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B-72120 January 14, 1948

Number: B-72120

Date: 1948-01-14

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The Honorable, The Postmaster General.

My dear Mr. Donaldson:

I have your letter of December 18, 1947, requesting a decision concerning certain questions involving the legality of a proposed new lease with the City of New York, the new owners of the quarters now occupied by the post office garage at Brooklyn, New York.

The record shows that the quarters were originally occupied under a lease dated January 4, 1938, with the Brooklyn Service Station, Inc., for a 10- year term beginning November 18, 1937, and that the City of New York, which acquired title to the property in question on November 26, 1945, through condemnation proceedings, has submitted a proposal for a new lease to become effective September 11, 1947, at a reduced rental rate, the Government, however, to assume the cost of maintenance and repairts and certain other obligations for the purpose of protecting the City against damages to persons or property arising out of the Government's occupancy of the property. Specifically, you request to be advised as follows:

"I shall be pleased to have your ruling as to whether the agreement submitted by the City of New York may be approved, and if so whether the costs of repairs, maintenance, insurance, et cetera, may be defrayed from the appropriation for 'Vehicle Service.' If your ruling is in the affirmative, I shall also be pleased to know what showing your office will require, during the continuance of the agreement with the City of New York, of compliance with the provisions of the law as embodied in U.S.C. 40, paragraph 278a. It will also be appreciated if you will rule whether this equipment items, the personal property of the former owner of the premises may be acquired at the making price of $1,407, and the expense charged to the appropriation for 'Vehicle Service.'"

Under th eoriginal lease referred to, the Brooklyn Service Station, Inc., let certain space in the building located on the east side of Washington Street, between Concord and Tillary Streets, brooklyn, New York, to the Government for a 10-year term beinning November 16, 1937, at an annual rental rate of $56,000. Paragraph 6 of said lease required the lessor to furnish certain fixtures and facilities as part of the rental consideration and to keep same in good repair and condition to the satisfaction of the Government. In addition, paragraph 7 of the lease obligated the lessor to maintain the premises in good repair and tenantable condition during the continuance of the lease, except in case of damage arising from the act or negligence of the Government's agents or

employees. As indicated above, the record shows that title to the building in question (except a portion of the equipment, the ownership on which is reported to have been retained by the Government's original lessor) was acquired by the City of New York on November 26, 1945, through condemnation proceedings; that the Government has continued occupancy of the quarters and has paid rent accruing subsequent to the condemnation proceedings up to and including September 30, 1947, to the City of New York at the rental rate stipulated in the original lease; and that the City has complied with the terms of the original lease in every respect. In the meantime, it appears that as a result of negotiations conducted with the City by representatives of the Post Office Department, the City, by proposal dated October 13, 1947, offered to reduce the rental to $40,000 per annum, effective as of November 26, 1945, upon certain terms and conditions set forth therein and to execute a formal agreement with the United States for the continued use and occupancy of the garage space on a month to month basis, terminable by either party on 30 days' notice. In addition to the reduction in rental, the said proposal of October 13, 1947, provides as follows:

"1. Commencing September 11, 1947 the United States Government wil assume full responsibility and pay for all maintenance charges for said property including heating and lighting and also agrees to make all necessary major and minor repairs to the building, fixtures and plumbing therein at its own cost and expense.

"2. The United States Government shall keep the adjacent sidewalks in repair and free from deposits of objectionable materials.

"3. The United States Government shall comply with all laws and ordinances and rules and regulations of the various Departments and Bureaus of the Government of the City of New York, of the State of New York and of the Federal Government, as they effect said premises.

"4. The United States Government shall have during the term of this agreement, exclusive possession and control of the said premises and agrees to save harmless the City of New York and its agents and representatives from any claim for damages by reason of injury to persons or property occuring on said premises or the sidewalks adjacent thereto.

"5. The United States Government will procure Public Liability Insurance in adequate limits for the benefit of the City of New York covering the said premises, elevators and adjacent sidewalks."

By letter of November 25, 1947, to the then Postmaster General, the City submitted a supplemental proposal under which it offered to assume responsibility for payment of meter charges for all water consumed in the operation of the garage from November 26, 1945.

It is stated in you letter, in effect, that acceptance of the City's proposal will result in a saving to the United States of $31,644.54 in rent over the rent provided for under the original lease. As to the cost of maintenance and repair of the property, it is stated in the postal inspector's report of December 1, 1947, that the cost of maintenance work performed by the City during the 211/2 months beginning November 26, 1945, the date it acquired title, averaged $208.91 per month, which amount represented the cost of all normal and necessary maintenance work, including a fixed charge of $18.50 per month for elevator

inspection and lubrication. Also, it is stated in said report that the Assistant Director of Real Estate for the City has expressed the view that the Government will be permitted to occupy the garage quarters for at least another two years. With respect to the expense which will have to be assumed by the Government for maintenance and repairs, in the event of the acceptance of the City's proposal, it is stated in your letter as follows:

"I major and minor repairs requiring immediate attention:

(a) Replacement of stairwell wall $126.32 (b) Replacement of steam pipe 14.22 (c) Adjustment of truck entrance doors 50.88 (d) Glass replacement 14.76 (e) Recementing 10 square feet of sidewalk 4.38 _____ Total $210.56

"II Anticipated major repairs:

(a) Replacement of two fire doors for stoker 200.00

"III Possible claim by the City of New York for maintenance work performed subsequent to September 11, 1947:

