Text as published on gao.gov, https://www.gao.gov/products/b-197256, archived 2026-07-12. GAO published no original file for this decision. Rendered by Comptroller Desk.

B-197256, Nov 19, 1980

Number: B-197256

Date: 1980-11-19

B-197256, NOV 19, 1980

DIGEST: CITY OF OSCEOLA, MISSOURI, HAS NO LEGAL BASIS FOR RECOVERING FROM THE UNITED STATES AMOUNT OF INCREASED COSTS IT SUSTAINED BECAUSE OF EARLIER ERRONEOUS DETERMINATION OF ELIGIBLE GRANT COSTS BY ENVIRONMENTAL PROTECTION AGENCY, AS LONG AS FULL STATUTORY FEDERAL SHARE WAS PAID TO CITY WHEN GRANT WAS FINALLY MADE.

CLAIM OF CITY OF OSCEOLA, MISSOURI:

THE CITY OF OSCEOLA, MISSOURI, (CITY) HAS FILED A CLAIM AGAINST THE UNITED STATES ARISING FROM A SEWER AND WATER TREATMENT CONSTRUCTION PROJECT FUNDED BY A GRANT FROM THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (AGENCY). THE CITY ARGUES THAT, BECAUSE OF IMPROPER AND UNJUSTIFIED RULINGS BY THE AGENCY, THE PROJECT HAS BEEN DELAYED MANY YEARS AND CONSEQUENTLY THE CITY MUST INCUR EXTRA COSTS EXCEEDING $200,000 TO COMPLETE THE PROJECT. THE CITY SEEKS TO RECOVER THESE ADDED COSTS FROM THE GOVERNMENT. WE FIND NO LEGAL BASIS FOR RECOVERY.

THE FACTS

AS PART OF ITS HARRY S. TRUMAN RESERVOIR PROJECT, IT BECAME NECESSARY FOR THE UNITED STATES ARMY CORPS OF ENGINEERS (CORPS) TO ACQUIRE INTERESTS IN LAND OWNED BY THE CITY, WHICH INCLUDED STREETS, SIDEWALKS, PARKS, SEWERS, AND A SEWAGE TREATMENT SYSTEM. ACCORDINGLY, ON JULY 30, 1970, THE CORPS AND THE CITY ENTERED INTO A CONTRACT UNDER WHICH THE CITY WAS TO CONVEY TO THE GOVERNMENT ITS INTERESTS IN THE LAND AND FACILITIES WITHIN THE RESERVOIR PROJECT BOUNDARIES, AND TO RELOCATE AND RECONSTRUCT THE VARIOUS CITY FACILITIES. IN RETURN, THE CORPS WAS TO PAY THE CITY $145,890 AS REIMBURSEMENT FOR RELOCATION OF THE SEWERS AND TREATMENT WORKS, AND $383,000 AS REIMBURSEMENT FOR THE REMAINING RELOCATION WORK. THE CONTRACT SPECIFIED THAT PAYMENT WOULD NOT BE MADE UNTIL THE RELOCATION WORK WAS COMPLETED.

THE CREATION OF HARRY S. TRUMAN LAKE REQUIRED THE CITY TO CONSTRUCT TWO REPLACEMENT SEWER SYSTEMS. THE NORTH SIDE SYSTEM WAS COMPLETED IN EARLY 1973. THE SOUTH SIDE SYSTEM WAS DIVIDED INTO TWO SECTIONS TO SATISFY THE CLEAN WATER POLICIES OF THE STATE OF MISSOURI. SECTION I CONSISTED OF THE COLLECTOR SEWERS WHICH UNDER MISSOURI POLICIES WOULD NOT RECEIVE PRIORITY FOR FEDERAL GRANTS. SECTION II CONSISTED OF THE TREATMENT PLANT, LIFT STATIONS, FORCE MAINS, AND INTERCEPTOR SEWERS. IN AUGUST 1972 THE CITY APPLIED FOR A FEDERAL GRANT TO ASSIST IT IN THE CONSTRUCTION OF SECTION II.

