

DOCUMENT RESUME

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No Cafeteria for Federal Employees at Waterside Mall.
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Report to Rep. Charlie Rose; by Robert F. Keller, Acting
Comptroller General.

Issue Area: Facilities and Material Management (700).
Contact: Logistics and Communications Div.
Budget Function: General Government: General Property and
Records Management (804).
Organization Concerned: General Services Administration;
Environmental Protection Agency; Bresler-Reiner Co.: Town
Center Management Corp.
Congressional Relevance: Rep. Charlie Rose.

The General Services Administration (GSA) had been in contact with the Bresler-Reiner Companies as early as May 1970 concerning construction of a privately-owned building in the southwest area of Washington, D.C. for the Environmental Protection Agency (EPA). In June 1970, the Bresler-Reiner Companies notified GSA that the Waterside Mall and Tower complex was under construction and should be ready for occupancy by September 1971. Although GSA continues to negotiate to have the lessor install a cafeteria at the mall complex, a cafeteria appears to be no closer to being operational than it was when the lease was agreed to in February 1971. Findings/Conclusions: The lease provides that the cafeteria be installed in space not leased by GSA and be under the lessor's full control without cost to the Government. The Government has the right to install food facilities in the leased space, if deemed necessary. The lessor disagreed with various GSA's positions on the cafeteria requirement; these disagreements have delayed resolution of the matter. The issue is currently pending before the GSA Board of Contract Appeals. EPA began to occupy the mall as the leased space was completed, beginning with 600 employees in August 1971. Recommendations: The Administrator of GSA should establish a firm opening date for the operation of a lessor-installed cafeteria in non-Government leased space. If that date is not met, the Administrator should have a cafeteria established in Government-leased space. (Author/SW)

REPORT OF THE
COMPTROLLER GENERAL
OF THE UNITED STATES

No Cafeteria For Federal
Employees At Waterside Mall

General Services Administration

A February 1971 lease agreement between the General Services Administration and the Town Center Management Corporation requires Town Center to provide a cafeteria facility for Federal employees at the Waterside Mall building complex in Washington, D.C.

Town Center has not provided a cafeteria facility and the General Services Administration's actions have not been effective in resolving the issue. GAO recommends that the General Services have a cafeteria established and recover damages from Town Center for noncompliance with the lease.



03590



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-95136

The Honorable Charlie Rose
House of Representatives

Dear Mr. Rose:

In your August 9, 1976, letter, you requested certain information on the General Services Administration's leasing of space for the Environmental Protection Agency in the Waterside Mall building complex, Washington, D.C. You were particularly concerned that a monetary recovery be made for the lessor's failure to comply with lease requirements to provide a cafeteria and that a full-service cafeteria be installed within a reasonable time to serve Federal employees' needs at the Waterside Mall complex. You also asked specific questions related to an investigation of the matter by General Services' Office of Investigations.

As subsequently agreed, you directed the questions related to the General Services' investigation to the Administrator of General Services, who responded in a January 5, 1977, letter. We did not examine the Administrator's response. Our review focused on General Services' efforts to obtain cafeteria facilities in accordance with its interpretation of the lease terms and any needed corrective actions. We also reviewed the lease acquisition of the space for the Environmental Protection Agency.

Our review of the cafeteria situation at the Waterside Mall is discussed chronologically and specifically in appendix I. The question of whether the lessor is required to furnish cafeteria facilities at its expense in non-Government leased space is currently pending before the General Services' Board of Contract Appeals. Our comments are not intended to prejudice the Board's decision on this question; however, we believe that notwithstanding the Board's case, General Services can take certain actions to expedite the installation of a cafeteria. In summary, we found that:

--The February 1971 lease agreement with General Services requires the lessor to provide a cafeteria at

the Waterside Mall complex. The lease provides that the cafeteria be installed in space not leased by General Services and be under the lessor's full control without cost to the Government. Also, the Government has the right to install food facilities in the leased space, if deemed necessary.

- The Environmental Protection Agency began to occupy the mall as the leased space was completed and became available, beginning with 500 employees in August 1971. In early 1972 both agency and General Services officials had begun to express concern over the lack of adequate food facilities. At that time, they expected to have 1,600 agency employees in the mall by March 1972.
- The lessor has not installed a cafeteria, and General Services' actions to have a lessor-installed cafeteria have been ineffective.
- The lessor disagreed with various General Services' positions on the cafeteria requirement and presented a variety of arguments which served to delay resolution of the matter. Such disagreements effectively occupied General Services' attentions and detracted from its efforts to have the required cafeteria installed.
- General Services stated in a July 1976 letter to us that it had not enforced the cafeteria requirement 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 those officials. While we found no evidence of a conscious decision not to resolve the cafeteria issue, and the turnover of officials may have delayed actions, there was sufficient continuity of responsible officials who should have been familiar with the lease terms and could have taken action with respect to installation of a cafeteria. However, we could not determine from our review of the records why General Services did not resolve the cafeteria issue. Instead, General Services appeared more concerned with the lessor's disagreements related to the cafeteria than with the prompt installation of a cafeteria.