(a) Plumbing repairs 900.00 (b) Charge for servicing elevator 2/3 of $18.50 12.33 _____ Total $912.33

"IV Annual Maintenance Charges: Annual Two Years

(a) Maintenance of vehicular entrance doors $457.92 $915.84 (b) General maintenance work ($87.60 per month) $1,051.20 $2,102.40 (c) Periodical inspection and servicing of elevator @ $30.50 per month 366.00 732.00 (d) Sidewalk repairs @ $4 per month 48.00 96.00 _____ _____ Total $1,923.12 $3,846.24

"V Public liability insurance: Annual rate $206.93 $413.86"

In justification of the estimated expenditures, quoted above, you state that:

"It will be noted that immediate and anticipated repair work, and possible claims, involve a cost of $31,322.89 and that annual maintenance charges, including insurance, total $2,130.05. Assuming a total occupancy of two years, the latter item would involve a total cost of $4,260.10 and adding the $1,322.89 for repair work and claims, the total would be $5,582.99 which would be substantially less than 25 per cent of one year's rental figured at $40,000 a year, the rate requested by the City of New York. Consequently, the approval of the agreement submitted by the City of New York would not seem to be in contravention with the provisions of law as contained in U.S.C. 40 paragraph 278 a. In view of the anticipated cost of negotiating a lease in the present market for other suitable garage quarters at Brooklyn, the approval of the agreement submitted by the City of New York would seem to be decidedly to the financial interest of the Government."

In the light of the circumstances set forth in your letter, this Office would not be required to object to the execution of a new lease obligating the Government to maintain and repair the space in question and to the charging of the cost of repairs, maintenance and insurance to the appropriation "Vehicle Service," provided the deviation in the form of the lease be previously approved by the Interdepartmental Board of Contracts and Adjustments, Bureau of the

Budget, as required under paragraph 8 of the "Instructions To Be Oberved In Executing Leases," attached to the standard form of Government leaseas modified for use of the Post Office Department (see decision of December 18, 1946, B-61488, to your predecessor), and provided further that the new lease contain a provision for adjustment of any rental heretofore paid to the City at the rate of $56,000 per annum for the period beginning November 26, 1945, and ending September 30, 1947. However, paragraph numbered 4 of the city's proposal, quoted above, appears ojectional insofar as concerns the provision relating to liability for any claim for damages by reason of injury to persons or property occurring on said premises or sidewalks adjacent thereto and should not be included in any lease agreement executed wiht the City. 16 Comp Gen. 803. In that connections, there would appear to be no legal objection to a provision in the lease requiring the Government to procure public liability insurance as part of the rental consideration.

With respect to the showing that will be required by this office during the continuance of the lease relative to compliance with section 322 of the Economy Act of June 30, 1932, 47 Stat. 412, as amended (40 U.S.C., section 278(a)), it is assumed that your question relates to the 25 percent limitation contained in said act. If such be the case, you are advised that it will be necessary to transmit to the Postal Accounts Division of this Office, Asheville, North Carolina, an itemized statement of all expenditures made for repairs and maintenance on and after September 11, 1947, for filing with the proposed new lease (18 Comp. Gen. 675), and any expenditure claimed as not being subject to the percentage restriction will have to be supported and justified by clear and convincing evidence that the maintenance or the repairs involved are not, in fact, subject to such percentage restiction. 20 Comp. Gen. 105. On the other hand, if your question relates to the 15 per centum limitation, you are advised that this Office has not required the submission of any particular type of evidence to establish the fair market value of rented premises, it being an administrative responsibility to justify in each individual case, by the best available evidence, that the rental payment stipulated in the lease is not in excess of that limitation. See, in this connection, B-57765, May 24, 1946. Also, see 12 Comp. Gen. 440.

With reference to your last question, the "Treasury and Post Office Departments Appropriation Act, 1948," Public Law 147, approved July 1, 1947, under the heading "Vehicle service," provides as follows:

"For the hire, purchase, maintenance, repair, and operation of vehicles for use in the collection, transportation, delivery, and supervision of the mail, including the repair of vehicles owned by, or under the control of, units of the National Guard and departments and agencies of the Federal Government where repairs are made necessary because of utilization of such vehicles in the Postal Service; the rental of garage facilities; accident prevention; lease of quarters not exceeding a term of ten years for the housing of Government-owned motor vehicles, and including compensation to necessary employees in the Motor Vehicle Service, 436,500,000, of which $4,514,000 shall be available exclusively for the purchase of trucks: Provided, That the Postmaster General may purchase and maintain from this appropriation such tractors and trailer trucks as may be required in the operation of the vehicle service: Provided further, That no part of this appropriation shall be expended for maintenance or repair of motor-propelled passenger-carrying vehicles for use in connection with the administrative work of the Post Office Department in the District of Columbia.

"Transportation of equipment and supplies: For the transportation and delivery of equipment, materials and supplies for the Post Office Department and Postal Service by freight, express, or motor transportation, and other incidental expenses, $520,000."

While the said appropriation provides for "rental of garage facilities," there is nothing contained therein authorizing the purchase of the equipment as itemized on page 8 of the postal inspector's report of December 1, 1947, referred to above, and as referred to in your letter. Therefore, your last question is answered in the negative.

Respectfully,

Acting Comptroller General of the United States.