THE CITY ESTIMATES THAT IN EARLY 1974 THE TOTAL COST OF THE SOUTH SIDE SYSTEM WOULD HAVE BEEN $625,427, CONSISTING OF $184,291 FOR SECTION I, $376,961 FOR

SECTION II, AND $64,175 FOR TECHNICAL SERVICES, ADMINISTRATIVE COSTS AND CONTINGENCIES. OF THIS AMOUNT THE CITY EXPECTED TO PAY $251,507. THE REMAINDER OF THE COST WAS TO BE MET BY GRANTS FROM THE FEDERAL GOVERNMENT AND THE STATE OF MISSOURI.

TO MEET ITS SHARE OF THE COST OF THE PROJECT, THE CITY PLANNED TO USE THE $145,890 IT WAS TO RECEIVE AS COMPENSATION UNDER ITS CONTRACT WITH THE THE CORPS. HOWEVER, IN FEBRUARY 1974, THE AGENCY'S REGIONAL OFFICE NOTIFIED THE CITY THAT $137,000 OF THE AMOUNT THE CITY WAS TO RECEIVE FROM THE CORPS WAS FOR RELOCATION OF FACILITIES WHICH WERE ALSO TO BE FUNDED BY THE AGENCY GRANT, AND THAT THEREFORE THIS AMOUNT WOULD BE DEDUCTED FROM THE TOTAL COST OF THE PROJECT ELIGIBLE FOR THE GRANT. THIS DECISION BY THE AGENCY SUBSTANTIALLY REDUCED THE AMOUNT OF THE GRANT AND LEFT THE CITY UNABLE TO FUND ITS SHARE OF THE COST OF THE PROJECT. THE CITY ATTEMPTED TO MARKET REVENUE BONDS TO MAKE UP THE DIFFERENCE, BUT FOR TECHNICAL REASONS THE BONDS WERE NOT MARKETABLE AT THAT TIME.

SUBSEQUENT TO THE AGENCY'S FEBRUARY 1974 DECISION, SEVERAL MEETINGS WERE HELD AMONG REPRESENTATIVES OF THE CITY, THE AGENCY, THE CORPS, AND, ON OCCASION, THE MISSOURI CLEAN WATER COMMISSION, IN AN ATTEMPT TO FUND THE PROJECT. AT THESE MEETINGS, THE CITY ATTEMPTED TO CONVINCE THE AGENCY THAT ITS DECISION TO DEDUCT THE BULK OF THE CORPS PAYMENT FROM ELIGIBLE COSTS WAS ERRONEOUS.

THERE IS NO INDICATION IN THE RECORD THAT THE CITY SUBMITTED ANY FORMAL ADMINISTRATIVE APPEAL FROM THE DECISION OF THE AGENCY'S REGIONAL OFFICE. WE UNDERSTAND THAT AT THAT TIME, THE AGENCY HAD NOT ESTABLISHED REVIEW AND HEARING PROCEDURES PERTAINING TO DENIAL OR AMOUNTS OF GRANT AWARDS. ANY RATE THE RECORD SHOWS NO FURTHER ACTION BY THE CITY BETWEEN OCTOBER 1974 AND OCTOBER 1976 TO TRY TO IMPLEMENT THE SOUTH SIDE PROJECT.

IN OCTOBER AND NOVEMBER 1976 THE CITY SUPPLIED THE AGENCY WITH LETTERS FROM THE CORPS INDICATING THAT THE CONTRACT PAYMENT WAS NOT A GRANT BUT RATHER REIMBURSEMENT TO THE CITY FOR DAMAGE TO ITS PROPERTY, AND ALSO SHOWING HOW THE $145,800 IN DAMAGES WAS CALCULATED. BASED ON THESE LETTERS THE AGENCY DECIDED THAT AN ADDITIONAL $30,000 OF THE CORPS PAYMENT SHOULD NOT BE DEDUCTED FROM THE ELIGIBLE COSTS OF THE PROJECT. AT THAT TIME THE AGENCY OFFERED THE CITY A GRANT IN THE AMOUNT OF $135,000. THE CITY ACCEPTED THIS OFFER AND THE FORMAL GRANT AGREEMENT BECAME EFFECTIVE MARCH 31, 1977.