CONCLUSIONS

Although General Services continues to negotiate to have the lessor install a cafeteria at the Waterside Mall complex, a cafeteria appears to be no closer to being operational than it was when the lease was agreed to in February 1971. Apparently, Environmental Protection Agency employees will not have adequate food facilities for some time. General Services should establish a firm timeframe for installing and operating a cafeteria. If the lessor does not meet the required timeframe, General Services should exercise its prerogative to have a cafeteria established in Government-leased space and obtain appropriate compensation.

RECOMMENDATIONS

We recommend 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 is not met, we recommend 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 recommend 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 must establish a cafeteria in Government-leased space, we recommend that its withheld rent also cover the rental value of the space used for the cafeteria and all installation costs.

AGENCY COMMENTS AND GAO EVALUATION

General Services' comments on this report are included in appendix II. The agency agreed with the tenor of the report and stated that the cafeteria matter should have been resolved long ago. The agency also advised us that it was withholding rent from the lessor, as we recommended; however, the contracting officer informed us later that General Services has not actually begun to withhold rent but is in the process of determining what amount of rent the agency can justifiably withhold.

In response to our recommendations directed toward establishing either a lessor- or Government-installed cafeteria, the agency said that it believes that our report

is somewhat optimistic about General Services' legal rights to obtain a cafeteria and damages, but it is reinstating the matter before the Board of Contract Appeals.


After receiving agency comments, we contacted General Services officials to determine the status of a proposed cafeteria and the agency's intentions regarding our recommendation on establishing a cafeteria. They informed us that General Services intends to await a determination by the Board of Contract Appeals before initiating any further action. Although the lessor has the right to have his dispute resolved by the Board of Contract Appeals, we believe that employees should not be denied an eating facility because of technical and legal difficulties between the parties. General Services should establish a firm date for a lessor-installed cafeteria in non-Government space. If the lessor refuses because of either the pending appeal or other reasons, General Services should install a cafeteria in Government-leased space at Government expense and assess the cost to the lessor by withholding rent.

As you requested, we did not obtain comments from the lessor.

As you know, section 236 of the Legislative Reorganization Act of 1970 requires the head of a Federal agency to submit a written statement on actions taken on our recommendations to the House Committee on Government Operations and the Senate Committee on Governmental Affairs not later than 60 days after the date of the report and to the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the date of the report.

As arranged with your office, we are sending copies to the Administrator of General Services, the Director of the Office of Management and Budget, and the four Committees. Unless you publicly announce its contents earlier, no further distribution of this report will be made until 10 days from the date of the report.

Sincerely yours,


ACTING Comptroller General
of the United States

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ABBREVIATIONS

| | |
|-------------|---|
| AFGE | American Federation of Government Employees |
| EPA | Environmental Protection Agency |
| GSA | General Services Administration |
| Town Center | Town Center Management Corporation |

FINDINGS

GSA SELECTION OF THE SOUTHWEST
AREA OF WASHINGTON, D.C.

The General Services Administration (GSA) had been in contact with the Bresler-Reiner Companies as early as May 1970 concerning construction of a privately owned building in the southwest area of Washington, D.C. In June 1970 the Bresler-Reiner Companies notified GSA that the Waterside Mall and Tower complex was under construction and should be ready for occupancy by September 1971.

In November 1970 the Town Center Management Corporation (Town Center) of the Bresler-Reiner Companies offered GSA the following space at the Waterside complex.

| <u>Location</u> | <u>Square feet</u> | <u>Availability date</u> |
|----------------------|--------------------|---|
| Mall West, 3rd floor | a/ 90,000 | Between 3-6/71 |
| Tower West | 158,600 | About 9/71 |
| Tower East | 200,000 | 18 to 24 months after start of construction |
| Mall East, 3rd floor | <u>60,000</u> | 18 to 24 months after start of construction |
| Total | a/ <u>508,600</u> | |

a/Includes 20,000 to 30,000 square feet of space that Town Center desired to withhold from the offer to provide for cafeterias and restaurant facilities.

On January 5, 1971, the Environmental Protection Agency (EPA) officially requested space in Washington, D.C., from GSA to consolidate its activities--then in 10 different locations in the metropolitan D.C. area--and to provide space for authorized additional employees. EPA requested that 400,000 square feet of office, file, storage, and miscellaneous space be available as follows.

| <u>Amount of space</u> | <u>Available by</u> |
|------------------------|---------------------|
| 80,000 sq. ft. | June 1, 1971 |
| 120,000 sq. ft. | Dec. 31, 1971 |
| 200,000 sq. ft. | June 30, 1972 |

EPA told GSA that if no Government-controlled space was available, it wanted GSA to acquire the space. GSA determined that there was no Government-owned or controlled space available. On January 19, 1971 it solicited offers for leasing 400,000 square feet of net useable space, plus or minus 5 percent.

The GSA solicitation identified the southwest area of Washington, D.C., as the location of the required space. In commenting to GSA on the proposed solicitation for its headquarters' space, EPA stated on December 23, 1970, "The southwest area of Washington, D.C. * * * is not a firm requirement of EPA" and that the only geographic consideration was "a downtown D.C. location within a reasonable radius of the Executive Offices." According to GSA, the solicitation was limited to the southwest area because it had determined that there were no other areas with 400,000 square foot blocks of space available.

