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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-114839 Value DATE: APR 27 1979 (Proposed to be Transferred)

MATTER OF: ~~Transfer~~ of Power Plant by Department of the Army to Panama Canal Company

DIGEST:

1. Where the Army and Panama Canal Company cannot agree on the transfer value of a power plant proposed to be transferred from the Army to the Company under section 372, title II, Canal Zone Code, no transfer can take place. The General Accounting Office has no authority to adjudicate the appropriate transfer price.

2. Use agreement giving Panama Canal Company authority to use, operate and maintain Army power plant pending agreement on terms of proposed transfer of ownership, provides no basis for Army to reimburse Company for cost incurred by Company for replacement power due to generator failure since Company purchased replacement power to meet contract obligations to supply electricity and not to meet obligations arising out of use agreement.

The Chief of Engineers, Department of the Army, has requested our advice concerning the terms of a proposed transfer from the Army Corps of Engineers (Army) to the Panama Canal Company (Company), of a 33 megawatt power plant located at Fort Clayton, Miraflores, Panama Canal Zone.

Transfer of the power plant on a reimbursable basis is said to have been directed by the Senate Appropriations Committee. The Army refers to Senate Report No. 91-1118 (1970), where it is stated that--

> "* * * the Army is financing a 33 MW powerplant which will operate as part of the Panama Canal Company's system. The introduction of such an element in the Company's system appears to be a cumbersome procedure that will almost certainly reduce efficiency and increase the costs borne by the U.S. taxpayer. Legislation enacted by the Congress soon after reorganization of the Panama Canal Company provides for transfer of property to the Panama Canal Company by other Government agencies in the interest of economy and

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maximum efficiency in the use of Government property and facilities. The Committee considers that such a transfer of the Army powerplant to the Panama Canal Company should be effected under this legislation on a reimbursable basis." At 39-40.

In early October 1971, following some preliminary negotiations, the Panama Canal Company proposed to the U.S. Army Southern Command (USARSO), the intended user of the new power plant, that the Company operate the plant after it was accepted for service until the reaching of a satisfactory final agreement transferring the plant to the Company in compliance with the wishes of the Senate Appropriations Committee. It was proposed that the final agreement be made retroactive to the date the Company acquired use of the plant. This proposal was agreed to by USARSO, and on October 15, 1971, the plant was turned over to the Company "to use, operate, and maintain," pending approval of a transfer agreement.

From September 1973 to February 1974, there were a series of superheater failures in a steam generator in the plant, culminating in a spray nozzle failure and total plant breakdown on February 3, 1974. Repairs to the generator by the Company cost $13,768. Additionally, during the periods of plant shutdown, the Company activated standby units and purchased energy from Panamanian sources to replace the lost power. The excess cost of energy from these alternative sources was $190,263.

Correspondence between the Company and the Army and the Company's submission to this Office indicate that the Company believes that the transfer price of the power plant, originally set at the plant's cost of $7,912,781, should be reduced by $204,031 to allow for the total excess cost incurred by the Company as a result of the generator failures. The Army and the Company agree that the generator failure was attributable to latent defects in the equipment supplied by Army's contractor, Foster-Wheeler. However, the Army's contracting officer decided that no claim would be asserted against Foster-Wheeler for the excess cost of energy purchased by the Company during the period the plant was inoperative ($190,263) but only for the actual cost of repairs. The Army believes that it had no valid claim against Foster-Wheeler for the additional cost of purchased power because that cost represented consequential damages which the supplier could not reasonably have foreseen, no notice was given the supplier at the time of the failures, and no opportunity was given the supplier to mitigate the damages.

An offer to settle for $13,768, the cost of repairs, was made by the Army to the contractor in April 1976, and was accepted.

Foster-Wheeler's check for $13,768 was deposited into the miscellaneous receipts account in the Treasury.

While the Army and the Company agree that this resolution of the claim against the contractor was final with respect to the transaction between the Corps of Engineers and the contractor, the Company continues to seek an adjustment in the transfer price of the power plant to compensate it not only for the cost of repairs but for the cost of the purchase of power from other sources. The Army is willing to adjust the transfer price only for the cost of repairs.

The Panama Canal Company and the Army propose to transfer the power plant pursuant to section 372 of Title 2 of the Canal Zone Code, which provides in pertinent part:

> "(a) In the interest of economy and maximum efficiency in the utilization of Government property and facilities, there are authorized to be transferred between departments and agencies, with or without exchange of funds, all or so much of the facilities, buildings, structures, improvements, stock and equipment, of their activities located in the Canal Zone, as may be mutually agreed upon by the departments and agencies involved and approved by the Director of the Bureau of the Budget.
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> "(b) With respect to transfers without exchange of funds, transfers:
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> "(1) to or from the Panama Canal Company are subject to section 62 of this title * * *."

