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B-125444, December 2, 1955, 35 Comp. Gen. 319

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B-125444, DECEMBER 2, 1955, 35 COMP. GEN. 319

APPROPRIATIONS - FISCAL YEAR OBLIGATIONS - MAINTENANCE SERVICE CONTRACTS FRENCH LAW - SECTION 1311, SUPPLEMENTAL APPROPRIATION ACT, 1955 CONTRACTS EXECUTED BY A CONTRACTING OFFICER NEAR THE END OF THE FISCAL YEAR 1954, BUT NOT FORWARDED TO THE CONTRACTORS FOR SIGNATURE UNTIL JULY 1, MAY NOT BE RECORDED AS OBLIGATIONS OF THE FISCAL YEAR 1954 FUNDS UNDER SECTION 1311 OF THE SUPPLEMENTAL APPROPRIATION ACT, 1955, UNLESS THE FOLLOWING THREE FACTORS ARE PRESENT: (1) A BID IN WRITING, (2) ACCEPTANCE OF THE BID COMMUNICATED TO THE BIDDER IN THE SAME MANNER AS THE BID WAS MADE, AND (3) A CONTRACT WHICH INCORPORATES THE TERMS AND CONDITIONS OF THE BID WITHOUT QUALIFICATIONS. MAINTENANCE SERVICE CONTRACTS WHICH ARE ENTERED INTO NEAR THE END OF THE FISCAL YEAR 1954 FOR SERVICES TO BE PERFORMED IN THE SUCCEEDING FISCAL YEAR ARE CONTRACTS FOR CONTINUOUS SERVICES WHICH DO NOT REPRESENT A BONA FIDE NEED OF THE FISCAL YEAR 1954, AND SUCH CONTRACTS MAY NOT BE RECORDED AS VALID OBLIGATIONS AGAINST FISCAL YEAR 1954 FUNDS. ESTIMATES OF MUNICIPAL TAX LIABILITIES ON UNITED STATES PROPERTY LOCATED IN FOREIGN COUNTRIES, WHICH ARE BASED ON TAX BILLS RECEIVED IN PRIOR YEARS, MAY BE RECORDED AS VALID APPROPRIATION OBLIGATIONS PURSUANT TO SECTION 1311, SUPPLEMENTAL APPROPRIATION ACT, 1955; HOWEVER, ESTIMATES BASED ON THE POSSIBILITY THAT A FOREIGN MUNICIPALITY MIGHT ASSESS A TAX IN AN AMOUNT THAT IS A MATTER OF CONJECTURE DO NOT SUPPORT EVIDENCE OF SUCH LEGAL LIABILITY AS TO WARRANT A VALID APPROPRIATION OBLIGATION. A LETTER TO THE STATE DEPARTMENT AS A COPROPRIETOR OF A COOPERATIVE BUILDING IN PARIS, CONFIRMING THAT A MAJORITY DECISION TO REPLACE THE ELEVATOR WILL, UNDER FRENCH LAW, OBLIGATE ALL COOWNERS TO PAY THE PRO RATA SHARE OF THE COST, DOES NOT CONSTITUTE A BINDING AGREEMENT WHICH WILL SUPPORT A VALID OBLIGATION OF APPROPRIATIONS UNTIL THE MAJORITY DECISION IS MADE.

TO THE SECRETARY OF STATE, DECEMBER 2, 1955:

BY LETTER DATED AUGUST 26, 1955, THE ASSISTANT SECRETARY-1CONTROLLER REQUESTS RECONSIDERATION OF FOUR ITEMS IN OUR REPORT OF APRIL 22, 1955 (B- 114876) TO THE HOUSE AND SENATE COMMITTEES ON APPROPRIATIONS. THE REPORT CONCERNED THE BALANCES OF APPROPRIATIONS AND FUNDS UNDER CONTROL OF THE DEPARTMENT OF STATE AS OF JUNE 30, 1954, AS REPORTED BY YOU PURSUANT TO SECTION 1311 OF THE SUPPLEMENTAL APPROPRIATION ACT, 1955, 68 STAT. 830, 31 U.S.C. 200. THE ASSISTANT SECRETARY STATES THAT IN THE OPINION OF YOUR DEPARTMENT THE ITEMS IN QUESTION ARE NOT CONTRARY TO THE PROVISIONS OF SECTION 1311 AND REQUESTS OUR DECISION THEREON.