GSA received offers from the two firms to which the January 19 solicitation was directed. L'Enfant Plaza West, Inc., offered 393,318 square feet of space in the L'Enfant Plaza West building at an annual rate of \$7.06 a square foot including services and utilities. Town Center offered 420,000 square feet in the Waterside complex--400,000 square feet of office space and 20,000 square feet of storage space--at an annual rate of \$5.74 a square foot including services and utilities, or \$5.31 a square foot excluding utilities.

Negotiations with both firms resulted in a low offer from Town Center of 443,800 square feet of office space at an average rate of \$5.30 and 23,000 square feet of storage space at an average rate of \$2.45. L'Enfant Plaza West, Inc., did not change its original offer.

Town Center amended its offer on February 12, 1971. Details of the amended offer, as revised through negotiations with GSA, identified the offered space as:

| <u>Type of space</u> | <u>Area</u> | <u>Average rate</u> | <u>Annual rate</u> |
|----------------------|----------------|---------------------|--------------------|
| | (square feet) | | |
| Office | 443,800 | \$5.30 | \$2,353,400 |
| Storage | <u>23,000</u> | 2.45 | <u>56,300</u> |
| Total | <u>466,800</u> | \$5.16 | <u>\$2,409,700</u> |
| Parking | 204,800 | \$1.25 | \$ 256,000 |

| <u>Location of space</u> | <u>Office space</u> | <u>Storage space</u> |
|----------------------------------|---------------------|----------------------|
| | (square feet) | |
| Waterside Mall West (note a) | 93,800 | 17,000 |
| Waterside Tower West (note b) | 185,000 | 3,000 |
| Waterside Tower East (note b) | <u>165,000</u> | <u>3,000</u> |
| Total | <u>443,800</u> | <u>23,000</u> |

a/Rates for the Mall West office and storage space (\$5.50 and \$2.50 a sq. ft. respectively) included services and utilities.

b/Rates for the Towers West and East office and storage space (\$5.25 and \$2.30 a sq. ft. respectively) excluded utilities.

Town Center also offered GSA an option on an additional 60,000 square feet of office space in the Waterside Mall East (on the 3rd floor) at a rate of \$5.50 a square foot including services and utilities.

On February 19, the Administrator approved the Space Management Division's recommendation that GSA accept Town Center's amended offer. He also approved the option for office space in Waterside Mall East. By letter of the same date, GSA notified Town Center that it was accepting their January 27 offer, as amended February 12, to lease 466,800 square feet of space at the Waterside complex and the option offer of 60,000 square feet of space on the 3rd floor of Waterside Mall East.

In summary, (1) EPA requested 400,000 square feet of space in Washington, D.C., (2) GSA solicited proposals from two firms in the southwest area, and (3) GSA, as it did on a number of other leases during that time, was in contact with the eventual lessor prior to the formal solicitation. Furthermore, GSA entered into an agreement for a total amount of space 32 percent greater than EPA had originally requested without amending the solicitation or otherwise notifying the other firm that it could have offered a greater amount of space. Although we believe GSA's acceptance of the amended offer was questionable because it did not afford both firms the opportunity to compete on an equal basis, a L'Enfant Plaza West official informed us that it would not

have reduced its price if it had been given the opportunity to offer additional space. Also, although a L'Enfant Plaza West official informed us that the short response time made bid-submission difficult, L'Enfant Plaza West was able to submit a timely bid and did so without formal complaint. It therefore appears that L'Enfant Plaza West was not prejudiced by GSA's actions.

Agency comments

In commenting on our report, GSA stated that our reporting of being in contact with the lessor prior to the solicitation was not germane to the subject of Congressman Rose's inquiry. We do not agree, because when we review specific aspects of a program, we study and report on elements other than those specifically requested so that the report will be complete and balanced.

GSA stated that it is regularly in contact with all potential lessors for all its acquisitions before soliciting offers, and that it is a commonplace and advisable activity of the real estate business to take listings and discuss available property with the broker, agent, or owner well before any procurement actions are taken.

We do not believe that prior contacts with potential lessors is improper as long as efforts are made to contact all potential lessors and sufficient care is taken to assure that lessors are treated equally. In this regard, we contacted the unsuccessful firm that responded to the solicitation in question. An official told us that the first contact the firm had with GSA concerning either the solicitation or GSA's desire to lease space at that time was a telephone call from GSA asking if the firm was interested in offering space. After responding that it was interested, GSA delivered the solicitation to the firm that same day. The official said that the telephone call was the first indication the firm had of GSA's desire to lease space. Also, he told us that because of the short deadline (14 days) for response to the solicitation, the firm had a difficult time preparing and submitting a timely bid to GSA.

THE WATERSIDE MALL CAFETERIA

Schedule B, Part III, of GSA's Solicitation Number 55, dated January 19, 1971, which became part of the lease, states 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." (Pars. 10.a. (1) and (3).)

Furthermore, the solicitation states

"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 * * *." (Pars. 10.b.(1).)

In the 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 acceptance of the GSA letter.