ON JUNE 23, 1977, JOHN H. MORSE, THE AGENCY'S REGIONAL COUNSEL, SUBMITTED A MEMO TO CHARLES V. WRIGHT, THE ACTING REGIONAL ADMINISTRATOR, CONCERNING THE DEDUCTION OF THE CORPS PAYMENT IN CALCULATING THE GRANT TO THE CITY. HE STATED:

"THERE IS CURRENTLY NO PROGRAM OR POLICY GUIDANCE FROM HEADQUARTERS ON THE ISSUE OF DEDUCTION FROM ELIGIBLE PROJECT COSTS OF ANY SUMS AWARDED TO A MUNICIPALITY BY THE CORPS OF ENGINEERS AS COMPENSATION FOR MUNICIPAL FACILITIES TAKEN IN CONNECTION WITH RESERVOIR CONSTRUCTION. ***

"THE DIFFICULTY WITH LEGAL SUPPORT OF A POLICY TO DEDUCT PAYMENTS RECEIVED BY THE CITY FROM THE CORPS STEMS FROM THE PRINCIPLE THAT SUCH COMPENSATION IS NOT A GIFT OR A GRANT BUT IS COMPENSATION REQUIRED UNDER THE CONSTITUTION FOR THE TAKING OR DAMAGING OF PROPERTY, EVEN THOUGH IN THE CASE OF MUNICIPAL FACILITIES, THE MEASURE OF COMPENSATION MAY BE REPLACEMENT COST."

(CITY EXHIBIT D, AGENCY EXHIBIT 15)

AFTER SUBSEQUENT DISCUSSION WITH THE CITY, THE AGENCY'S REGIONAL ADMINISTRATOR AUTHORIZED THE CITY TO ADVERTISE FOR BIDS WITH THE UNDERSTANDING THAT THE AGENCY WOULD FUND SECTION II WITHOUT SUBTRACTING THE PAYMENT FROM THE CORPS FROM THE ELIGIBLE COSTS.

THERE ARE SOME DISCREPANCIES IN THE RECORD CONCERNING THE AMOUNTS OF THE LOW BID AND THE CONSTRUCTION CONTRACT EVENTUALLY AWARDED. THE CITY'S FIGURES, BASED ON A NOVEMBER 1979 LETTER FROM ITS CONSULTING ENGINEERS WHICH CLAIMS TO SET OUT "ACTUAL PROJECT COSTS BASED UPON CONSTRUCTION CONTRACT AWARDED IN 1977" (CITY EXHIBIT H), ARE $357,719 FOR SECTION I, $479,562 FOR SECTION II, AND $117,736 FOR TECHNICAL SERVICES, ADMINISTRATIVE COSTS, AND CONTINGENCIES, FOR A TOTAL OF $955,017. THE CITY'S SHARE OF THIS AMOUNT WOULD BE $459,833.

THE AGENCY'S FIGURES, BASED ON AN AUGUST 1977 INTERNAL MEMORANDUM SHOWING THE LOW BID (AGENCY EXHIBIT 16), ARE $436,280.50 FOR SECTION I AND $384,086 FOR SECTION II FOR A SUBTOTAL OF $820,366.50. THERE IS NO FIGURE GIVEN FOR TECHNICAL SERVICES, ADMINISTRATIVE COSTS, AND CONTINGENCIES, ALTHOUGH THE MEMORANDUM ESTIMATES THAT THE CITY'S SHARE OF ENGINEERING AND OTHER ASSOCIATED FEES WOULD BE ABOUT $80,000. BASED ON THESE FIGURES, THE CITY'S SHARE WOULD BE $554,689.