THE FIRST ITEM INVOLVES FOUR CONTRACTS EXECUTED BY THE AMERICAN EMBASSY CONTRACTING OFFICER, PARIS, FRANCE, ON JUNE 26 AND JUNE 30, 1954, BUT WHICH WERE NOT FORWARDED TO THE CONTRACTORS FOR SIGNATURE UNTIL AFTER JULY 1. WE QUESTIONED THE RECORDING OF THE AMOUNTS INVOLVED AS OBLIGATIONS INCURRED DURING FISCAL YEAR

1954 BECAUSE THERE WAS NO EVIDENCE IN THE FILE TO SHOW THAT THE BIDS WERE ACCEPTED BEFORE THE END OF THAT FISCAL YEAR, SUCH AS WOULD CREATE A BINDING CONTRACTUAL RELATIONSHIP BETWEEN THE PARTIES. YOUR DEPARTMENT CONTENDS THAT THERE WAS A "BINDING OFFER" IN EACH CASE AND THAT THE SIGNING OF THE CONTRACTS ON JUNE 26 AND JUNE 30, 1954,"IS THE EVIDENCE THAT THE BIDS WERE ACCEPTED PRIOR TO THE CLOSE OF FISCAL YEAR 1954, AND THROUGH THIS ACTION, THE CONTRACTS WERE CONCLUDED.' FROM THIS CONTENTION IT WOULD APPEAR THAT THE CUSTOMARY NOTICES OF ACCEPTANCE WERE NOT FURNISHED TO THE CONTRACTORS AND THAT THE SIGNING OF THE CONTRACTS BY THE CONTRACTING OFFICER CONSTITUTED THE ACCEPTANCE OF THE BIDS. HOWEVER, ASSUMING THAT SUCH IS THE CASE, BEFORE IT CAN BE HELD THAT THERE WAS A BINDING AGREEMENT IN EACH INSTANCE THE FOLLOWING FACTORS MUST BE PRESENT:

1. EACH BID MUST HAVE BEEN IN WRITING.

2. THE ACCEPTANCE OF EACH BID MUST HAVE BEEN COMMUNICATED TO THE

BIDDER IN THE SAME MANNER AS THE BID WAS MADE. IF THE BID WAS

MAILED, THE CONTRACT MUST HAVE BEEN PLACED IN THE MAILS BEFORE

THE CLOSE OF FISCAL YEAR 1954. IF THE BID WAS DELIVERED OTHER

THAN BY MAIL, THE CONTRACT MUST HAVE BEEN DELIVERED IN LIKE

MANNER BEFORE THE END OF FISCAL YEAR 1954.

3. EACH CONTRACT MUST HAVE INCORPORATED THE TERMS AND CONDITIONS

OF THE RESPECTIVE BID WITHOUT QUALIFICATION. OTHERWISE, IT MUST

BE VIEWED AS A COUNTEROFFER AND THERE WOULD BE NO BINDING AGREEMENT

UNTIL ACCEPTED BY THE CONTRACTOR.

THE MATTER WILL BE EXAMINED FURTHER AND IF ALL OF THE FOREGOING FACTORS ARE FOUND TO HAVE EXISTED WE WILL NOT QUESTION FURTHER THE OBLIGATIONS AGAINST THE FISCAL YEAR 1954 FUNDS. IF ANY ONE OR MORE OF THE FACTORS WERE NOT PRESENT, OUR COMMENTS WILL STAND.