A cafeteria, as called for in the lease agreement between GSA and Town Center, has not been installed at the

Waterside Mall. According to the agreements and the occupancy of the leased space, the cafeteria should have been fully operational by early 1972. By this time EPA officials were expressing their concern over the delay in providing a cafeteria and lack of adequate food facilities in the neighborhood.

Cafeteria efforts--1971 to September 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 Waterside Mall and that, subject to necessary permits and occupancy, the cafeteria was planned to open concurrent with occupancy. In addition, Town Center notified GSA that it was finalizing lease negotiations for several other food facilities.

In January 1972 EPA informed GSA that the lessor had told EPA that it could not open any facilities in the Waterside Mall before April or May 1972. At that time, there had been 600 EPA personnel employed at the complex since August 1971, and an additional 200 were scheduled to be assigned there at the end of January 1972. Furthermore, an additional 800 personnel were scheduled to be relocated to the complex when the Tower West building was completed (then estimated for March 1972).

Based on the lack of construction progress, GSA's Assistant Commissioner for Buildings Management told GSA's Assistant Commissioner for Operating Programs on January 28, 1972, that the lessor's revised target dates of April or May 1972 were unrealistic and that openings would be further delayed unless action was taken to expedite the completion of work. The Assistant Commissioner for Buildings Management stated that the facilities in operation at the mall in January 1972 were "totally inadequate to provide for the 1,600 EPA personnel who will be employed in the Complex by March 1972." He stated also that "We understand that the SMD [Space Management Division] is preparing to notify the Lessor that he is in default for failure to provide adequate food facilities" and that "we believe that there is an immediate need to review and evaluate the Lessor's total food service plan for compliance with the lease contract."

On February 4, 1972, the contracting officer notified Town Center that he was "very much concerned about the

present condition of totally inadequate eating facilities for the occupants of the Waterside Mall Complex." He reminded Town Center of its amended offer to provide cafeteria facilities in accordance with the solicitation, the cafeteria being operational concurrent with or prior to occupancy of the space by the lessee. He requested that Town Center give GSA a detailed accounting of its plans within 2 weeks.

On February 9 the contracting officer requested additional information from Town Center concerning food facilities at Waterside Mall. On that same day, the Deputy Assistant Commissioner for Operating Programs notified the Assistant Commissioner for Buildings Management that, following a meeting with Town Center, the lessor had agreed to expand a temporary automatic vending machine facility in operation at the mall.

On February 28 the contracting officer wrote to Town Center that meetings and discussions between members of his staff and the president of Town Center had resulted in "little substantial progress in obtaining the adequate food facilities required by lease for Waterside Mall." The contracting officer reminded the lessor of the cafeteria requirement of the lease and that

"* * * there has been no agreement to change this requirement, nor is there any documentation rescinding such a requirement. Therefore, as Contracting Officer acting for the interest of the Government relative to this project, I remind you of the aforementioned contractual obligation and state the Government's position of deeming this item as necessary to fulfill the lease agreement. Until such time as tangible evidence of adherence to the aforementioned is provided and a mutual agreement reached relative to its timely provision, all future rental payments will be held in abeyance effective March 31, 1972."

In response to the contracting officer's decision to withhold rental payments, the president of Town Center on March 2, 1972, wrote GSA that the solicitation "gives the Government the right to install food service, or vending facilities within the confines of the leased space." However, this was not the issue that the contracting officer had raised. While the solicitation does contain this provision in Schedule B, Part III, Paragraph 10.b. (1), the

issue is Paragraph 10.a (1) and (3) which require the lessor to furnish a cafeteria at his expense in space excluded from the area covered by the lease.

Furthermore, the lessor stated that in consultation with GSA it was agreed that no effort would be made to provide a cafeteria-type food facility within the mall complex, but if private food service operators did not choose to locate within the mall, Town Center would provide GSA with space for a facility. GSA has stated that it has no record of such an agreement or contract modification. We found no indication of GSA waiving the cafeteria requirement.

According to the lessor, GSA said that if the private facilities could serve the agency's needs, a Government-operated facility would not be necessary. Also, the lessor said that an informal agreement had been reached to waive the requirement for such a facility. In both instances the lessor was referring to a federally operated facility; whereas, the lease requires a lessor-installed and operated cafeteria. In this regard GSA officials cannot waive a lease provision without some resulting benefit to the Government. Furthermore, it is a well established principle that, in general, agreements affecting real property must be in writing to be binding.

The lessor admitted that GSA did have the right under the terms of the lease solicitation to insist on a Government food facility. However, the lessor felt "* * * the enforcement of such a requirement would be a breach of faith with the business community and those restaurant tenants * * *" in Waterside Mall who had executed leases assuming that there would not be a Government facility. The lessor stated that he felt he had complied with the solicitation and the subsequent agreements.

On March 10, 1972, the Acting Assistant Commissioner for Buildings Management summarized the cafeteria problem in a memorandum to the Assistant Commissioner for Operating Programs. According to the memorandum, the lessor stated at 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 attributed this lack of outside interest to the economically unfeasible investment a cafeteria would be in the face of anticipated competition. The lessor

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.

At a meeting with GSA officials on March 30, the lessor produced a copy of what he claimed was the original solicitation, which differed from GSA's version regarding the cafeteria requirement. The lessor's version did not refer to the cafeteria requirement and covered only Government-installed vending facilities.

