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ANNUAL LIMITATION CONTAINED IN APPROPRIATIONS TO THE ARCHITECT OF THE CAPITOL SINCE 1927, 40 U.S.C. SEC. 166A (1970), IS APPLICABLE ONLY TO REGULAR AND SPECIAL GOVERNMENT EMPLOYEES OF THAT OFFICE, INCLUDING CONSULTING ARCHITECTS AND ENGINEERS WHO BY NATURE OF THE SUPERVISION GIVEN THEM BY FEDERAL PERSONNEL ARE TANTAMOUNT TO FEDERAL EMPLOYEES. TRAVEL BY INDEPENDENT CONSULTING ARCHITECTS AND ENGINEERS, WHETHER PAID UNDER A CONTRACT ON A FIXED FEE OR HOURLY RATE BASIS, OR ON A PER DIEM BASIS, ARE NOT COVERED BY THIS LIMITATION, EVEN IF THEY SEPARATELY STATE AND ARE SEPARATELY REIMBURSED FOR THEIR TRAVEL EXPENSES.

THE ARCHITECT OF THE CAPITOL - TRAVEL REIMBURSEMENT LIMITATION:

THIS DECISION IS IN RESPONSE TO AN INQUIRY FROM GEORGE M. WHITE, ARCHITECT OF THE CAPITOL (ARCHITECT) CONCERNING THE SCOPE OF THE TRAVEL EXPENSE LIMITATION APPEARING IN THE ANNUAL LEGISLATIVE BRANCH APPROPRIATION ACTS MAKING FUNDS AVAILABLE TO THE ARCHITECT FOR VARIOUS PURPOSES, AND WHETHER IT IS LIMITED SOLELY TO THE TRAVEL OF GOVERNMENT EMPLOYEES OR ALSO INCLUDES CONSULTING ARCHITECTS AND ENGINEERS.

THE LIMITATION IN QUESTION FIRST APPEARED IN THE LEGISLATIVE APPROPRIATION FOR FISCAL YEAR 1927, ACT OF MAY 13, 1926, CH. 294. STAT. 546 AND PROVIDED AS FOLLOWS:

"APPROPRIATIONS HEREIN MADE UNDER THE CONTROL OF THE ARCHITECT OF THE CAPITOL SHALL BE AVAILABLE FOR EXPENSES OF TRAVEL ON OFFICIAL BUSINESS NOT TO EXCEED IN THE AGGREGATE UNDER ALL FUNDS THE SUM OF $1,000."

THIS LIMITATION WAS PROPOSED BY THE ARCHITECT UPON THE RECOMMENDATION OF THE COMPTROLLER GENERAL AFTER IT WAS DISCOVERED THAT THE ARCHITECT HAD BEEN MAKING DISBURSEMENTS FOR TRAVEL WITHOUT STATUTORY AUTHORITY. SEE HEARINGS ON THE LEGISLATIVE ESTABLISHMENT APPROPRIATIONS BILL FOR 1927 BEFORE A SUBCOMMITTEE OF THE HOUSE COMMITTEE ON APPROPRIATIONS, 69TH CONG., 1ST SESS. 66-67 (1926). WITH MINOR CHANGES IN THE LANGUAGE, THIS PROVISION HAS CONTINUED TO BE INCLUDED IN THE ARCHITECT'S APPROPRIATIONS - MOST RECENTLY APPEARING IN THE LEGISLATIVE BRANCH APPROPRIATION ACT, 1973, PUB. L. NO. 95-94, AUGUST 5, 1977, 91 STAT. 653, 672, WHERE THE LIMITATION WAS SET AT $20,000.

THE ARCHITECT STATES THAT OVER THE YEARS, HE AND HIS PREDECESSORS HAVE BEEN INFORMALLY ADVISED BY OFFICIALS OF THE GAO THAT ANY AND ALL CLEARLY IDENTIFIABLE TRAVEL DISBURSEMENTS, INCLUDING SEPARATELY STATED OR SEPARATELY REIMBURSABLE TRAVEL DISBURSED TO ARCHITECTS AND ENGINEERS UNDER CONTRACT, ARE CHARGEABLE AGAINST THE TRAVEL LIMITATION CONTAINED IN THE APPROPRIATION TO THE ARCHITECT.