AMENDMENT NO. 2 TO THE GRANT AGREEMENT, WHICH REFLECTS BOTH THE ELIMINATION OF ANY DEDUCTION FOR THE CORPS PAYMENT AND COST INCREASES THROUGH OCTOBER 1977, INDICATES THAT THE PROJECT COST ELIGIBLE FOR THE GRANT WAS $427,900.

THE INCREASE IN THE CITY'S SHARE OF THE COST OF THE PROJECT BETWEEN 1974 AND THE AWARD OF THE CONSTRUCTION CONTRACT IN 1977 CAN BE CALCULATED AS $208,326 BASED ON THE CITY'S FIGURES, OR $303,182 BASED ON THE FIGURES SUPPLIED BY THE AGENCY. IT IS THE $208,326 INCREASE WHICH THE CITY NOW CLAIMS SHOULD BE AWARDED TO IT.

GAO JURISDICTION

AS A THRESHOLD MATTER, THE AGENCY URGES THAT THE GENERAL ACCOUNTING OFFICE NOT CONSIDER THE CITY'S CLAIM FOR SEVERAL REASONS. FIRST, IT ASSERTS THAT FORMER MAYOR GLEN F. TOALSON, WHO HAS PRESENTED THE CLAIM, HAS NOT SHOWN THAT HE IS AUTHORIZED TO REPRESENT THE CITY. SECOND, IT ARGUES THAT THE CLAIM PRESENTS QUESTIONS OF FACT WHICH ARE BEST RESOLVED BY THE AGENCY'S OWN ADMINISTRATIVE PROCEDURES. THIRD, IT CONTENDS THAT THE CITY HAS NOT EXHAUSTED THE ADMINISTRATIVE GRANT DISPUTE PROCEDURES WHICH ARE MANDATED BY THE CITY'S GRANT AGREEMENT. FINALLY, IT ARGUES THAT CONSIDERING THE CLAIM WOULD BE CONTRARY TO GAO'S OWN POLICY OF NOT INTERFERING WITH AN AGENCY'S RESPONSIBILITY FOR AWARDING AND ADMINISTERING GRANTS. WE DO NOT AGREE WITH THESE ARGUMENTS, FOR THE REASONS STATED BELOW.

1. AUTHORITY OF MR. TOALSON TO PRESENT CLAIM:

THE AGENCY ARGUES THAT NOTHING IN THE RECORD BEFORE IT ESTABLISHES THAT FORMER MAYOR GLEN A. TOALSON IS AUTHORIZED TO PRESENT A CLAIM ON BEHALF OF THE CITY. HOWEVER, THE OSCEOLA CITY COUNCIL ADOPTED A RESOLUTION ON APRIL 6, 1979, DESIGNATING MR. TOALSON AS "SPECIAL REPRESENTATIVE AND LIAISON" OF THE CITY FOR PURPOSES OF NEGOTIATING AND MAKING AGREEMENTS WITH THE UNITED STATES, THE AGENCY, THE CORPS, AND ALL OTHER FEDERAL DEPARTMENTS AND AGENCIES ON ALL MATTERS CONCERNING THE TRUMAN PROJECT. BASED ON THIS RESOLUTION WE CONCLUDE THAT FORMER MAYOR TOALSON IS AUTHORIZED TO PRESENT THE CLAIM ON BEHALF OF THE CITY.

2. QUESTIONS OF FACT:

THERE IS, AS DESCRIBED EARLIER, A DIFFERENCE OF $94,856 IN THE AMOUNT OF INCREASED COSTS FROM 1974 TO THE DATE THE CONSTRUCTION CONTRACT WAS AWARDED IN 1977 BETWEEN THE CITY'S CALCULATIONS AND THE AGENCY'S. HOWEVER, THE CITY'S FIGURES ARE LOWER, AND ITS CLAIM IS BASED ON THIS LOWER FIGURE. IN ANY EVENT, IT IS NOT NECESSARY TO RESOLVE THIS DISCREPANCY UNLESS THE QUESTION OF LAW IS DECIDED IN FAVOR OF THE CLAIMANT.