On April 19 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 (withholding rental payments) until all cafeteria requirement studies were completed.

On May 2, 1972, the Assistant Commissioner for Buildings Management wrote a memorandum to the Office of Operating Programs stating that he believed that the lessor had known about GSA's version of Solicitation Number 55, which required a lessor-installed cafeteria. He recommended that the lessor be required to install and operate a 10,500 square foot and 350 seat capacity cafeteria. On May 5 the Assistant Commissioner for Operating Programs agreed with this recommendation. Also on that date, he issued a note saying "I think we should find some way to put a cafeteria in EPA space. Let's take that position & run. We may have some costs and problems but 3000 employees need some Government controlled service."

During a May 23 meeting of the lessor and EPA and GSA officials, an EPA official expressed the need for an adequate, fast service cafeteria. The lessor explained the difficulties in finding a private operator to run a cafeteria. According to the records, after the lessor left the meeting, the contracting officer stated that the lessor should not be relieved of the responsibility for furnishing a cafeteria. The contracting officer stated that he would wait for a schedule of commercial food facility openings in the mall from the lessor before taking further action. The lessor provided some information on June 1, 1972. On June 7 the contracting officer wrote the lessor that the June 1 letter did not include all the information requested at the May 23 meeting (i.e., sample menus, selling prices, and opening dates).

On June 20 the 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 produce 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.

The lessor may have felt that GSA had strengthened his position by not specifically requiring a cafeteria meeting the lease requirements. GSA officials may have inferred either in meetings or correspondence with the lessor that restaurants in the mall would satisfy the requirements. GSA gave consideration to the lists of restaurants the lessor repeatedly submitted before contemplating further action. GSA's saying that it would allow the lessor time to produce three restaurants before acting could be construed as meaning that these restaurants could meet the requirements. GSA could have avoided any misunderstanding by stating that the restaurant data was for informational purposes only and that the cafeteria was still required.

On August 23 the Assistant Commissioner for Buildings Management wrote to the Office of Operating Programs that EPA had compiled statistics estimating tangible losses to the Government of more than \$33,000 a month, and that losses would increase to more than \$50,000 a month with EPA's increased occupancy. These estimates represented the value of productive time lost to the Government as a result of employees being unable to obtain suitable lunches and return within their allotted 30-minute lunch period. The Assistant Commissioner recommended that:

--Action should be initiated to recover the losses by withholding the above amounts from future rental payments, retroactive to the initial occupancy.

--The lessor should be told to establish a suitable interim facility by September 11, 1972, and a

permanent cafeteria within 90 days. The lessor should also be advised that if he failed to meet this schedule, the Government would act to accomplish the installation.

Specific requirements for the interim facility were listed and the permanent facility was to meet the minimum requirements provided to the Office of Operating Programs.

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 interests.

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 follow-up 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 10, 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 now occupies the space intended for the cafeteria.

Recent events--August 1975 to present

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.

On October 1, EPA's Deputy Assistant Administrator for Administration wrote to the contracting officer about the possibility of having a cafeteria installed at the Waterside complex. In response, GSA requested a study to determine the feasibility of such a project and again requested a study of the existing facilities to see whether a cafeteria was needed. The EPA official wrote to GSA again on November 18 stating that it was essential to explore the cafeteria matter thoroughly so that a decision could be made as to whether other alternatives should be considered.

On November 20 the Regional Administrator summarized the cafeteria problem in a memorandum to GSA's Acting Administrator.

"With the opening of restaurants in late 1972 and early 1973, the issue of sufficient

eating facilities receded, and a Contracting Officer's decision on the Lessor's responsibility to provide a cafeteria was proposed but never rendered."

He pointed out that because of increased occupancy, EPA had expressed the need for a cafeteria. In November 1975 GSA was preparing to meet with the lessor and, if necessary, issue a contracting officer's decision directing the lessor to provide either a cafeteria or compensation.

In December the EPA local lodge of the American Federation of Government Employees union (AFGE) became involved with the cafeteria issue and the corresponding lease requirements.

In a January 6, 1976, meeting with the lessor, GSA stated its position that the lessor had not satisfied the lease requirements for a cafeteria. In response, the lessor stated that:

- Two different solicitations were originally issued; the lessor's copy stated only that the Government had the right to establish food facilities.
- The existing private eating facilities met and far exceeded the original cafeteria requirement.
- The lessor had not heard anything from GSA since April 19, 1972, when he was informed that the matter was under review. [Our review of GSA files showed correspondence and records of meetings from April 1972 to September 1972 in which the cafeteria and the adequacy of food facilities were discussed between GSA and EPA officials, and the lessor.]
- GSA had signed an estoppel in August 1974 stating that there were no outstanding claims against the lessor.
- The current restaurant operators had discussed filing an injunction against the lessor if he acted to build a cafeteria.

The lessor also stated that he would not consent to installing a single large cafeteria and that there was no

available space for a cafeteria at the mall. A GSA official suggested that monetary compensation might be considered in lieu of the cafeteria.