HE ALSO STATES THAT:

"THE EXTENSIVE CHARACTER OF THE CONSTRUCTION PROGRAMS DURING THE LAST TWO DECADES OF NECESSITY HAVE INVOLVED CONSIDERABLE TRAVEL BY ARCHITECTS AND ENGINEERS UNDER CONTRACT, THE AMOUNT OF WHICH COULD NOT BE FORECAST WITH ANY DEGREE OF ACCURACY FOR APPROPRIATION PURPOSES. HENCE, AS A RESULT OF THE INFORMAL ADVICE FROM YOUR OFFICE REFERRED TO SUPRA, THE VAST MAJORITY OF OUR CONTRACTS FOR PERSONAL SERVICES OF ARCHITECTS AND ENGINEERS HAVE CONSISTED OF PERCENTAGE-OF-CONSTRUCTION COST, LUMP-SUM AND HOURLY-RATE- SCHEDULE FEES WHICH INCLUDED ALL NECESSARY TRAVEL IN THE FEE BASIS WITHOUT SEPARATE IDENTIFICATION. WHEREVER TRAVEL OF ARCHITECTS AND ENGINEERS UNDER CONTRACT WAS NOT INCLUDED IN THE FEE BASIS, SUCH TRAVEL WAS CHARGED AGAINST THE APPROPRIATION LIMITATION, TOGETHER WITH ALL TRAVEL OF EMPLOYEES OF MY OFFICE.

"IN RECENT YEARS, THERE HAS BEEN AN INCREASE IN THE NUMBER AND THE MAGNITUDE OF CONTRACTS INVOLVING A LIMIT OF COST TOGETHER WITH AN HOURLY- RATE-SCHEDULE OF FEES. THIS CIRCUMSTANCE HAS RESULTED FROM AN EXPANSION IN NON-CONSTRUCTION TYPE WORK WHICH HAS ALSO BEEN THE KIND OF WORK THAT HAS BEEN DIFFICULT TO ADEQUATELY PROGRAM IN ADVANCE. FOR EXAMPLE, THE MASTER PLANNING ACTIVITY, THE SENATE OFFICE SYSTEMS RESEARCH PROJECT AND THE INITIAL INVESTIGATORY PHASE OF THE RESTORATION OF THE MAIN LIBRARY OF CONGRESS BUILDING ARE PROJECTS WHERE IT WAS DEEMED IN THE BEST INTEREST OF THE GOVERNMENT TO PROCEED IN THAT MANNER.

"IN ORDER TO AVOID THE NECESSITY OF COMING WITHIN THE PURVIEW OF THE TRAVEL LIMITATION, AS IT HAS BEEN INTERPRETED, WE HAVE HAD TO ASK THE PROSPECTIVE CONSULTANTS TO INCLUDE TRAVEL COSTS AS A PART OF THEIR QUOTED HOURLY RATES.

"A PARTY IN CONTRACT NEGOTIATIONS, OF COURSE, WILL PROTECT ITSELF BY CONTINGENCY DEMANDS, AS LONG AS EXTENT AND COST OF TRAVEL ARE UNKNOWN AND NOT REIMBURSABLE AT ACTUAL COST. SUCH DEMANDS ARE BOUND TO INCLUDE A RISK FACTOR, AND AGREED UPON TRAVEL FACTOR COSTS ARE LIKELY TO EXCEED ACTUAL EXPENDITURES IN THE END, PARTICULARLY IN CONTRACTS BASED ON HOURLY RATE SCHEDULES; THEY UNDULY IMPEDE THE NEGOTIATION PROCESS AND TEND TO RESULT IN LARGER FEES THAN WOULD OTHERWISE BE PAYABLE BY THE GOVERNMENT.

"IN MY PERSONAL JUDGMENT, THE REAL PURPOSE AND A PROPER INTERPRETATION OF THE INTENT OF THE LIMITATION ON TRAVEL IS TO LIMIT THE TRAVEL OF GOVERNMENT EMPLOYEES. IF THE PURPOSE WERE TO LIMIT THE TRAVEL OF CONSULTANTS UNDER CONTRACT WITH THE GOVERNMENT, THEN IT SHOULD MAKE NO DIFFERENCE WHAT KIND OF REIMBURSEMENT IS PROVIDED IN THE CONTRACT, I.E., HOURLY RATE, PERCENTAGE FEE, LUMP-SUM OR OTHER TYPE; THE ACTUAL COST OF TRAVEL CAN EASILY BE DETERMINED REGARDLESS OF THE METHOD OF PAYMENT FOR SERVICES ON TRAVEL, THEN WE MUST ASK FOR AN INCREASE IN THE LIMITATION SO THAT THE ARCHITECTS, ENGINEERS AND OTHER CONSULTANTS WITH WHOM WE CONTRACT, CAN PROPERLY PERFORM THE SERVICES THAT ARE REQUIRED BY THE GOVERNMENT.

