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B-148493, Mar. 25, 1963

Number: B-148493

Date: 1963-03-25

B-148493, MAR. 25, 1963

TO MORGAN, HOLZHAUER, BURROWS, WENZEL AND KEENE:

IN YOUR LETTER OF FEBRUARY 12, 1963, YOU REQUESTED THAT WE REEXAMINE THE POSITION TAKEN IN OUR LETTER OF FEBRUARY 6, 1963, AFFIRMING THE DISALLOWANCE OF YOUR CLIENT'S CLAIM FOR $15,016.90, IN THE LIGHT OF CERTAIN REPRESENTATIONS MADE TO YOU BY THE DEPARTMENT OF JUSTICE. THIS CLAIM IS FOR DAMAGES ALLEGEDLY SUSTAINED AS A RESULT OF A BREACH OF A GOVERNMENT CONTRACT FOR THE TRANSPORTATION AND STORAGE OF HOUSEHOLD EFFECTS OF MILITARY PERSONNEL ORDERED TO AND FROM THE MARINE CORPS BASE AT TWENTY-NINE PALMS, CALIFORNIA.

OUR LETTER OF FEBRUARY 6, WAS TO THE EFFECT THAT SINCE YOUR CLAIM WAS ONE FOR UNLIQUIDATED DAMAGES ARISING OUT OF AN ALLEGED BREACH OF CONTRACT, IT FELL WITHIN A CLASS OF CLAIMS WHICH OUR OFFICE HAS CONSISTENTLY DECLINED TO CONSIDER ON THE MERITS. IN YOUR PRESENT LETTER YOU POINT OUT THAT ACTING ASSISTANT ATTORNEY GENERAL JOSEPH D. GUILFOYLE INDICATED THAT IF YOU SUBMIT YOUR CLAIM TO OUR OFFICE IN A SPECIFIC AMOUNT, SHOWING THE BASIS FOR YOUR COMPUTATION, YOU WILL HAVE PRESENTED A CLAIM FOR LIQUIDATED DAMAGES UPON WHICH OUR OFFICE MAY PASS, THUS POSSIBLY AVOIDING LITIGATION.

YOUR CLAIM IS NOW FOR A SUM CERTAIN ($15,016.90). YOU BASE YOUR COMPUTATION ON THE FOLLOWING ALLEGATIONS:

(1) DEVIATIONS FROM YOUR CLIENT'S CONTRACT WITH THE GOVERNMENT RESULTED IN GROSS REVENUE LOSS OF $33,370.89, FIGURED AT THE CONTRACT RATES;

(2) YOUR CLIENT'S RECORDS SHOW THAT VARIABLE COSTS CONSTITUTE 55PERCENT OF GROSS REVENUES.

THUS, YOU FIGURE THE VARIABLE COSTS ON THE GROSS REVENUE ALLEGED TO BE LOST AS $18,353.99, RESULTING IN A LIQUIDATED CLAIM FOR $15,016.90.

BLACK'S LAW DICTIONARY, THIRD EDITION, DEFINES "LIQUIDATED DAMAGES" AS A SPECIFIC SUM OF MONEY WHICH HAS BEEN EXPRESSLY STIPULATED IN ADVANCE BY THE CONTRACTING PARTIES AS THE AMOUNT OF DAMAGES TO BE RECOVERED BY ONE PARTY FOR A BREACH OF THE AGREEMENT BY THE OTHER, WHEREAS, "UNLIQUIDATED DAMAGES" ARE DEFINED AS DAMAGES SUCH AS ARE NOT YET REDUCED TO A CERTAINTY IN AMOUNT, NOTHING MORE BEING ESTABLISHED THAN THE PLAINTIFF'S RIGHT TO RECOVERY, OR SUCH AS CANNOT BE FIXED BY A MERE MATHEMATICAL CALCULATION FROM ASCERTAINED DATA IN THE CASE. NOWHERE IN THE INVOLVED CONTRACT IS PROVISION MADE FOR THE RECOVERY OF "LIQUIDATED DAMAGES" IN THE EVENT OF THE GOVERNMENT'S BREACH OF CONTRACT; ON THE CONTRARY, YOUR CLAIM HAS NOT YET BEEN REDUCED TO A CERTAINTY AND CANNOT BE FIXED

BY A MERE MATHEMATICAL CALCULATION FROM ASCERTAINED DATA IN THE CASE.

