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B-131932, Mar. 13, 1958

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TO MR. LEO M. JOHNSON, CIVILIAN DISBURSING OFFICER, DEPARTMENT OF THE ARMY:

BY 1ST INDORSEMENT OF JANUARY 8, 1958, FILE NO. ENGCR 167 (26 SEPT 57) DA 45-108-ENG-565, THE OFFICE OF THE CHIEF OF ENGINEERS FORWARDED HERE YOUR REQUEST FOR REVIEW OF CERTAIN NOTICES OF EXCEPTIONS ISSUED BY OUR OFFICE CONCERNING PAYMENTS TO THE TOWN OF BRIDGEPORT, WASHINGTON, FOR FIRE PROTECTION, SNOW REMOVAL, STREET MAINTENANCE, FOR THE PERIOD FROM JULY 1, 1950, TO DECEMBER 31, 1956, UNDER CONTRACT NO. DA-45-108-ENG-565, DATED JUNE 15, 1950.

THE AUDIT ACTION TAKEN WAS BASED UPON THE PREMISE THAT SINCE THE GOVERNMENT HOUSING UNITS SERVED WITH THE ABOVE SERVICES ARE LOCATED WITHIN THE LIMITS OF THE TOWN OF BRIDGEPORT, THE UNITED STATES IS ENTITLED TO RECEIVE SUCH SERVICES WITHOUT CHARGE. 36 COMP. GEN. 286; 35 ID. 311; 31 ID. 405; 26 ID. 382. THEREFORE, IT WAS CONCLUDED THAT THE CONTRACT PURPORTING TO OBLIGATE THE UNITED STATES FOR SUCH SERVICES WAS UNAUTHORIZED.

THE REQUEST FOR REVIEW IS ON THE BASIS THAT THE ABOVE DECISIONS CITED IN THE NOTICE OF EXCEPTION ARE DISTINGUISHABLE FROM THE PRESENT CASE. THE PRIMARY BASIS FOR THE CLAIMED DISTINCTION APPEARS TO BE THAT CITED DECISIONS CONCERNED CITIES HAVING POPULATIONS GREATER THAN BRIDGEPORT'S POPULATION OF APPROXIMATELY 300; THAT ITS POPULATION WAS GREATLY INCREASED BY THE INFLUX OF APPROXIMATELY 200 GOVERNMENT WORKERS WHO OCCUPIED THE 40 GOVERNMENT CONSTRUCTED HOUSES AND TRAILERS WHICH WERE LOCATED APPROXIMATELY FIVE BLOCKS FROM THE INHABITED TOWN AREA; THAT THE INCREASE IN TAX RECEIPTS WAS NEGLIGIBLE DUE TO WORKERS OCCUPYING GOVERNMENT HOUSING; AND THAT SINCE THE CITY DID NOT HAVE POLICE AND FIRE PROTECTION CONSIDERED AS ADEQUATE TO MEET A STANDARD SATISFACTORY TO THE GOVERNMENT AND SINCE THE CITY WAS NOT FINANCIALLY ABLE TO IMPROVE THE SERVICES BEING RENDERED ACTION WAS TAKEN TO PROVIDE THESE SERVICES AT THE LEAST COST TO THE GOVERNMENT. IT IS STATED THAT AT THE TIME THE ABOVE CONTRACT WAS EXECUTED IT WAS BELIEVED THAT THE STATUTE AUTHORIZING THE CONSTRUCTION OF THE CHIEF JOSEPH DAM (JULY 24, 1946, 60 STAT. 634, 637 AS IMPLEMENTED BY H.DOC. 693, 79TH CONGRESS) CONSTITUTED SUFFICIENT AUTHORITY FOR EXECUTION OF THE CONTRACT AND THAT THE PAYMENTS UNDER THE CONTRACT ARE NOT CONSIDERED AS A PAYMENT IN LIEU OF TAXES BUT ON THE CONTRARY AS A REIMBURSEMENT TO THE TOWN TO PERMIT THE PURCHASE OF FIRE EQUIPMENT AND SERVICES TO BRING PROTECTION UP TO AN ADEQUATE STANDARD.