On January 20, 1976, the contracting officer wrote to the lessor that "Neither Solicitation #55 nor the letter of award * * * recites or implies that a cluster of eating facilities amounts to 'a' cafeteria." The lessor was requested to submit his position on the matter before a contracting officer's decision was rendered. The lessor informed GSA on February 2 that the records were in storage but a response should be completed by February 28. On March 2 the lessor responded that based on negotiations with GSA leasing personnel and a GSA study of internal eating facilities, he was advised at a September 1972 meeting that food facility requirements had been met.

The contracting officer's decision was rendered on March 17, 1976, stating that the lessor was not in compliance with the lease agreement and directing that the lessor either give GSA a schedule of construction and occupancy dates or appeal the decision. The lessor informed GSA that he was appealing the decision and would not supply such a schedule.

The lessor submitted his notice of appeal on April 19, 1976. He 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 (see p. 5) 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.

On April 29, 1976, the Director, Concessions Division, wrote to the Director, Space Management Division,

suggesting that GSA request from the lessor detailed drawings for a cafeteria and sample menus and prices. The lessor was also to be told that this submittal would not mean acceptance of his proposal. This suggestion was made to the lessor at a May 7 meeting. The lessor said that it would take several weeks to develop the concept and furnish layout drawings. On May 20 the contracting officer wrote to the lessor that the Government had a requirement for a cafeteria under the lease and that the existing facilities did not meet the employees' needs. Examples were given of the type of operation GSA was looking for.

On June 9 another meeting was held at which time the lessor presented a space and equipment layout and indicated that the operator would be the proprietor of the Greek Subway restaurant at the mall. On June 23, 1976 GSA officials met with the proposed operator to discuss details of the proposal. The Director, Concessions Division, believed that the proposed cafeteria style facility would satisfy the requirements of a large number of EPA personnel. He recommended that the Director, Space Management Division, request a formal offer from the lessor, including final plans which clearly delineate the dining area, sample menus with prices, and a commitment to the Government that the cafeteria would continue in operation for the duration of the Government's lease. The contracting officer requested this information from the lessor on July 12, 1976. The proposed operator said that after arrangements for financing and renting the space were resolved, the facility could be operational in approximately 35 days.

On July 8 the lessor wrote to the contracting officer again stating that:

- He had complied with the lease requirements.
- A single large cafeteria would be a breach of faith with the business community.
- "We would continue to cooperate in any way possible to satisfy the needs of the agency and try to save the government the expense of additional food facilities as outlined in the offer of January 27, 1971 made a part of the lease, which stated, a cafeteria would be furnished, '* * * if so it will be done on an actual cost basis plus 10% overhead and 10% representing contractor (lessor) profit'."

Concerning the above-mentioned provision in the offer of January 27, 1971, GSA's Acting General Counsel had previously written us on February 3, 1976, that

"The Lessor's original offer to lease the space contained a proviso that reserved the right to make a separate charge for the actual cost of providing a cafeteria. * * * As this was unacceptable to the Government, the offer was amended to provide, 'A cafeteria or cafeterias shall be provided in accordance with paragraph 10(a) of Schedule B, Part III of the offer. Said cafeteria shall be operational concurrent with or prior to occupancy of the general office space by lessee' * * *."

On August 5, 1976, the lessor sent GSA sample menus with prices for the proposed facility. The lessor also asked GSA for any specific language it wished to include in the private operator's final lease. The lessor pointed out that he had informed GSA of his position regarding compliance with the lease requirements. He stated that he recognized the needs of the occupants for additional food facilities in the complex and would continue to cooperate with GSA in an effort to resolve the matter.

On August 16 the lessor gave GSA and EPA authorization to discuss the proposed facility directly with the operator of the Greek Subway restaurant, now called the Subway Cafeteria. On the same date the Board of Contract Appeals acted on a GSA motion to dismiss the lessor's appeal. The appeal was dismissed without prejudice to the right of either party to have the appeal reinstated on the Board's docket upon written request.

On September 2 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. The lessor was told that GSA expected the facility to be operational within 90 days of the letter (by December 1, 1976) and that the Government was reserving its right to have the appeal reinstated in the event that the contracting officer decided that the lease requirements were not being satisfied.

On September 15 the lessor asked what funds GSA had allocated to satisfy the special requirement clause

of the lease (actual cost plus 10 percent overhead plus 10 percent profit) under which he stated the cafeteria fell. On September 27 GSA wrote 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. The lessor was requested to specify when the proposed facility would be completed and was warned that failure to have the cafeteria operational would be considered a violation of the lease requirement.

On October 6 at a meeting with the proposed operator, GSA learned that the operator did not believe that he could start renovation until January 1977 due to a lack of funds, city remodeling requirements, and a change in the proposed location. After the meeting the contracting officer suggested that a letter be written to the lessor stating that due to his inaction, GSA intended to request renewal of the Board of Contract Appeals action and deduct a proper amount from the rent retroactive to when the cafeteria was originally due to be in operation.

On October 7 GSA received another letter from the lessor stating that the Government was responsible for the installation costs for the cafeteria. The lessor also stated that negotiations were being chilled by an AFGE Newsletter demanding a clean, Government-run cafeteria.