THE UNITED STATES SUPREME COURT IN WILLIAM CRAMP AND SONS V. UNITED STATES, 126 U.S. 495, 500 (1910), HELD THAT EXECUTIVE OFFICERS OF THE UNITED STATES ARE NOT AUTHORIZED TO ENTERTAIN AND SETTLE CLAIMS FOR UNLIQUIDATED DAMAGES. AND THE COURT OF CLAIMS AND THE DISTRICT COURTS HAVE HELD THAT ACCOUNTING OFFICERS, ALSO, ARE WITHOUT JURISDICTION TO CONSIDER CLAIMS FOR UNLIQUIDATED DAMAGES. POWER V. UNITED STATES, 18 CT.CL. 263, 275 (1883); DENNIS V. UNITED STATES, 20 CT.CL. 119, 121 (1885); STATE OF PENNSYLVANIA V. UNITED STATES, 36 CT.CL. 131, 135 (1901); STANDARD DREDGING CO. V. UNITED STATES, 71 CT.CL. 218 (1930); AND UNITED STATES V. ST. LOUIS CLAY PRODUCTS CO., 68 F.SUPP. 902, 905 906 (E.D.MO. 1946).

THE ACCOUNTING OFFICERS, HOWEVER, WHILE MAINTAINING THAT THEY HAVE JURISDICTION TO SETTLE CLAIMS FOR UNLIQUIDATED DAMAGES, FOLLOW THE GENERAL RULE THAT SUCH CLAIMS CANNOT BE ALLOWED. AS STATED IN 21 COMP. DEC. 134, 138 (1914), WHICH IS ILLUSTRATIVE OF OUR POSITION:

"* * * THE ACCOUNTING OFFICERS HAVE JURISDICTION TO SETTLE, EXCEPT WHERE OTHERWISE PROVIDED BY STATUTE, ANY AND ALL CLAIMS AGAINST THE GOVERNMENT, OF WHATEVER KIND OR DESCRIPTION THAT MAY BE PRESENTED TO THEM FOR SETTLEMENT, AND THEY HAVE THE POWER TO ALLOW ANY LEGAL CLAIM THAT IS SUPPORTED BY EVIDENCE FULLY SHOWING THE LIABILITY OF THE GOVERNMENT FOR THE AMOUNT CLAIMED OR ALLOWED. SOME CLAIMS, SUCH AS CLAIMS FOR UNLIQUIDATED DAMAGES RESULTING FROM BREACH OF CONTRACT, ARE OF A NATURE THAT MAY AND GENERALLY DO MAKE IT IMPRACTICABLE FOR THE ACCOUNTING OFFICERS TO DETERMINE WITH ACCURACY THEIR TRUE MERIT. SUCH CLAIMS OFTEN AND GENERALLY DO CALL FOR THE TAKING OF TESTIMONY, THE CROSS-EXAMINATION OF WITNESSES, THE WEIGHING OF CONFLICTING EVIDENCE, ETC., BEFORE ANY DETERMINATION AS TO THEIR JUSTNESS CAN BE REACHED. AND BECAUSE OF THIS, I.E., BECAUSE THE ACCOUNTING OFFICERS HAVE NOT THE NECESSARY MACHINERY FOR DETERMINING THE MERITS OF SUCH CLAIMS--- AND NOT BECAUSE OF ANY LACK OF JURISDICTION--- IT HAS BEEN A RULE, ADOPTED BY SUCCESSIVE COMPTROLLERS, NOT TO ALLOW THEM. * * *"