UNDER ARTICLE I OF THE CONTRACT THE TOWN IS OBLIGATED TO FURNISH THE ABOVE SERVICES TO THE GOVERNMENT FACILITIES ALL LOCATED WITHIN THE CORPORATED LIMITS OF THE TOWN TO AN EXTENT AND STANDARD SATISFACTORY TO THE GOVERNMENT "BUT IN NO EVENT TO A LESS EXTENT AND STANDARD THAN SUCH SERVICES ARE FURNISHED ANY OTHER RESIDENTIAL AREA OF THE TOWN.' UNDER ARTICLE III (B) THE TOWN IS REQUIRED TO

PROVIDE FIRE PROTECTION TO MEET THE NATIONAL UNDERWRITERS' REQUIREMENTS FOR TOWNS OF SIMILAR POPULATION. IT IS SPECIFIED THAT THE MINIMUM EQUIPMENT AND PERSONNEL TO BE PROVIDED SHALL CONSIST OF ONE 1,000 GALLON PER MINUTE PUMPER COMPLETELY EQUIPPED, AUXILIARY HOSE AND LADDER, TRUCK AND CHEMICAL ENGINE, ONE FIRE CHIEF, ONE PAID FIREMAN ON 24-HOUR DUTY, AND A TRAINED VOLUNTEER FIRE DEPARTMENT OF NOT LESS THAN 12 MEMBERS. THE TENOR OF THE CONTRACT IN ITS ENTIRETY APPEARS TO BE THAT SO FAR AS CONCERNS THE SERVICES HERE INVOLVED THE RESIDENTS OF THE GOVERNMENT OWNED AREA SHALL HAVE MADE AVAILABLE TO THEM SUCH SERVICES TO THE SAME EXTENT AS MAY BE PROVIDED FOR ANY OTHER RESIDENTIAL AREA.

IN CONSIDERATION FOR THE FURNISHING OF THE ABOVE SERVICES ARTICLE II OF THE CONTRACT PURPORTS TO OBLIGATE THE GOVERNMENT FOR AN ANNUAL PAYMENT OF $2,280 TO BEGIN UPON COMPLETION OF A MAJOR PORTION OF THE GOVERNMENT- CONTROLLED HOUSING AND OCCUPANCY THEREOF. WHILE IT IS URGED THAT THE CONTRACT MAY NOT BE CONSIDERED AS A CONTRACT FOR PAYMENTS TO THE TOWN "IN LIEU OF TAXES," OR THAT EITHER PARTY THERETO CONSIDERED IT AS SUCH, THE RECORD SHOWS THAT THE STIPULATED ANNUAL PAYMENT WAS CALCULATED BY AN APPROXIMATION OF THE TAX RATES SO THAT THE PAYMENTS WOULD BE COMPARABLE TO THOSE WHICH PRIVATE CITIZENS WOULD PAY FOR SUCH SERVICES FOR CORRESPONDING PROPERTY. THUS, IT APPEARS THAT THE EFFECT OF THE ARRANGEMENT IS TANTAMOUNT TO GENERAL TAXATION TO COVER THE OVERALL PRO RATA COST OF THE SERVICES TO BE FURNISHED UNDER THE CONTRACT WHICH SERVICES PRESUMABLY HAVE BEEN MADE AVAILABLE TO OTHER RESIDENTS OF THE TOWN WITHOUT SPECIAL SERVICE OR OTHER CHARGES OTHER THAN THE PAYMENT OF GENERAL TAXES. AS SUCH, THE ANNUAL PAYMENT PROVIDED FOR UNDER THE CONTRACT, IS NOTHING MORE OR LESS THAN A PAYMENT IN LIEU OF TAXES WHICH IS UNAUTHORIZED IN THE ABSENCE OF EXPRESS STATUTORY AUTHORITY THEREFOR. 31 COMP. GEN. 405; 23 ID. 406. THAT IT WAS SO INTENDED IS EVIDENCED BY THE FOURTH AND SIXTH INDORSEMENTS TO THE PRELIMINARY REPORT ON THE PROPOSED HOUSING UNITS, DATED MAY 3, 1949, WHICH RECITE RESPECTIVELY, THAT MUNICIPAL SERVICES IN CONNECTION THEREWITH ARE "TO BE EFFECTED BY GOVERNMENT PAYMENTS IN LIEU OF TAXES" AND THAT "SERVICES FURNISHED BY THE TOWN OF BRIDGEPORT AND GOVERNMENT PAYMENTS IN LIEU OF TAXES * * * SHOULD BE * * * ON AN EQUITABLE BASIS.' TO THE SAME EFFECT IS A STATEMENT IN A SUPPLEMENTAL MEMORANDUM DATED OCTOBER 20, 1949, TO DESIGN MEMO NO. 7 COVERING THE HOUSING UNITS THAT "FINANCIAL ASSISTANCE (TO THE TOWN OF BRIDGEPORT) FROM THE GOVERNMENT, IN THE FORM OF PAYMENTS IN LIEU OF TAXES, WILL BE REQUIRED," TO ENABLE THE TOWN TO SUPPLY POLICE AND FIRE PROTECTION AND INSTITUTE A GARBAGE COLLECTION SYSTEM.