"AS A RESULT OF THESE CONSIDERATIONS I ADVISED THE APPROPRIATIONS COMMITTEES DURING OUR ANNUAL APPROPRIATION HEARINGS FOR THE FISCAL YEAR 1977 THAT I CONSIDER THE TRAVEL LIMITATION CLAUSE IN QUESTION TO BE INTENDED AS A LIMITATION ON TRAVEL OF GOVERNMENT EMPLOYEES AND ON THEIR ACTIVITIES, AND NOT ON TRAVEL OF ARCHITECTS, ENGINEERS AND CONSULTANTS UNDER CONTRACT. NO ISSUE WAS TAKEN WITH MY INTERPRETATION BY THE COMMITTEES OR OTHER AUTHORITY OF THE CONGRESS."

AS TO THAT LATTER POINT, THE ARCHITECT STATED WHEN DISCUSSING THE REIMBURSEMENT OF TRAVEL EXPENSES DURING THE SENATE APPROPRIATIONS COMMITTEE HEARINGS:

"I MAY SAY ONE OTHER THING JUST AS AN INTERPRETATION. WE STATE HERE THAT TRAVEL IS DONE BY ARCHITECTS, ENGINEERS, AND OTHER CONSULTANTS. WHENEVER WE HAVE USED A CONSULTANT FOR EXPERT TESTIMONY IN THE EVENT OF LITIGATION WITH CONTRACTORS OR OTHERS AND WHERE THEY HAVE BEEN REIMBURSED ON A PER DIEM BASIS AND ARE NOT UNDER CONTRACT, WE HAVE REIMBURSED FOR TRAVEL TO THOSE INDIVIDUALS. WE HAVE INCLUDED THAT HERE, ALTHOUGH IT IS NOT ALTOGETHER CLEAR THAT THAT IS NECESSARY. THIS APPEARS TO BE, IN MY JUDGMENT, A LIMITATION ON GOVERNMENT EMPLOYEES AND THEIR ACTIVITIES, SINCE THE APPROPRIATION LANGUAGE STATES, 'OFFICIAL BUSINESS,' WHICH WOULD SEEM TO INDICATE THAT.

"I MENTION THAT BECAUSE CONSULTANTS THAT WE HIRE ON A CONTRACT BASIS OBVIOUSLY TRAVEL. THE ARCHITECTS FOR THE DIRKSEN BUILDING OR THE MADISON BUILDING, FOR EXAMPLE. NONE OF THEIR TRAVEL IS INCLUDED HERE, AS IT IS INCLUDED IN THEIR LUMP-SUM OR PERCENTAGE FEE. THIS IS PURELY OFFICIAL BUSINESS TRAVEL BY EMPLOYEES AND OTHERS MENTIONED." SEE HEARINGS ON H.R. 14238 BEFORE THE SENATE COMMITTEE ON APPROPRIATIONS, 94TH CONG., 2D SESS., AT 342 (1976).

NOTHING IN EITHER THE LANGUAGE OF THE LEGISLATIVE ESTABLISHMENT APPROPRIATION BILL FOR 1927, OR THE RELEVANT ACCOMPANYING REPORT (SEE H.R. REP. 568, 69TH CONG., 1ST SESS., 3 (1926)) EXPLAINS THE INTENDED SCOPE OF APPLICATION OF THE TRAVEL EXPENSE LIMITATION. HOWEVER, DURING THE HEARINGS ON THE 1927 ACT, THE FOLLOWING DISCUSSION TOOK PLACE REGARDING THE PROPOSED TRAVEL EXPENSE LIMITATION BETWEEN L.J. DICKINSON, HOUSE APPROPRIATIONS SUBCOMMITTEE CHAIRMAN, AND DAVID LYNN, THEN ARCHITECT OF THE CAPITOL:

"MR. DICKINSON. THE NEXT ITEM IS FOR THE SENATE OFFICE BUILDING, BUT IN IT YOU HAVE THIS NEW LANGUAGE, 'INCLUDING TRAVELING EXPENSES,' WITH REFERENCE TO THE SENATE OFFICE BUILDING. WHAT IS THE REASON FOR THAT?

"MR. LYNN. WE WERE ADVISED BY THE COMPTROLLER GENERAL'S OFFICE THAT WE OUGHT TO INSERT THAT PROVISION IN OUR VARIOUS ITEMS IN CASE WE HAD TO SEND A MAN OUT IN CONNECTION WITH SOME KIND OF WORK.

"MR. COLLINS. WHY WOULD IT NOT BE BETTER TO CARRY A SEPARATE CLAUSE HERE PROVIDING, FOR INSTANCE, THAT NOT OVER $1,000 FOR THE ITEMS LISTED HEREIN SHALL BE EXPENDED IN NECESSARY TRAVELING EXPENSES?