The contracting officer wrote to the lessor on October 15 stating that if the lessor failed to produce, no later than November 1, a schedule of critical events leading to an operating cafeteria by February 1, 1977, he would be considered abandoning negotiations, and GSA would have good cause to request reinstatement of the appeal. In response to the lessor's letter, the contracting officer stated that no additional facilities had been requested, and that the lessor was to deal only with GSA officials and not with union representatives in matters relating to the cafeteria.

The lessor responded with three letters. The first (October 29) dealt with the AFGE issue, the lessor maintaining that his intention in mentioning AFGE was to keep GSA advised regarding the proposed operator's concerns with the union. The lessor did state that the operator and AFGE representatives had met and final construction plans were being produced. The second (November 1)

included the cafeteria expansion plans and requested GSA's approval for construction to proceed. The third (also on November 1) was a rehash about who was responsible for the cost of the cafeteria and asserted that the lessor had met the lease requirements.

On November 9 the lessor was given partial approval of the cafeteria expansion plans and advised that before full approval could be given, GSA needed total layout information, including a seating capacity of 320. On November 10 the lessor sent the proposed operator the partly approved plan and requested that the operator furnish GSA a schedule of critical events leading up to the opening of an initial phase (estimated for Mar. 15, 1977) and a final phase (estimated for June 1, 1977) of the proposed expansion. GSA's November 16, 1976, fact sheet indicated that revised plans for the seating area were approved by the Concessions Division and construction would soon begin.

On December 13 the lessor sent GSA the approved plans for the initial phase and a copy of the building permit. He also indicated that the proposed operator was prepared to start work immediately on this phase of the expansion. In reviewing these plans, GSA noted that seating capacity for the initial phase had been reduced by 28 seats to 104. On January 25, 1977 the contracting officer wrote the lessor that GSA still expected a 320-seat cafeteria and wished to see a plan showing such by February 1, 1977.

On January 31, 1977, the lessor wrote the contracting officer stating that GSA's delay in approving the plans would detain the critical-events schedule for 60 days and that with the addition of the initial phase and a realignment of the existing seating, there were 236 seats available at the proposed operator's facility. On March 16, however, we found that there were only about 175 seats available. In early April GSA officials said the proposed cafeteria will not be operational before June 1977. On May 5 GSA informed us that the proposed cafeteria would not be available before July or August 1977.

GSA's reason for not resolving the issue

In a July 20, 1976, letter to us, GSA indicated that the cafeteria issue lay dormant for several years because of the number and turnover of GSA officials involved; however, GSA project files show that several of the officials

involved had signed or prepared correspondence both in the periods 1971-72 and 1975-76. While some of those GSA officials involved left GSA, others are still with the agency and, although not in the same positions, are in positions of authority directly related to the mall situation.

We found no evidence of a conscious decision by GSA officials not to resolve the cafeteria issue. While the turnover of officials may have delayed actions, there was a sufficient continuity of responsible officials who should have been familiar with the lease terms and could have taken action with respect to installation of a cafeteria. From our review of the project records and GSA's Office of Investigations' reports described below, we were unable to identify any particular reasons or GSA official responsible for not resolving the issue.

Office of Investigations' studies

At the request of the GSA Administrator, an investigation was initiated by the GSA Office of Investigations on December 12, 1975, to determine why a cafeteria had not been installed in accordance with the lease. The June 30, 1976, investigation report stated that the lease required the lessor to provide, at his expense, a full service cafeteria in the project for the use of EPA employees. The report summarized the situation between January 1971 and December 1975 and concluded that the investigation found no evidence to support the lessor's contention about a waiver, either verbal or written, in the documentation or during interviews with present and former GSA and EPA officials. The report also indicated that after the Assistant Commissioner of Operating Programs' April 19, 1972, letter, GSA officials did not vigorously press the issue for the cafeteria and efforts were confined to negotiations with the lessor concerning additional private food facilities. Interviews with GSA and EPA officials connected with the project revealed that no one had any factual knowledge of any waivers, decisions to accept private facilities in lieu of a cafeteria, or instructions not to pursue the provisions of the lease. During an interview with an investigator, the lessor said that the cafeteria requirement was waived by GSA, but he furnished no evidence of a waiver and declined to furnish a statement to GSA.

On September 23, 1976, the Director Office of Investigations, directed that a followup investigation be made.

The March 9, 1977, investigation report stated that the contracting officers and the Assistant Commissioners of Operating Programs were responsible for requiring the lessor to comply with the lease provisions. The GSA officials interviewed a second time made substantially the same statements as reported on June 30, 1976. They had no factual knowledge of any criminal wrongdoing or contract irregularities.

In the followup investigation, officials who had not been reached for the prior report were interviewed. A former contracting officer stated that when he assumed that position in 1973 he was not aware of the cafeteria situation and that the problem was not brought to his attention while he was in that position. He was succeeded in June 1974 by the present contracting officer. A former Assistant Commissioner of Operation Programs stated that when he assumed that position in June 1972, he was briefed about the issue. He stated that his predecessor had informed him that the lessor was planning to provide several restaurants in lieu of the "cafeteria required by the lease" and that "the contracting officer was deferring a final decision on the subject until GSA had an opportunity to study all the facts." He indicated that he was transferred in May 1973 before a final decision was rendered; however, he stated that in his capacity as Assistant Commissioner of Operating Programs, he could have issued a final decision to the lessor. Another former Assistant Commissioner of Operating Programs stated that he believed that the lessor had not complied with the lease provisions and that the cafeteria requirement was never waived, altered, or deleted.