OUR DECISIONS CONSISTENTLY HAVE HELD THAT CONTRACTS ENTERED INTO WITH MUNICIPALITIES FOR FURNISHING FIRE AND POLICE PROTECTION AND OTHER GOVERNMENTAL SERVICES TO FACILITIES OF THE FEDERAL GOVERNMENT LOCATED WITHIN THEIR BOUNDARIES DO NOT GIVE RISE TO VALID ENFORCEABLE OBLIGATIONS. 15 COMP. GEN. 295; 24 ID. 599; 31 ID. 405; 35 ID. 311; 36 ID. 286. THIS, IS IN ACCORDANCE WITH THE PRINCIPLE, RECOGNIZED BY THE OVERWHELMING WEIGHT OF AUTHORITY THAT THE FURNISHING OF FIRE PROTECTION IS A GOVERNMENTAL FUNCTION THE EXERCISE OF WHICH CARRIES WITH IT NO POWER TO INTERPOSE CONDITIONS NOT PROVIDED BY LAW. THE RULE APPLIES TO SMALL CITIES OR TOWNS TO THE SAME EXTENT AS TO LARGER CITIES OR TOWNS. 26 COMP. GEN. 382; B-129013, SEPTEMBER 20, 1956.

AT THE TIME THE ABOVE CONTRACT WAS ENTERED INTO THE TOWN OF BRIDGEPORT WAS CLASSIFIED AS A FOURTH CLASS TOWN. UNDER SECTION 35.27.370 (4) OF THE REVISED CODE OF WASHINGTON, THE COUNCIL OF EVERY TOWN IS EMPOWERED TO ESTABLISH, IMPROVE, AND REPAIR STREETS, SIDEWALKS AND PLACES WITHIN THE TOWN. UNDER SUBPARAGRAPH 6 OF THE ABOVE SECTION EVERY TOWN IS AUTHORIZED TO PROVIDE FIRE ENGINES AND ALL OTHER NECESSARY OR PROPER APPARATUS FOR THE PREVENTION AND EXTINGUISHMENT OF FIRES. UNDER SUBPARAGRAPH 8 EVERY TOWN IS AUTHORIZED TO LEVY

AND COLLECT ANNUALLY A PROPERTY TAX FOR THE PAYMENT OF CURRENT EXPENSES AND INDEBTEDNESS. THE DUTY TO PAY THE TAX SO LEVIED IS IN NO WAY DEPENDENT ON OR MEASURED BY THE SERVICE RENDERED ANY PARTICULAR PROPERTY. IN THIS CONNECTION THE 14TH AMENDMENT OF THE WASHINGTON STATE CONSTITUTION EXPRESSLY PROVIDES THAT PROPERTY OF THE UNITED STATES SHALL BE EXEMPT FROM TAXATION.

SINCE THE ABOVE CONTRACT WOULD HAVE THE EFFECT OF NULLIFYING THE TAX EXEMPT STATUS OF THE GOVERNMENT PROPERTY AND SINCE NO STATUTORY AUTHORITY HAS BEEN CITED AUTHORIZING PAYMENT OF ANY AMOUNT IN LIEU OF TAXES IN THIS INSTANCE, THE ABOVE CONTRACT MUST BE REGARDED AS UNAUTHORIZED AND VOID AB INITIO, AND THE EXCEPTIONS TAKEN TO THE PAYMENTS WERE PROPER AND WILL BE CONTINUED.