"MR. LYNN. I SHOULD LIKE TO GIVE YOU THIS STATEMENT IN REGARD TO TRAVELING EXPENSES:

TRAVELING EXPENSES UNDER THE OFFICE, BY AUTHORITY OF THE ARCHITECT OF THE CAPITOL, SINCE JULY 1, 1925:

CAPITOL BUILDING REPAIRS ---------- $ 72.06 CAPITOL POWER PLANT, 1926 ---------- 67.50 CAPITOL POWER PLANT, 1925-26, STOKERS, ETC --- 508.94 IMPROVING CAPITOL GROUNDS, 1926 ---------- 2.88 MAINTENANCE, HOUSE OFFICE BUILDING, 1925 ---- 29.12 CHAMBER MUSIC AUDITORIUM, LIBRARY OF CONGRESS ---------- 147.99

"IN CONNECTION WITH THE $2.88 FOR THE CAPITOL GROUNDS, I SENT OUR LANDSCAPE MAN TO BALTIMORE TO LOOK AT SOME SHRUBBERY WE WANTED TO PURCHASE FOR THE CAPITOL GROUNDS.

"THE AMOUNT EXPENDED IN CONNECTION WITH THE CAPITOL POWER PLANT FOR 1926 AND FOR 1925-26 WAS IN CONNECTION WITH THE STOKERS WE ARE INSTALLING. OUR SPECIFICATIONS

IT IS STATED THAT OUR INSPECTOR WILL BE SENT TO THE FACTORY AT CERTAIN INTERVALS TO INSPECT THE MATERIAL WHILE IT IS BEING FABRICATED.

"IN CONNECTION WITH THE EXPENDITURE FOR THE HOUSE OFFICE BUILDING, WE WERE AUTHORIZED TO EXPEND ABOUT NINE OR TEN THOUSAND DOLLARS IN EQUIPPING A NEW TELEPHONE EXCHANGE, AND I HAD TO SEND OUR DRAFTSMAN TO ATLANTIC CITY TO SEE MR. BACHARACH TO GET HIS APPROVAL OF THE PLANS. THE SPEAKER, WHO IS THE CHAIRMAN OF THE HOUSE OFFICE BUILDING COMMISSION, WAS OUT OF TOWN, AND MR. BACHARACH WAS THE MOST AVAILABLE MEMBER OF THE COMMISSION, SO WE SENT OUR DRAFTSMAN TO ATLANTIC CITY TO GET MR. BACHARACH'S APPROVAL.

"MR. DICKINSON. THE REASON YOU ARE ASKING FOR THIS LANGUAGE IS BECAUSE SOMETHING MIGHT HAPPEN IN CONNECTION WITH WHICH YOU WOULD NEED TO SEND A MAN OUT ON AN INSPECTION TRIP WITH REFERENCE TO THE PURCHASE OF SOMETHING FOR THE SENATE OFFICE BUILDING, THE HOUSE OFFICE BUILDING, OR THE CAPITOL GROUNDS?

"MR. LYNN. YES. HERETOFORE, WE HAVE NOT HAD THIS LANGUAGE IN OUR ITEMS, AND THE COMPTROLLER GENERAL'S OFFICE SUGGESTED THAT WE HAVE THIS TAKEN CARE OF THIS YEAR. ON THAT GROUND HE HAS LET OUR ACCOUNTS GO THROUGH DURING THE PAST YEAR."

HEARINGS ON THE LEGISLATIVE ESTABLISHMENT APPROPRIATIONS BILL FOR 1927 BEFORE A SUBCOMMITTEE OF THE HOUSE COMMITTEE ON APPROPRIATIONS, 69TH CONG. 1ST SESS., 66-67 (1926).

IT IS REASONABLE TO CONCLUDE FROM THE FOREGOING COLLOQUY THAT THE REFERENCE TO "OUR LANDSCAPE MAN," "OUR INSPECTOR," "OUR DRAFTSMAN" BY MR. LYNN WERE TO HIS EMPLOYEES. NONETHELESS, THIS LEGISLATIVE HISTORY IS NOT SUBSTANTIAL ENOUGH TO BE DISPOSITIVE OF THE QUESTION OF THE SCOPE OF THIS PROVISION.