("Department" in the Canal Zone Code includes the Department of the Army and "agency" includes the Panama Canal Company. C. Z. Code, tit. I, § 61.)

The General Counsel of the Panama Canal Company states in a letter to us that the proposed transfer is "without the exchange of funds between the interested agencies" and therefore, pursuant to section 62(d) of the Canal Zone Code, must be at a mutually agreed amount subject to the approval of the Administrator of General Services. Section 62 of the Canal Zone Code requires that the property be transferred at such appropriate amounts as are agreed to between the Company and the department or agency, and approved by the Director of the Bureau of the Budget. (This function and that of the Director under section 372, supra, were

transferred to the President by Reorganization Plan No. 2, 1970, and delegated by him to the Administrator of General Services, by Exec. Ord. No. 11713, 3A C.F.R. 173 (1973).)

Under section 62, when property is transferred to the Company from another Government agency, the net investment of the United States in the Company is to be increased to the extent the transfer value exceeds repayments to the Treasury by the Company. The Company must reimburse the Treasury, as nearly as possible, for the interest cost of the net direct investment in the Company by the United States.

The proposed transfer agreement provides for payment of the net transfer value of the generator into the Treasury in annual installments of not less than $300,000. Under section 62, if the proposed agreement went into effect, the net transfer value would be initially added to net United States investment, but the net investment would be reduced annually by the amount of repayment. The Company would reimburse the United States for the interest cost of the part of the transfer value not yet repaid and therefore still part of net United States investment.

The transfer cannot proceed under section 372 without the mutual agreement of the parties. The Army has indicated its unwillingness to proceed with the transfer in the absence of either an agreement with the Company as to the amount of funds to be added to the United States' investment in the Company, our advice as to the proper disposition of the plant, or our decision as to the appropriate valuation at which the property is to be transferred.

The Panama Canal Company contends that our Office has no authority to adjudicate the issue of the transfer price of the power plant. The Army argues that, under our decision at 38 Comp. Gen. 822 (1959), the Comptroller General has jurisdiction to decide questions of transfer under section 372. The Army further asserts that the legislative history of section 372 manifests congressional endorsement of the Comptroller General's assumption of jurisdiction to decide such issues.

The issue decided in 38 Comp. Gen. 822, supra, arose under section 204 of the Department of Commerce and Related Agencies Appropriation Act, 1956, 69 Stat. 236, which authorized the transfer of property located in the Canal Zone between departments and agencies, including the Panama Canal Company and the Canal Zone Government, where such a transfer would eliminate "duplicate activities and related facilities." We concluded that a proposed transfer of property to the Federal Aviation Agency (FAA) was not authorized by section 204 because in fact it would not result

in the elimination of "duplicate activities and related facilities." Section 204 was later superseded by C.Z. Code, tit. II, § 372, supra, which authorizes similar transfers between United States departments and agencies and the Panama Canal Company, "in the interest of economy and maximum efficiency in the utilization of Government property and facilities."

The proposed transfer of the Miraflores power plant to the Company does not appear to raise any issue similar to that decided at 38 Comp. Gen. 822, supra. It is not disputed that this transfer will operate to enhance efficiency and decrease cost (see, e.g., S. Rep. No. 91-1118, supra 39) and there is legal authority for this transfer. Neither the Army nor the Company has questioned the propriety of transferring the property.

Although agreement between the Company and the Army appears to be a prerequisite to consummation of the transfer, this Office has no authority to adjudicate the appropriate transfer value of the property or to compel agreement between the parties. Since the transfer price must be based on mutual agreement of the parties (as approved by General Services Administration), the Army is legally empowered to agree, subject to compliance with title II, section 62(d) of the Canal Zone Code, to the lower price suggested by the Company. However, we find no basis, in the relationship between the parties, for the Army to be liable for the cost to the Company of purchased power.

The Company contends that --

> "it is entitled to a credit for both its repair cost and its excess cost of supplying replacement power because both were incurred for the benefit of the Corps of Engineers in Army installations in the Canal Zone."

The Army argues that the Federal Claims Collection Act of 1966, 31 U.S.C. § 951 (1970), makes the settlement between it and Foster-Wheeler, the supplier of the steam generator, binding on the Company.

