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B-117057, August 12, 1955, 35 Comp. Gen. 85

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B-117057, AUGUST 12, 1955, 35 COMP. GEN. 85

LEASES - RENT - REPAIRS AND ALTERATIONS - LIMITATIONS - PAYMENTS - LEGALITY TENANTS WHOSE LEASES PROVIDE FOR TERMINATION IN THE EVENT THE PROPERTY IS TAKEN FOR PUBLIC USE BY EMINENT DOMAIN PROCEEDINGS HAVE NO PROPERTY RIGHT TO COMPENSATION UPON A TAKING, AND, THEREFORE, TERMINATION PAYMENTS MADE BY THE GOVERNMENT TO PRIOR TENANTS OF A BUILDING LEASED BY THE GOVERNMENT MUST BE INCLUDED AS AN EXPENSE IN OBTAINING POSSESSION OF THE BUILDING IN THE COMPUTATION OF THE 15 PERCENT FAIR-MARKET-VALUE LIMITATION IN 40 U.S.C. 278A. THE PROVISIONS IN A LEASE WHICH OBLIGATE THE GOVERNMENT TO INDEMNIFY THE LESSOR FOR LOSSES, LIABILITIES AND LITIGATION EXPENSES ARE, IN THE ABSENCE OF EXPRESS STATUTORY AUTHORITY, CONTRARY TO SECTIONS 3732 AND 3679, R.S. WHICH PROHIBIT THE ENTERING INTO OF CONTRACTS BEYOND THE EXTENT AND AVAILABILITY OF APPROPRIATIONS AND, THEREFORE, SUCH INDEMNITY PROVISIONS DO NOT IMPOSE ANY LEGAL OBLIGATION ON THE GOVERNMENT. THE COST OF ALTERATIONS, REPAIRS AND IMPROVEMENTS TO A BUILDING LEASED FOR NONDEFENSE OPERATIONS AND FUNCTIONS OF A GOVERNMENT AGENCY ARE CHARGEABLE TO THE APPROPRIATION FOR OPERATION EXPENSES AND NOT TO THE APPROPRIATIONS FOR "EMERGENCY OPERATING EXPENSES," WHICH WERE INTENDED FOR EMERGENCY PROGRAMS FOR DEFENSE ACTIVITIES. A CERTIFICATE WAIVING THE 25 PERCENT REPAIR AND ALTERATION LIMITATION IN 40 U.S.C. 278A, WHICH FAILS TO INCLUDE ALL COST FACTORS, INCLUDING THE COST OF ALTERNATIVE SPACE, MAY NOT BE ACCEPTED AS ESTABLISHING THAT THE LEASE IS ADVANTAGEOUS TO THE GOVERNMENT AS REQUIRED UNDER SECTION 210 (A) (8) OF THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949.

TO THE ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, AUGUST 12, 1955:

REFERENCE IS MADE TO LETTER OF FEBRUARY 7, 1955, FROM YOUR GENERAL COUNSEL, REPLYING TO OUR LETTER OF MARCH 5, 1954, B-117057, TO YOU, CONCERNING THE PROPRIETY OF PAYMENTS UNDER LEASE NO. GS-05B-1147, ENTERED INTO BY THE UNITED STATES AND CLARK-CONGRESS CORPORATION UNDER DATE OF JUNE 22, 1951, FOR THE RAND MCNALLY BUILDING, CHICAGO, ILLINOIS.

AS STATED IN THE LETTER OF MARCH 5, 1954, YOUR PREDECESSOR APPROVED THE EXECUTION OF THE LEASE BY THE REGIONAL DIRECTOR WITH THE UNDERSTANDING THAT THE COMMITMENTS WOULD BE " WITHIN LIMITATIONS OF ECONOMY ACT," (40 U.S.C. 278A), WHICH PROVIDES IN PERTINENT PART THAT--