WHILE A LITERAL READING OF THE STATUTE MIGHT LEAD ONE TO THE CONCLUSION THAT ANY AND ALL IDENTIFIABLE TRAVEL DISBURSEMENTS, INCLUDING SEPARATELY STATED OR SEPARATELY REIMBURSABLE TRAVEL EXPENSES INCURRED BY ARCHITECTS AND ENGINEERS UNDER CONTRACT, ARE CHARGEABLE AGAINST THE TRAVEL LIMITATION, WE DO NOT BELIEVE THAT THIS IS THE APPROPRIATE INTERPRETATION. AS THE ARCHITECT POINTS OUT, CONTRACTS LET BY HIS OFFICE FOR THE PERSONAL SERVICES OF ARCHITECTS AND ENGINEERS HAVE CONTAINED PROVISIONS FOR PERCENTAGE-OF-CONSTRUCTION-COST OR LUMP SUM PAYMENTS OR HOURLY-RATE-SCHEDULE FEE ARRANGEMENTS. EACH OF THESE MAY HAVE INCLUDED A FACTOR FOR PROSPECTIVE (I.E., ESTIMATED) TRAVEL IN THE FEE WITHOUT SEPARATE IDENTIFICATION. WHILE IT IS TRUE THAT THE ARCHITECT COULD REQUIRE HIS CONTRACTORS TO IDENTIFY SEPARATELY THEIR PROJECTED AND ACTUAL TRAVEL EXPENSES, THE SUBJECT APPROPRIATION LIMITATION DOES NOT, IN OUR VIEW, REQUIRE SUCH ACTION. THUS, FOR EXAMPLE, IF THE ARCHITECT WERE TO ADVISE PROSPECTIVE CONTRACTORS THAT THE APPROPRIATION CEILING WAS BEING APPROACHED AND THAT THEY COULD NOT BE REIMBURSED FOR TRAVEL EXPENSES, THE CONTRACTORS MIGHT ABSORB THE TRAVEL EXPENSES THEMSELVES BUT COMPENSATE BY INCREASING THEIR OVERALL FEES OR HOURLY RATE. ACCORDINGLY, THERE WOULD NOT SEEM TO BE ANY BENEFIT IN APPLYING THE TRAVEL LIMITATION TO THIS TYPE OF SITUATION.

MOREOVER, INSOFAR AS THIS STATUTORY PROVISION IS CONCERNED, WE SEE NO BASIS TO DIFFERENTIATE BETWEEN THE HANDLING OF THE TRAVEL EXPENSES OF INDEPENDENT CONSULTING ARCHITECTS AND ENGINEERS BASED ON WHETHER THE CONTRACTS UNDER WHICH THEY ARE ENGAGED PROVIDE FOR REMUNERATION ON A PER DIEM BASIS OR ON A FEE BASIS. THEREFORE, THAT DISTINCTION, WHICH THE ARCHITECT STATES THAT HE HAS TRADITIONALLY MADE BUT WITH WHICH HE NOW DISAGREES, NEED NOT BE FOLLOWED.

IN CONCLUSION, WE BELIEVE THAT THE STATUTORY LIMITATION SHOULD ONLY BE APPLIED TO TRAVEL BY REGULAR OR SPECIAL FEDERAL EMPLOYEES AND THAT TRAVEL BY INDEPENDENT CONSULTING ARCHITECTS OR ENGINEERS ENGAGED BY CONTRACT, NO MATTER HOW THEY ARE PAID, SHOULD NOT BE COUNTED AGAINST THE APPROPRIATION LIMITATION. IN DETERMINING WHETHER A CONSULTING ARCHITECT OR ENGINEER IS AN INDEPENDENT CONTRACTOR OR IS A SPECIAL GOVERNMENT EMPLOYEE, AND HENCE, THAT HIS OR HER TRAVEL SHOULD BE COUNTED AGAINST THE LIMITATION, CRITERIA SUCH AS THE DEGREE OF SUPERVISION BY OFFICERS OR EMPLOYEES OF THE OFFICE OF THE ARCHITECT OF THE CAPITOL SHOULD BE CONSIDERED. FOR A DISCUSSION OF OTHER FACTORS TO BE CONSIDERED, SEE 53 COMP.GEN. 543 (1974); 53 ID. 702 (1974); AND B-180703, JANUARY 30, 1976.

IN VIEW OF THE DEARTH OF LEGISLATIVE HISTORY ON THE INTENDED SCOPE OF THIS APPROPRIATION LIMITATION AND THE BROAD LANGUAGE OF THE PROVISION, WE BELIEVE THE ARCHITECT SHOULD PRESENT THIS PROBLEM TO THE CONGRESS AT THE NEXT SCHEDULED APPROPRIATIONS HEARINGS FOR ANY FURTHER LEGISLATIVE CLARIFICATION IT MAY DEEM NECESSARY OR APPROPRIATE.