THE SECOND ITEM INVOLVES TWO MAINTENANCE SERVICE CONTRACTS FOR GOVERNMENT PROPERTIES IN PARIS. ONE OF THE CONTRACTS WAS FOR WINDOW CLEANING SERVICES AT TWO GOVERNMENT-OCCUPIED BUILDINGS, EXTENDING FOR ONE YEAR FROM JUNE 27, 1954. THE FULL AMOUNT OF THE CONTRACT ($1,200) WAS RECORDED AS AN OBLIGATION AGAINST FISCAL YEAR 1954 FUNDS. THE OTHER CONTRACT WAS FOR GARDENING SERVICES EXTENDING FROM JUNE 1, 1954, TO MAY 31, 1955, ON THE BASIS OF WHICH THE FULL AMOUNT OF THE CONTRACT ($1,704) WAS OBLIGATED AGAINST FISCAL YEAR 1954 FUNDS. THE BASIS UPON WHICH WE QUESTIONED THE VALIDITY OF THESE OBLIGATIONS WAS THAT THE SERVICES CONTRACTED FOR DID NOT APPEAR TO BE INTENDED TO SERVE A BONA FIDE NEED OF THE FISCAL YEAR, CURRENT AT THE TIME THE CONTRACTS WERE EXECUTED.

THE GENERAL RULE FOR LEGALLY OBLIGATING A FISCAL YEAR APPROPRIATION IS THAT THE SUPPLIES OR SERVICES ARE REQUIRED TO SERVE A BONA FIDE NEED OF THE FISCAL YEAR IN WHICH THE NEED ARISES, AND ORDINARILY WHERE A CONTRACT IS ENTERED INTO DURING ONE FISCAL YEAR AND THE SERVICES CONTRACTED FOR ARE NOT PERFORMED OR REQUIRED UNTIL THE SUCCEEDING FISCAL YEAR THE APPROPRIATION CURRENT AT THE TIME THE

SERVICES ARE RENDERED IS PROPERLY CHARGEABLE WITH THE COST. 21 COMP. GEN. 1159; 27 ID. 764; B-114619, OF APRIL 17, 1953; B-123964, OF AUGUST 23, 1955.

ONE OF THE CONTRACTS HERE INVOLVED WAS DATED JUNE 1, 1954, AND THE OTHER WAS DATED JUNE 27, 1954. BOTH CONTRACTS APPEAR TO CALL FOR CONTINUING SERVICES AS DISTINGUISHED FROM A ONE JOB ARRANGEMENT, AND OUR REVIEW OF RECEIVING REPORTS IN THE CONTRACT FILES INDICATES THAT NO WORK WAS PERFORMED UNDER EITHER CONTRACT UNTIL SEPTEMBER 1954. HENCE, WE MUST CONCLUDE THAT THE SERVICES INVOLVED DID NOT SERVE A BONA FIDE NEED OF FISCAL YEAR 1954, AND FOR THAT REASON THE CONTRACTS MAY NOT BE REGARDED AS CREATING A VALID OBLIGATION AGAINST FISCAL YEAR 1954 FUNDS.

THE THIRD ITEM INVOLVES PRINCIPALLY AN UNSUBSTANTIATED OBLIGATION OF $2,000 TO COVER ANTICIPATED MUNICIPAL TAXES ON TWO BUILDINGS FOR WHICH NO TAX BILLINGS HAD BEEN RECEIVED DURING PRIOR YEARS. THE PRESENTATION ATTACHED TO THE ASSISTANT SECRETARY'S LETTER EXPLAINED THAT THIS ESTIMATED OBLIGATION WAS RECORDED BECAUSE, IN EARLY JULY 1954, A TAX BILL WAS RECEIVED ON A THIRD BUILDING FOR WHICH NO BILLINGS HAD BEEN RECEIVED IN PREVIOUS YEARS AND ON THAT BASIS IT WAS CONSIDERED THAT TAXES MIGHT BE ASSESSED ON THE OTHER TWO BUILDINGS. IT IS FURTHER STATED THAT THESE TWO BUILDINGS ARE LOCATED IN SEPARATE MUNICIPALITIES IN THE PARIS SUBURBS AND THAT THE TAX AUTHORITIES HAVE ADVISED THAT A TAX BILL FOR $824 WILL BE RENDERED BY THE MUNICIPALITY IN WHICH THE SMALLER BUILDING IS LOCATED. THE EMBASSY PROPOSES TO CHARGE THAT AMOUNT TO THE $2,000 ESTIMATED OBLIGATION AND HOLD THE BALANCE FOR PAYMENT OF TAXES ON THE LARGER BUILDING WHEN AND IF THE SECOND MUNICIPALITY PRESENTS A BILL.