AFTER JUNE 30, 1932, NO APPROPRIATION SHALL BE OBLIGATED OR EXPENDED FOR THE RENT OF ANY BUILDING OR PART OF A BUILDING TO BE OCCUPIED FOR GOVERNMENT PURPOSES AT A RENTAL IN EXCESS OF THE PER ANNUM RATE OF 15 PERCENTUM OF THE FAIR MARKET VALUE OF THE RENTED PREMISES AT DATE OF THE LEASE UNDER WHICH THE PREMISES ARE TO BE OCCUPIED BY THE GOVERNMENT NOR FOR ALTERATIONS, IMPROVEMENTS,

AND REPAIRS OF THE RENTED PREMISES IN EXCESS OF 25 PERCENTUM OF THE AMOUNT OF THE RENT FOR THE FIRST YEAR OF THE RENTAL TERM, OR FOR THE RENTAL TERM IF LESS THAN ONE YEAR * * *.

SINCE EXECUTION OF THE LEASE WAS AUTHORIZED SUBJECT TO THE ABOVE STATUTORY LIMITATIONS ANY RENTAL PAYMENTS PROVIDED FOR THEREUNDER--- INCLUDING ANY AMOUNTS THE GOVERNMENT WAS REQUIRED TO PAY TO OBTAIN POSSESSION OF THE BUILDING, EXCLUSIVE OF CONDEMNATION AWARDS--- IN EXCESS OF THE 15 PERCENTUM LIMITATION ARE UNAUTHORIZED AND BEYOND THE SCOPE OF THE CONTRACTING OFFICER'S AUTHORITY.

IN THE PRESENT INSTANCE YOUR GENERAL COUNSEL NOW HAS SUBMITTED A NEW ADMINISTRATIVE APPRAISAL PREPARED BY MR. ARTHUR A. MAY, CHIEF APPRAISAL STAFF, PBS, GSA, WHO, YOU STATE, IS AN ACKNOWLEDGED AUTHORITY AND EXPERT IN THE APPRAISAL FIELD. THIS REPORT SHOWS THAT THE FAIR MARKET VALUE OF THE BUILDING AT THE DATE OF THE LEASE (JUNE 21, 1951) WAS $2,500,000. THE NEW APPRAISAL IS SUBSTANTIALLY IN ACCORD WITH THE VALUATION INDICATED IN OUR LETTER OF MAY 5, 1954, AND IS ACCEPTED FOR AUDIT PURPOSES FOR DETERMINING COMPLIANCE WITH THE 15 PERCENTUM LIMITATION. ON THE BASIS OF SUCH VALUATION, RENTAL PAYMENTS, TOGETHER WITH ANY OTHER PAYMENTS WHICH THE GOVERNMENT HAS BEEN OR MAY BE REQUIRED TO MAKE TO OBTAIN POSSESSION OF THE BUILDING--- EXCLUSIVE OF ANY CONDEMNATION AWARDS IN THE PENDING PROCEEDINGS--- DISCUSSED UNDER POINT 2 OF THE LETTER OF FEBRUARY 7, 1955, WILL NOT BE CREDITED IN EXCESS OF THE PER ANNUM RATE OF $375,000 AND THE NECESSARY ACTION SHOULD BE TAKEN TO RECOVER ALL EXCESS PAYMENTS. CURRENT AND FUTURE PAYMENTS WILL, OF COURSE, BE MADE ON THE BASIS OF THE PER ANNUM RATE INDICATED. HOWEVER, ANY PAYMENTS FOR PERSONAL PROPERTY PURCHASED FROM TENANTS FOR RE-USE BY THE GOVERNMENT WILL NOT BE QUESTIONED, IF OTHERWISE PROPER. REPRESENTATIVES OF OUR DIVISION OF AUDITS WILL REVIEW THE ACTION TAKEN BY YOUR ADMINISTRATION TO DETERMINE THE CORRECTNESS OF THE COMPUTATION OF THE AMOUNT OF EXCESS RENTALS AND THAT THE EXCESSIVE AMOUNTS ARE RECOVERED.