3. EXHAUSTION OF ADMINISTRATIVE REMEDIES:

THE AGENCY ASSERTS THAT THIS OFFICE CANNOT CONSIDER THE CITY'S CLAIM BECAUSE THE CITY HAS NOT EXHAUSTED THE ADMINISTRATIVE PROCEDURES FOR RESOLVING DISPUTES MANDATED BOTH BY AGENCY REGULATIONS AND BY THE TERMS OF THE GRANT AGREEMENT. THE AGENCY ALSO REFERS TO MANY DECISIONS, BOTH BY THE COURTS AND BY THIS OFFICE, IN WHICH IT HAS BEEN HELD THAT, WHERE AN AGENCY PROVIDES ADMINISTRATIVE PROCEDURES FOR RESOLVING DISPUTES ARISING FROM ITS ACTIVITIES, A COMPLAINING PARTY MUST AVAIL ITSELF OF THESE PROCEDURES BEFORE SEEKING RELIEF OUTSIDE THE AGENCY.

THE AGENCY'S REGULATIONS AND THE GRANT AGREEMENT REQUIRING THAT DISPUTES ARISING UNDER THE GRANT BE RESOLVED BY THE AGENCY'S ADMINISTRATIVE PROCESSES ARE NOT APPLICABLE TO THE CITY'S CLAIM. SIMILARLY, THE DECISIONS REFERRED TO BY THE AGENCY ARE NOT CONTROLLING IN THIS INSTANCE. THESE REGULATIONS AND DECISIONS DO NOT APPLY BECAUSE THE CITY'S CLAIM IS NOT A DISPUTE UNDER ITS GRANT AGREEMENT WITH THE AGENCY.

THE AGENCY AND THE CITY ARE IN COMPLETE AGREEMENT THAT UNDER THE APPLICABLE STATUTES AND REGULATIONS THE AGENCY WILL PROVIDE FUNDING FOR 75 PERCENT OF THE FULL COST OF SECTION II OF THE CITY'S SOUTH SIDE SEWER SYSTEM. THEY BOTH AGREE THAT NO PART OF THE PAYMENT TO THE CITY UNDER ITS 1970 CONTRACT WITH THE CORPS WILL BE DEDUCTED FROM ELIGIBLE COSTS OF THE PROJECT, AND THAT THE FULL AMOUNT OF THAT PAYMENT IS AVAILABLE TO THE CITY TO PAY ITS SHARE OF THE COSTS OF THE PROJECT. IN SHORT, THE FORMER DISPUTE BETWEEN THE AGENCY AND THE CITY OVER THE PROPER AMOUNT OF THE GRANT HAS BEEN RESOLVED.

THE CITY'S CLAIM, RATHER THAN BEING A GRANT DISPUTE, IS IN THE NATURE OF A CLAIM FOR DAMAGES ARISING FROM THE ERRONEOUS ACTIONS OF THE AGENCY. THERE IS THEREFORE NO GRANT DISPUTE WHICH CAN BE RESOLVED BY THE AGENCY'S ADMINSTRATIVE PROCEDURES.

WE CONCLUDE THAT THERE ARE NO ADMINISTRATIVE REMEDIES FOR THE CITY TO EXHAUST, AND THAT THIS OFFICE IS A PROPER FORUM FOR CONSIDERING THE CITY'S CLAIM UNDER 31 U.S.C. SEC. 71.

