria by leasing the space at the location where the lessor had informed the Government it would have a cafeteria. The Board concluded that the Government's continuing to take occupancy, never withholding rent, and occupying substantial portions of the space where the lessor planned to locate the cafeteria constituted a

Government representation with knowledge that the lease provision requiring a cafeteria would not be enforced. The lessor relied on this Government representation by leasing portions of the space planned for the cafeteria to the Government and by furnishing alternative food facilities.

SUMMARY COMMENTS

GSA was not aggressive in enforcing the 1971 lease provision and EPA employees wound up without adequate food facilities.

GSA told us that the cafeteria requirement was not enforced due to inadvertence rather than a conscious decision not to enforce the lease, and that contributing factors were the number of officials involved in the problem and the high turnover rate among officials.

We found no evidence of a conscious decision not to resolve the cafeteria issue but we could not determine why the issue was not resolved early during the lease period. While there was a high turnover of GSA officials (e.g. three contracting officers during the first three years of the lease) there was a continuity of officials at management levels who should have been familiar with the lease terms.

During early 1976 and again during the latter part of 1976 and early 1977 (the same timeframe we were performing our review) GSA's Office of Investigations looked into the cafeteria situation. The investigators interviewed the GSA officials, some of whom were no longer employed by GSA, directly involved and found that no one had any factual knowledge of any waivers, decision to accept private facilities in lieu of a cafeteria, or instructions not to pursue the provisions of the lease. In summary, the officials interviewed

by the investigators stated they had no factual knowledge of any criminal wrongdoing or contract irregularities.

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Mr. Chairman, this concludes my prepared statement. My associates and I will be happy to respond to any questions you or other members of the Subcommittee have at this time.