YOUR GENERAL COUNSEL APPEARS TO BE IN ACCORD WITH THE FOREGOING VIEWS. HIS EXPLANATION CONCERNING PAYMENTS TOTALLING $102,937.05 TO THE 39 TENANTS WHOSE LEASES CONTAINED "EMINENT DOMAIN" CLAUSES HAS BEEN NOTED. BUT, IN THE LIGHT OF THE FUNDAMENTAL RULE THAT, UNDER A LEASE CONTAINING AN "EMINENT DOMAIN" CLAUSE, THE LESSEE HAS NO PROPERTY RIGHT TO COMPENSATION UPON A TAKING, WE CANNOT VIEW SUCH SETTLEMENTS AS PROPER. SEE 22 COMP./GEN. 1112, 1114, AND CASES CITED THEREIN. WE WILL TAKE NO ACTION IN THAT CONNECTION, HOWEVER, SINCE AS ABOVE INDICATED THEY ARE FOR RECOVERY AS AN EXPENSE INCURRED FOR THE PURPOSE OF OBTAINING POSSESSION OF THE BUILDINGS REQUIRED TO BE CONSIDERED INCIDENT TO THE 15 PERCENTUM LIMITATION.

WITH RESPECT TO THE INDEMNITY PROVISIONS CONTAINED IN PARAGRAPHS 22 (B) AND 24 OF THE LEASE, IT MAY BE STATED FOR YOUR FUTURE GUIDANCE THAT OBLIGATIONS OF SUCH INDEFINITE AND UNLIMITED CHARACTER CONSISTENTLY HAVE BEEN REGARDED BY THE ACCOUNTING OFFICERS AS OBJECTIONABLE IN THE ABSENCE OF EXPRESS STATUTORY AUTHORITY THEREFOR. 15 COMP. DEC. 405; 16 ID. 38; 7 COMP. GEN. 507; 16 ID. 803. AS ADMITTED BY YOUR GENERAL COUNSEL, THE GENERAL SERVICES ADMINISTRATION HAS NO EXPRESS AUTHORITY FOR UNDERTAKINGS SUCH AS CONTAINED IN PARAGRAPHS 22 (B) AND 24 OF THE PRESENT LEASE. SUCH CIRCUMSTANCES AND IN VIEW OF THE PROVISIONS OF SECTION 3732, REVISED STATUTES, 41 U.S.C. 11 AND THE PROVISIONS OF SECTION 3679 (A) OF THE REVISED STATUTES, AS AMENDED BY THE ACT OF SEPTEMBER 6, 1950, 64 STAT. 765 (31 U.S.C. 665), IT MUST BE HELD THAT THE CONTRACTING OFFICER EXCEEDED HIS AUTHORITY IN INCLUDING SUCH PROVISIONS IN THE LEASE AND, ACCORDINGLY, MAY NOT BE RECOGNIZED AS IMPOSING ANY LEGAL OBLIGATION ON THE GOVERNMENT.

AS TO THE 25 PERCENTUM LIMITATION UPON ALTERATIONS, IMPROVEMENTS AND REPAIRS, THE RECORD SHOWS THAT PAYMENTS TOTALING $2,374,317.31 WERE MADE BY THE GOVERNMENT FOR REPAIRS TO THE BUILDING. SUCH PAYMENTS WERE MADE FROM APPROPRIATIONS AS FOLLOWS:

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SUCH STATEMENTS DO NOT APPEAR TO PERTAIN PRIMARILY TO THE APPROPRIATION CHARGEABLE BUT, ON THE CONTRARY, THEY APPEAR TO RELATE TO THE CIRCUMSTANCES UNDER WHICH THE ADMINISTRATION ASSUMED RESPONSIBILITY FOR CERTAIN VETERANS ADMINISTRATION OFFICE BUILDINGS. BOTH THE GENERAL STATEMENT AND THE HIGHLIGHT STATEMENT WHICH APPEAR TO PRESENT THE POSITION OF YOUR ADMINISTRATION CLEARLY SHOW THAT THE AMOUNTS REQUESTED FOR EMERGENCY OPERATING EXPENSES WERE INTENDED FOR USE INCIDENT TO THE EMERGENCY PROGRAM INVOLVING THE ACCOMMODATION OF ADDITIONAL EMPLOYEES REQUIRED IN CONNECTION WITH EXPANDED ACTIVITIES OF DEFENSE AND IMMEDIATELY RELATED AGENCIES OF THE REGULAR ESTABLISHMENT AND, EXCEPT FOR MINOR EXPENSES FOR SAFEGUARDING VITAL RECORDS, INVOLVE SPACE FOR THE EXPANSION OF REGULAR DEFENSE AND RELATED ACTIVITIES. NOWHERE, EITHER BY INFERENCE OR IN THE LANGUAGE OF THE HEARINGS ON THE ACT, DO WE FIND ANY JUSTIFICATION FOR USING THE APPROPRIATION " EMERGENCY OPERATING EXPENSES" TO HOUSE NONDEFENSE ACTIVITIES. THAT THE APPROPRIATION WAS INTENDED TO COVER COSTS OF EMERGENCY OPERATIONS IN THE DEFENSE EFFORTS FOR SPECIFIED AGENCIES AND NOT NORMAL OPERATIONS OF THE GOVERNMENT AS HERE INVOLVED IS CLEARLY ESTABLISHED FROM THE GENERAL STATEMENT WITH RESPECT TO THAT APPROPRIATION APPEARING IN PART 2, PAGES 488, 501 OF THE HEARINGS BEFORE THE HOUSE SUBCOMMITTEE ON THE SUPPLEMENTAL APPROPRIATION BILL FOR 1952. MOREOVER, AS POINTED OUT IN THE LETTER OF MARCH 5, 1954, THE GENERAL RULE IS THAT A SPECIFIC APPROPRIATION FOR A SPECIFIC OBJECT IS EXCLUSIVELY AVAILABLE THEREFOR AS AGAINST A MORE GENERAL APPROPRIATION. 17 COMP. GEN. 1050; 19 ID. 892; AND 24 ID. 807. ACCORDINGLY, THE APPROPRIATION " OPERATING EXPENSES"--- AS TO WHICH THE 25 PERCENTUM LIMITATION IS APPLICABLE--- BEING SPECIFICALLY AVAILABLE FOR NORMAL EXPENDITURES OF THIS NATURE WOULD APPEAR TO BE AVAILABLE IN THIS INSTANCE, TO THE EXCLUSION OF THE APPROPRIATION " EMERGENCY OPERATING EXPENSES" THE APPROPRIATION CHARGED FOR THE REPAIRS AND ALTERATIONS.

APPARENTLY ANTICIPATING THE FOREGOING CONCLUSION, THERE NOW HAS BEEN SUBMITTED A " CERTIFICATE OF DETERMINATION" EXECUTED ON FEBRUARY 1, 1955, BY THE ACTING COMMISSIONER OF PUBLIC BUILDINGS, PURSUANT TO THE PROVISIONS OF SECTION 210 (A) (8) OF THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949, AS AMENDED

(40 U.S.C. 490). THAT SECTION PROVIDES THAT---

WHENEVER AND TO THE EXTENT THAT THE ADMINISTRATOR HAS BEEN OR HEREAFTER MAY BE AUTHORIZED BY ANY PROVISION OF LAW OTHER THAN THIS SUBSECTION TO MAINTAIN, OPERATE, AND PROTECT ANY BUILDING, PROPERTY, OR GROUNDS SITUATED IN OR OUTSIDE THE DISTRICT OF COLUMBIA, INCLUDING THE CONSTRUCTION, REPAIR, PRESERVATION, DEMOLITION, FURNISHING, AND EQUIPMENT THEREOF, HE IS AUTHORIZED IN THE DISCHARGE OF THE DUTIES SO CONFERRED UPON HIM---