4. GAO'S POLICY ON MAKING AND ADMINISTERING GRANTS:

THE AGENCY CONTENDS THAT FOR THIS OFFICE TO CONSIDER THE CITY'S CLAIM WOULD VIOLATE GAO'S OWN POLICY AGAINST INTERFERING WITH THE FUNCTIONS AND OBLIGATIONS OF GRANTOR AGENCIES IN MAKING AND ADMINISTERING GRANTS. THE AGENCY REFERS TO GAO'S POLICY GOVERNING ITS REVIEW OF COMPLAINTS CONCERNING CONTRACTS UNDER GRANTS (40 FED. REG. 42406 (1975)), AND MANY DECISIONS BY THIS OFFICE TO SUPPORT ITS POSITION.

THE POLICY AND DECISIONS ARE NOT APPLICABLE TO THIS CASE. THE CITY'S CLAIM, AS CURRENTLY STATED, IS NOT A DISPUTE CONCERNING THE AWARD OR ADMINISTRATION OF A GRANT. AS INDICATED ABOVE, THE PARTIES ARE NOT IN DISPUTE ABOUT THE AWARD OR THE MANNER IN WHICH THE CITY'S GRANT IS BEING ADMINISTERED. THEREFORE, THERE IS NO POLICY REASON FOR THIS OFFICE NOT TO CONSIDER THE CITY'S CLAIM.

THE MERITS

THE AGENCY GRANT TO THE CITY WAS MADE UNDER SECTION 201(G) OF THE FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED, 33 U.S.C. SEC 1281(G), WHICH AUTHORIZES THE AGENCY TO MAKE GRANTS TO STATES, MUNICIPALITIES, OR INTERSTATE OR INTERMUNICIPAL AGENCIES, FOR THE CONSTRUCTION OF PUBLICLY OWNED WASTE TREATMENT WORKS. SECTION 202(A) PROVIDES THAT, FOR ANY GRANT MADE FROM FUNDS AUTHORIZED FOR FISCAL YEAR 1972 OR LATER, THE AMOUNT OF THE GRANT SHALL BE 75 PERCENT OF THE COST OF CONSTRUCTION OF THE TREATMENT WORKS APPROVED BY THE AGENCY'S ADMINISTRATOR. 33 U.S.C. SEC. 1282(A).

THE 75 PERCENT FUNDING REQUIREMENT HAS BEEN STRICTLY ENFORCED BOTH BY THE COURTS AND BY THIS OFFICE. FOR EXAMPLE, IN MANATEE COUNTY V. TRAIN, 583 F.2D 179 (5TH CIR. 1978), THE COURT STATED THAT THE AGENCY ADMINISTRATOR EXERCISES HIS DISCRETION ONLY IN DECIDING WHETHER OR NOT TO APPROVE A PARTICULAR PROJECT FOR A GRANT.

"ONCE THE ADMINISTRATOR APPROVES THE PROJECT, HOWEVER, THE PERCENTAGE AMOUNT OF THE FEDERAL SHARE IS SET BY LAW, WITHOUT ANY DISCRETION LEFT IN THE ADMINISTRATOR. BEFORE THE 1972 AMENDMENTS, THE FEDERAL SHARE WAS SET AT 33 PERCENT. THE 1972 AMENDMENTS INCREASED THE FEDERAL SHARE FOR ALL NEW PROJECTS TO 75 PERCENT AUTOMATICALLY WITHOUT GIVING EPA ANY DISCRETION."

583 F.2D AT 183.

IN 53 COMP.GEN. 547, 549 (1974), THIS OFFICE, AFTER EXAMINING BOTH THE LANGUAGE OF THE STATUTE AND ITS LEGISLATIVE HISTORY, DETERMINED THAT THE 75 PERCENT FUNDING LEVEL WAS MANDATORY AND THAT THE AGENCY "DOES NOT HAVE THE AUTHORITY TO MAKE ANY GRANTS IN A LESSER AMOUNT." FINALLY, IN FEDERAL FACILITY CONTRIBUTIONS TO CAPITAL COSTS OF SEWAGE TREATMENT, 59 COMP.GEN. 1, 7 (1980), WE CONCLUDED:

"THE ADMINISTRATOR, IN APPROVING 75 PERCENT CONSTRUCTION GRANTS, MUST DO SO FOR THE TOTAL OTHERWISE UNOBJECTIONABLE PLANT CONSTRUCTION COST."