AT THE TIME THE OBLIGATION IN QUESTION WAS RECORDED THERE WAS ONLY A BARE POSSIBILITY THAT A TAX ASSESSMENT WOULD BE LEVIED AGAINST THE TWO BUILDINGS AND THE AMOUNT OF SUCH POSSIBLE TAX LIABILITY WAS A MATTER OF CONJECTURE. WE MUST CONCLUDE, THEREFORE, THAT THERE WAS INSUFFICIENT EVIDENCE OF A LEGAL LIABILITY OF THE UNITED STATES FOR THE AMOUNT INVOLVED TO SUPPORT A VALID OBLIGATION UNDER THE PROVISIONS OF SECTION 1311 ABOVE. HOWEVER, SINCE THE TAX AUTHORITIES NOW HAVE ADVISED THAT A TAX BILL OF $824 WILL BE PRESENTED ON ONE OF THE BUILDINGS, AN OBLIGATION IN THAT AMOUNT MAY BE CONTINUED AGAINST FISCAL YEAR 1954 FUNDS IF THE ITEM IS OTHERWISE PROPERLY CHARGEABLE IN THAT YEAR. THE BALANCE OF THE $2,000 OBLIGATION MAY NOT BE CONTINUED UNLESS SIMILAR ADVICE OF A PENDING TAX BILL, OR OTHER ACCEPTABLE EVIDENCE OF A TAX LIABILITY, IS RECEIVED CONCERNING THE OTHER BUILDING.

THE REMAINING OBLIGATION ($3,838) FOR MUNICIPAL TAXES WAS RECORDED IN JUNE 1954 AS AN ESTIMATE OF THE GOVERNMENT'S TAX LIABILITY ON OTHER EMBASSY BUILDINGS IN PARIS. THE ESTIMATE WAS BASED UPON TAX BILLS RECEIVED ON THESE BUILDINGS FOR THE PREVIOUS YEAR. INASMUCH AS A TAX LIABILITY WITH RESPECT TO THESE BUILDINGS HAS BEEN ESTABLISHED, IT IS ONLY REASONABLE TO PRESUME THAT THE GOVERNMENT WILL BE SIMILARLY ASSESSED DURING THE CURRENT YEAR. ACCORDINGLY, WE WILL NOT QUESTION THE VALIDITY OF THE OBLIGATION NOR THE REASONABLENESS OF THE BASIS USED IN ESTIMATING THE AMOUNT THEREOF.

THE FOURTH ITEM PERTAINS TO AN OBLIGATION RECORDED ON JUNE 30, 1954, IN THE AMOUNT OF $857, REPRESENTING THE GOVERNMENT'S SHARE OF THE COST OF REPLACING THE ELEVATOR IN A BUILDING IN PARIS, OF WHICH THE GOVERNMENT IS COPROPRIETOR WITH SEVERAL PRIVATE TENANTS. REGARDING THIS ITEM, WE COMMENTED IN OUR REPORT AS FOLLOWS:

* * * THE FUNDS WERE OBLIGATED ON THE BASIS OF A LETTER DATED JUNE 29, 1954. THE

ITEM IN QUESTION IS NOT A VALID OBLIGATION OF FISCAL YEAR 1954 FUNDS INASMUCH AS THERE WAS NO BINDING AGREEMENT AT JUNE 30, 1954, OBLIGATING THE GOVERNMENT. IN FACT, IT WAS NOT DEFINITELY KNOWN AT THAT TIME THAT REPLACEMENT WOULD BE NECESSARY.