UNDER THE PROVISIONS OF 31 U.S.C. 71, THE GENERAL ACCOUNTING OFFICE HAS AUTHORITY TO SETTLE AND ADJUST ALL CLAIMS BY AND AGAINST THE UNITED STATES. THIS AUTHORITY, WHEN EXERCISED, IS CONCLUSIVE UPON THE EXECUTIVE AGENCIES OF THE UNITED STATES (SKINNER AND EDDY CORP. V. MCCARL, 275 U.S. 1, 4-5, FOOTNOTE 2 (1927) (, IN THE ABSENCE OF SPECIFIC PROVISIONS OF LAW DEROGATING FROM SUCH AUTHORITY OR IN THE ABSENCE OF LITIGATION WHICH MAY SUBSEQUENTLY DEVELOP AND IN WHICH THE DEPARTMENT OF JUSTICE IS REQUIRED UNDER THE LAW TO DEFEND OR PROSECUTE THE INTERESTS OF THE UNITED STATES. WE APPRECIATE THE DESIRABILITY OF AVOIDING THE TIME AND EXPENSE OF LITIGATION, IF POSSIBLE, AND WE ALSO APPRECIATE THE CONCERN OF THE DEPARTMENT OF JUSTICE IN EXPLORING THE AVAILABILITY OF PROCEDURES, OTHER THAN ACTIONS IN COURT, WHICH MIGHT BE AVAILABLE TO POTENTIAL LITIGANTS AGAINST THE UNITED STATES. HOWEVER, WHATEVER YOUR UNDERSTANDING MIGHT BE OF ANY REPRESENTATIONS MADE AS TO THE POSSIBLE REMEDIES AND RELIEF WHICH MIGHT BE AVAILABLE TO YOU, WE ARE CONCERNED WITH THE DISCHARGE OF OUR RESPONSIBILITIES AND DUTIES UNDER THE LAW. CONSIDERATION OF PROPERLY FILED CLAIMS BY OUR OFFICE IS AFFORDED IN ACCORDANCE WITH THE PROCEDURES AND PRECEDENTS ESTABLISHED ON THE BASIS OF OUR EXPERIENCE AND UNDERSTANDING OF THE LIMITATIONS UPON OUR HANDLING.

THE FACT THAT YOUR CLIENT WAS ADVISED TO FILE A CLAIM FOR AN AMOUNT STATED IN CERTAIN SUM AND THAT YOU OBTAINED THE IMPRESSION OF THE SUFFICIENCY OF THIS PROCEDURE DOES NOT SERVE TO REQUIRE OUR OFFICE TO CONSIDER THE CLAIM OF YOUR

CLIENT ON ITS MERITS AS MIGHT BE REFLECTED IN ANY PARTICULAR RECORDS MADE AVAILABLE. IT SHOULD BE NOTED THAT IN ANY CASE THE EXERCISE OF OUR CLAIMS SETTLEMENT FUNCTION IS ORDINARILY PREDICATED ON RECORDS MADE AVAILABLE AT OUR OFFICE, NOT AT SOME DISTANT LOCATION. WHILE YOU OBVIOUSLY HAVE STATED A CLAIM FOR A CERTAIN AMOUNT, THE FACILITIES OF OUR OFFICE ARE NOT SO DESIGNED AS TO SETTLE AND ADJUST CLAIMS AGAINST THE UNITED STATES BASED ON INSPECTION OF THE BOOKS AND RECORDS OF YOUR CLIENT AT A LOCATION OR LOCATIONS NOT NAMED. WE AGAIN EMPHASIZE THAT, AS FAR AS WE ARE AWARE, YOUR CLAIM IS BASED ON INTANGIBLE FACTORS WHICH MAY OR MAY NOT BE PROVEN AND WE FEEL THAT THERE IS NO REASONABLE BASIS UPON WHICH WE MIGHT PROCEED TO CONSIDER THE MERITS OF THIS CLAIM.

OUR DUTY IS TO PROTECT THE INTERESTS OF THE UNITED STATES AND TO PRESERVE PUBLIC FUNDS. IN THE PRESENT INSTANCE, WE DO NOT BELIEVE THAT PROPER PROTECTION OF THE GOVERNMENT'S INTERESTS PERMITS OUR OFFICE TO CONSIDER YOUR CLAIM ON ITS MERITS.