IT FOLLOWS THAT IN 1974, UNLESS THERE WAS SOME OTHER VALID PROGRAM REASON FOR DEDUCTING THE AMOUNT OF THE CORPS PAYMENT FROM THE TOTAL COST OF THE PROJECT, THE AGENCY WOULD HAVE BEEN IN VIOLATION OF SECTION 202(A) OF THE ACT IF IT HAD MADE A GRANT TO THE CITY WHICH WAS LESS THAN 75 PERCENT OF THE TOTAL CONSTRUCTION COST OF THE PROJECT.

WHILE IT IS TRUE THAT IN THE ABSENCE OF A FEDERAL STATUTE TO THE CONTRARY, PAYMENTS MADE UNDER ONE FEDERAL GRANT PROGRAM CANNOT BE USED TO MATCH FEDERAL PAYMENTS MADE UNDER ANOTHER FEDERAL GRANT PROGRAM, THE $145,800 PAYMENT FROM THE CORPS BELONGED TO THE CITY AND WAS IN NO WAY A GIFT OR GRANT FROM THE CORPS. IT REPRESENTED JUST COMPENSATION TO THE OWNER OF PROPERTY BY THE FEDERAL GOVERNMENT IN ITS EXERCISE OF ITS POWER OF EMINENT DOMAIN. THUS, THE CITY SHOULD HAVE BEEN ABLE TO USE THIS MONEY FOR ANY PURPOSE IT DESIRED, INCLUDING MEETING ITS SHARE OF THE COSTS OF THE SOUTH SIDE PROJECT.

THE EPA DOES NOT DISPUTE THE FACT THAT ITS DECISION IN 1974 TO DEDUCT THE AMOUNT OF THE CORPS PAYMENT WAS ERRONEOUS. HAD THE GRANT ACTUALLY BEEN MADE IN 1974 ON THAT INCORRECT BASIS, THE CITY WOULD HAVE BEEN IN A POSITION TO PRESS ITS CLAIM IN COURT FOR AN ADJUSTMENT. HOWEVER, THE GRANT WAS NOT MADE UNTIL 1977, AND THERE IS AGAIN NO DISPUTE THAT THE AMOUNT PAID TO THE CITY REPRESENTED THE FULL 75 PERCENT FEDERAL SHARE FOR ALL ELIGIBLE PROJECT COSTS AT THEIR 1977 LEVEL.

THE CITY DOES NOT SPECIFY ANY LEGAL GROUNDS WHICH WOULD REQUIRE THE GOVERNMENT TO REIMBURSE IT FOR THE ADDITIONAL COSTS IT HAS HAD TO BEAR BECAUSE OF THE DELAY IN AWARDING THE CONSTRUCTION CONTRACT. RATHER, THE CITY MERELY ASSERTS THAT BECAUSE THE UNITED STATES BY ITS ACTIONS CREATED AN ADDITIONAL EXPENSE FOR THE CITY, THE CITY IS ENTITLED TO BE REIMBURSED FOR THAT ADDED EXPENSE. ITS LEGAL THEORY APPEARS TO BE A CLAIM FOR CONSEQUENTIAL DAMAGES. HOWEVER, DAMAGES ARISING FROM A FEDERAL AGENCY'S EXERCISE OF ITS DISCRETIONARY AUTHORITY, HOWEVER MISGUIDED, ARE NOT COMPENSABLE. SEE DALEHITE V. UNITED STATES, 346 U. S. 15 (1953).