IN THE PRESENTATION ACCOMPANYING THE ASSISTANT SECRETARY'S LETTER IT IS STATED THAT UNDER FRENCH LAW AN AGREEMENT AMONG A MAJORITY OF COOWNERS TO UNDERTAKE REPAIRS OR ALTERATIONS IS BINDING ON ALL COOWNERS AND THE EXPENSES THEREOF MUST BE SHARED ON A PRO RATA BASIS. WHEN SUCH REPAIRS OR ALTERATIONS ARE CONTEMPLATED, THE COOPERATIVE MANAGEMENT FIRM SOLICITS THE VOTE AND COMMITMENT OF THE COOWNERS. A MAJORITY VOTE IN FAVOR REPRESENTS AN ORDER TO THE MANAGEMENT FIRM TO CONTRACT FOR THE NECESSARY WORK. THAT BASIS YOUR DEPARTMENT URGES THAT THE LETTER OF JUNE 29, 1954, WAS IN ESSENCE A CONTRACT OR ORDER REVOCABLE ONLY BY AN OVERRULING VOTE OF THE MAJORITY OF THE COOWNERS, AND UNTIL REVOKED IS EVIDENCE OF A LEGAL LIABILITY OF THE GOVERNMENT SUFFICIENT TO SUPPORT A VALID OBLIGATION OF FUNDS UNDER SECTION 1311. THE LETTER OF JUNE 29, 1954, STATES IN PERTINENT PART:

WE UNDERSTAND THAT ANOTHER MEETING WILL BE HELD WHEN FURTHER ESTIMATES FOR THIS PROJECT ARE IN YOUR HANDS, BUT THAT AT THE PRESENT TIME ONE ESTIMATE HAS BEEN RECEIVED FROM THE FIRM ROUX COMBALUSIER IN THE AMOUNT OF 3,000,000 FRANCS, OF WHICH THE GOVERNMENT'S SHARE WOULD BE 300,000 FRANCS.

THE PURPOSE OF THIS LETTER IS TO CONFIRM THAT A MAJORITY DECISION BY THE COPROPRIETORS OF 76 RUE SPONTINI TO REPLACE THE ELEVATOR IN THIS BUILDING WILL INVOLVE THE GOVERNMENT IN AN OBLIGATION TO PAY ITS SHARE OF SUCH REPLACEMENT COSTS.

WE CANNOT AGREE THAT THE ABOVE LETTER CONSTITUTES A BINDING COMMITMENT ON THE PART OF THE UNITED STATES. IT MERELY CONFIRMS THE GOVERNMENT'S UNDERSTANDING THAT A MAJORITY DECISION OF THE COPROPRIETORS WILL OBLIGATE THE GOVERNMENT TO PAY ITS PRO RATA SHARE OF THE COST. IT IS OUR VIEW THAT THE COMMITMENT DOES NOT COME INTO BEING UNTIL SUCH MAJORITY DECISION IS MADE AND THAT, UNDER THE CITED PROVISION OF FRENCH LAW, IF SUCH DECISION IS MADE THE LIABILITY TO PAY ATTACHES AUTOMATICALLY. HENCE, THE ONLY EFFECT THE LETTER OF JUNE 29 COULD HAVE HAD WAS TO RECORD THE GOVERNMENT'S DESIRE, AS ONE COPROPRIETOR, TO REPLACE THE ELEVATOR.

IT APPEARS SIGNIFICANT TO NOTE THAT, AT THE TIME OF OUR REVIEW IN FEBRUARY 1955, THERE WAS NO INDICATION THAT A MAJORITY DECISION HAD BEEN REACHED TO PROCEED WITH THE PROPOSED WORK. IN FACT, AT A MEETING OF THE COOWNERS ON OCTOBER 12, 1954, OVER THREE MONTHS AFTER THE CLOSE OF FISCAL YEAR 1954, IT WAS DECIDED TO TEST THE ELEVATOR FURTHER BEFORE DECIDING WHETHER A REPLACEMENT WAS NECESSARY.

IN VIEW OF THE FOREGOING, WE MUST CONCLUDE THAT NO BINDING COMMITMENT FOR THIS ITEM WAS EFFECTED DURING FISCAL YEAR 1954 AND THE AMOUNT OF $857 DOES NOT CONSTITUTE A VALID OBLIGATION OF FUNDS FOR THAT YEAR.