(8) TO REPAIR, ALTER, AND IMPROVE RENTED PREMISES, WITHOUT REGARD TO THE 25 PERCENTUM LIMITATION OF SECTION 278A OF THIS TITLE, UPON A DETERMINATION BY THE ADMINISTRATOR THAT BY REASON OF CIRCUMSTANCES SET FORTH IN SUCH DETERMINATION THE EXECUTION OF SUCH WORK, WITHOUT REFERENCE TO SUCH LIMITATION, IS ADVANTAGEOUS TO THE GOVERNMENT IN TERMS OF ECONOMY, EFFICIENCY, OR NATIONAL SECURITY: PROVIDED, THAT SUCH DETERMINATION SHALL SHOW THAT THE TOTAL COST (RENTALS, REPAIRS, ALTERATIONS, AND IMPROVEMENTS) TO THE GOVERNMENT FOR THE EXPECTED LIFE OF THE LEASE SHALL BE LESS THAN THE COST OF ALTERNATIVE SPACE WHICH NEEDS NO SUCH REPAIRS, ALTERATIONS, OR IMPROVEMENTS. A COPY OF EVERY SUCH DETERMINATION SO MADE SHALL BE FURNISHED TO THE GENERAL ACCOUNTING OFFICE;

ON THE BASIS OF THE COSTS USED IN THE CERTIFICATE THE TOTAL COST TO THE GOVERNMENT FOR THE INITIAL FIVE-YEAR TERM IS STATED AS $7,612,500, AND THE COST OF ALTERNATIVE SPACE REQUIRING NO REPAIRS OR ALTERATIONS IS STATED AS $8,004,840 OR AT THE RATE OF $3 PER SQUARE FOOT FOR 533,656 SQUARE FEET. WHILE ON THE BASIS FOR THE ABOVE COMPUTATION THE LEASING OF THE RAND MCNALLY BUILDING WOULD APPEAR TO BE ADVANTAGEOUS TO THE GOVERNMENT IN TERMS OF ECONOMY, IT FAILS TO TAKE INTO CONSIDERATION THE TOTAL COST TO THE GOVERNMENT. SPECIFICALLY, IT FAILS TO INCLUDE PAYMENTS TOTALING $102,937 VOLUNTARILY PAID TO THE 39 TENANTS FOR VACATING THE BUILDING, OR THE CASH PAYMENT OF $73,439 PAID TO RAND MCNALLY AFTER OFFSETTING OCCUPANCY COSTS AGAINST THE RENTAL CREDIT OF $300,000. NEITHER DOES IT INCLUDE THE COST OF RENTAL PAID FOR OTHER QUARTERS BY THE AGENCY OCCUPYING THE BUILDING WHICH THE GOVERNMENT WOULD NOT HAVE INCURRED HAD THE RAND MCNALLY BUILDING BEEN AVAILABLE FOR OCCUPANCY AS OF THE EFFECTIVE DATE OF THE LEASE. FURTHERMORE, IN DEMONSTRATING THE COMPARATIVE COSTS OF THE SPACE OCCUPIED AND ALTERNATIVE SPACE (ITEMS 1 AND 10), NO CONSIDERATION HAS BEEN GIVEN TO THE FACT THAT THERE WAS ONLY PARTIAL OCCUPANCY OF THE LEASED BUILDING DURING THE FIRST YEAR OF THE FIVE-YEAR TERM. IN THE CIRCUMSTANCES, THE CERTIFICATE MAY NOT BE ACCEPTED AS ESTABLISHING THAT THE LEASING OF THE RAND MCNALLY BUILDING WAS ADVANTAGEOUS TO THE GOVERNMENT IN TERMS OF ECONOMY AND EFFICIENCY. ACCORDINGLY, ON THE PRESENT RECORD, PAYMENTS FOR REPAIRS, ALTERATIONS AND IMPROVEMENTS WILL NOT BE CREDITED IN EXCESS OF $94,750 (25 PERCENT OF $375,000), PENDING YOUR FURTHER ACTION OR RECEIPT OF YOUR COMMENTS.

IN VIEW OF THE APPARENT FLAGRANT DISREGARD OF THE CONTROLLING STATUTES AND OTHER IRREGULARITIES IN THE EXECUTION OF THIS LEASE WE FEEL THAT WE HAVE NO ALTERNATIVE BUT TO INCLUDE THIS MATTER IN OUR REPORT TO THE CONGRESS INCIDENT TO THE ACTIVITIES OF PUBLIC BUILDINGS SERVICE, GENERAL SERVICES ADMINISTRATION.