STATUTORY: UNDER THE FEDERAL WATER POLLUTION CONTROL ACT, THE CITY WAS NOT ABSOLUTELY ENTITLED TO RECEIVE A FEDERAL GRANT FOR THE CONSTRUCTION OF THE SOUTH SIDE PROJECT. CF. DART INDUSTRIES V. UNITED STATES, NO. 471-77 (CT.CL., APRIL 6, 1979, SLIP OP. AT 5). THE DECISION WHETHER OR NOT TO PROVIDE FEDERAL FUNDING FOR THE PROJECT, AFTER IT HAD BEEN GIVEN PRIORITY BY THE STATE OF MISSOURI, WAS WITHIN THE DISCRETION OF THE AGENCY'S ADMINISTRATOR. AS WE INDICATED ABOVE, UNDER SECTION 202(A) OF THE ACT, 33 U.S.C. SEC. 1282(A), IF THE ADMINISTRATOR DECIDES TO MAKE A GRANT, THE FEDERAL CONTRIBUTION MUST BE 75 PERCENT OF THE TOTAL COST OF THE PROJECT. THE AMOUNT OF THE FEDERAL GRANT CAN BE NEITHER MORE NOR LESS THAN 75 PERCENT. THE REIMBURSEMENT BEING SOUGHT BY THE CITY IS ABOVE AND BEYOND THE 75 PERCENT FEDERAL SHARE OF THE COST UNDER THE ACT. THE CITY IS SEEKING TO RECOVER THE INCREASE IN ITS SHARE OF THE COST CAUSED BY THE ERRONEOUS AGENCY ELIGIBILITY DECISION.

IN OUR OPINION, THE ACT CREATES NO RIGHT IN THE CITY TO RECEIVE ANY AMOUNT GREATER THAN THE 75 PERCENT OF THE PROJECT COST, WHICH THE AGENCY HAS ALREADY AGREED TO PAY UNDER THE GRANT AGREEMENT.

GRANT AGREEMENT: SECTION 203(A) OF THE FEDERAL WATER POLLUTION CONTROL ACT, 33 U.S.C. SEC. 1283(A), PROVIDES THAT THE APPROVAL OF A PROJECT BY THE ADMINISTRATOR OF THE AGENCY CREATES A CONTRACTUAL OBLIGATION OF THE UNITED STATES TO PAY ITS SHARE OF THE PROJECT COSTS. HOWEVER, PRIOR TO THE APPROVAL OF THE PROJECT, THERE WAS NO CONTRACTUAL RELATIONSHIP FOR THIS PURPOSE BETWEEN THE UNITED STATES AND THE CITY.

THE AGENCY'S DECISION TO DEDUCT THE AMOUNT OF THE CORPS PAYMENT FROM THE ELIGIBLE COSTS OF THE PROJECT WAS MADE IN FEBRUARY 1974. THIS WAS MORE THAN 3 YEARS BEFORE THE AGENCY'S APPROVAL OF THE PROJECT BY THE AWARD OF A GRANT. IT WAS NOT UNTIL THE AWARD OF THE GRANT IN MARCH 1977 THAT THE UNITED STATES BECAME OBLIGATED BY CONTRACT TO PAY ITS SHARE OF THE PROJECT COSTS.

THEREFORE, THE 1974 DECISION BY THE AGENCY CANNOT BE CONSIDERED AS A BREACH OF A CONTRACT WITH THE CITY. THE CITY CANNOT RECOVER ITS INCREASED COSTS AS CONTRACT DAMAGES UNDER THE GRANT AGREEMENT.

THE DELAY IN FUNDING THIS PROJECT WAS REGRETTABLE AND WE FULLY APPRECIATE THE ADDED FINANCIAL BURDEN THE CITY HAS HAD TO ASSUME. NEVERTHELESS, WE CONCLUDE THAT THERE IS NO LEGAL BASIS UPON WHICH THE CITY CAN BE REIMBURSED FOR THE ADDED COSTS IT HAS INCURRED BECAUSE OF THE AGENCY'S ORIGINAL DECISION NOT TO ACCEPT THE CORPS OF ENGINEERS PAYMENT AS PART OF THE LOCAL SHARE.