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
WASHINGTON, DC 20405



July 19, 1977

Honorable Elmer B. Staats
Comptroller General
United States General Accounting Office
Washington, DC 20548

Dear Mr. Staats:

As requested in Mr. F. J. Shafer's letter of May 11, we have reviewed the draft report entitled "No Cafeteria for Federal Employees at Waterside Mall." Our comments are attached.

As our comments indicate, the administration of the lease requirement for the lessor to provide a cafeteria is being properly handled by the contracting officer. The draft report's recommendations coincide with the actions being taken to protect the Government's rights. Since the case could well end up in the courts, we are proceeding diligently within the parameters of the lease contract.

We believe that the attached comments demonstrate that the contracting officer's actions are in accordance with the draft report's conclusions and recommend that the draft report eliminate references to the original lease acquisition. If you feel it is necessary, we would be happy to meet with you to discuss the matter further.

Sincerely,

A handwritten signature in black ink, appearing to read "Joel W. Solomon".

Joel W. Solomon
Administrator

Enclosure

GSA Comments on GAO Draft Report -
"No Cafeteria for Federal Employees at Waterside Mall"

1. Both the draft letter to Congressman Rose and the draft report appear critical of the fact that GSA was in contact with the lessors prior to the issuance of the solicitation.

This does not appear to be at all germane to the subject of the inquiry and in addition leaves the impression that the procedure is improper. We wish to advise you that GSA is regularly in contact with all potential lessors for all its acquisitions prior to issuing an SFO. These contacts are routinely made in the process of conducting market surveys to determine what to solicit from the marketplace and on what terms. The information developed on the existing real estate market from these surveys is utilized in preparing the SFO. It is a commonplace and advisable activity of the real estate business to take "listings" of available real property and discuss the property with a broker, agent, or owner well before any procurement actions are taken.

GSA recognizes the prudence of market surveys prior to issuing SFO's and has included this in its handbook (PBS P 1600.1). Paragraph 14a(1)b of Chapter 3 states that the survey should be made by "consultation with realtors, brokers, managers, owners" along with physical inspection of the property and ascertaining probable cost of the space.

Having taken this proper action in the procurement of space for EPA, GSA discovered that there were only two facilities in the entire Washington Metropolitan Area of sufficient size to house EPA; namely, Waterside Mall and L'Enfant Plaza. The SFO that was issued had a delineated area of Southwest Washington, D.C., which contained both of these locations. GAO's apparent misunderstanding of the purpose of a market survey underscores their statement that the delineated area of Southwest "affected both the level and degree of competition for space." This could only be true if GSA overlooked an available half million square foot building during its market survey. It is, however, the very purpose of a market survey to prevent such errors in the procurement process.

2. We are inclined to agree with the tenor of your report which indicates that the prior administration did not pursue this matter with sufficient diligence. It should have been resolved long ago.

3. We believe the draft report presents an oversimplified picture of the situation and is somewhat optimistic with respect to our legal rights to obtain a cafeteria and damages. Nevertheless, we are currently withholding rent and are reinstating the case before the Board of Contract Appeals where opposing arguments will be thoroughly aired.

PRINCIPAL OFFICIALS
RESPONSIBLE FOR ADMINISTERING ACTIVITIES
DISCUSSED IN THIS REPORT

| | <u>Tenure of office</u> | |
|---|-------------------------|------------|
| | <u>From</u> | <u>To</u> |
| ADMINISTRATOR OF GENERAL SERVICES: | | |
| Joel W. Solomon | May 1977 | Present |
| Robert T. Griffin (acting) | Feb. 1977 | Apr. 1977 |
| Jack Eckerd | Nov. 1975 | Feb. 1977 |
| Arthur F. Sampson | June 1973 | Oct. 1975 |
| Arthur F. Sampson (acting) | June 1972 | June 1973 |
| Rod Kreger (acting) | Jan. 1972 | June 1972 |
| Robert L. Kunzig | Mar. 1969 | Jan. 1972 |
| COMMISSIONER, PUBLIC BUILDING SERVICE: | | |
| James B. Shea, Jr. | June 1977 | Present |
| Tom L. Peyton (acting) | May 1977 | June 1977 |
| Nicholas A. Panuzio | Sept. 1975 | Apr. 1977 |
| Walter Meisen (acting) | Oct. 1974 | Sept. 1975 |
| Larry F. Roush | Aug. 1973 | Oct. 1974 |
| Larry F. Roush (acting) | Jan. 1973 | Aug. 1973 |
| John F. Galuardi (acting) | July 1972 | Jan. 1973 |
| Arthur F. Sampson | Mar. 1970 | June 1972 |
| REGION III ADMINISTRATOR: | | |
| John F. Galuardi | July 1974 | Present |
| George Perryman | July 1972 | June 1974 |
| John F. Galuardi | Oct. 1970 | June 1972 |
| William Badger | Sept. 1969 | Sept. 1970 |

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