The Company, however, does not contend that it is entitled to damages under the Foster-Wheeler contract. In his letter to this Office the Company's General Counsel stated:

> "It is well established by Comptroller General decisions that an agency shall be reimbursed for the actual cost of goods and services it provides another agency. This is the basis of the Company's claim."

Thus, although the dispute presented to this Office by the Army for resolution is in the context of the transfer value of the power plant (a question which we have no authority to adjudicate), the Company's submission makes it clear that the controversy arises from a disputed claim for services which the Company claims to have provided to the Army pursuant to the agreement whereby the Panama Canal Company was permitted to "use, operate, and maintain" the power plant until the final transfer agreement could be completed. Even if the transfer is not consummated, the Company presumably would seek to collect the disputed amount from the Army.

The Army characterizes its legal relationship with the Company under their agreement as one of "buyer-seller." However, the so-called "sale" cannot be consummated until the parties agree on the plant's transfer value. Inasmuch as agreement may never be reached, we do not think that a "buyer-seller" relationship can be said to exist between the parties in the absence of such an agreement.

In its March 25, 1977, letter to the Army Corps of Engineers, the Company argued that the agreement under which it operates and maintains the power plant gives rise to an agency relationship, and that under general principles of agency it is entitled, as the Army's agent, to be reimbursed by its principal for funds expended or loss incurred while performing under the agreement.

The authority under which the Company operates and maintains the Miraflores power plant is an exchange of letters between the Chief of Staff, USARSO and the Executive Secretary of the Canal Zone Government. The letter from the Chief of Staff reads in pertinent part:

> "The proposal contained in your letter * * *, dated 7 October 1971, concerning an interim agreement for the operation of the 33 Megawatt power plant at the Miraflores Generating Station is accepted. This exchange of correspondence is considered to constitute such an interim agreement and the Panama Canal Company is hereby permitted to use, operate and maintain the new power plant.
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> "The Panama Area Engineer has advised that a prefinal inspection of the power plant was held on 15 October 1971, and that the Panama Canal Company took over operation of the plant immediately after the inspection. Accordingly,

under the provisions of paragraph 'd' of the proposed General Provisions of the Memorandum of Understanding, the 'ready to serve' date is established as 15 October 1971 and the final agreement, when executed, will be made retroactive to that date."

The terms of the Company proposal, which the USARSO letter incorporates by reference, are as follows:

"* * * I propose that we enter into an interim arrangement under which the Panama Canal Company will be permitted to use, operate and maintain the new facilities.

"Accountability for financial obligations incurred and responsibility for actions taken during the period that this working arrangement is in force, would be resolved by the terms and conditions of whatever agreement may subsequently be reached.

"USARSO would incur no risk in such an agreement as the effective date of the final agreement would be written to make it retroactive to the date that USARSO turned the plant over to the Company for operation."

Even if, as the Company argues, the above exchange of letters can be said to place the Army and the Company in a principal-agent relationship, that does not resolve the issue of liability for these costs. "Since an agency is essentially a contractual and consensual relationship, the duties and liabilities of the principal are primarily based on the contract * * *." 3 C.J.S. Agency § 318 (1973).

Under the agreement, the Company agreed to "use, operate, and maintain" the power plant. In its letter of February 13, 1978, the Army noted that the alternative power purchased by the Company after the generator failure--

"* * * would have entered the Company's power distribution grid system and would have been distributed to all of the Company's customers, not solely to the Army. It would be extremely difficult, if not impossible, to determine precisely what allocation was made among the Company's customers of the electricity from those specific power sources.

"Whatever allocation may have been made, however, the important fact is that this power has already been paid for under the utility contracts between the Army, and other customers, and the Company. Electricity is purchased by the Army from annual Operation and Maintenance, Army (OMA) appropriations pursuant to the terms of such utility contracts. These contracts provide that the Army will purchase electrical power usually at varying rates depending on what volume of power is used, regardless of the source of the power. Thus, any electrical power the Army received, whether it was from the 33 megawatt power plant at Miraflores, or from the Company's own generating sources, or from Panamanian sources has already been paid for by the Army. * * *"

The Company apparently operates in effect as a public utility, supplying power to the Army and other customers, making capital investments to meet customer demands, bearing the costs of operating and maintaining the generating facilities, and recovering its costs through rates charged its customers. The record does not indicate whether the Company has already included in its rates a factor to cover the costs of purchasing or generating alternative power as a result of this breakdown. To the extent it has, the Army has, as it maintains, already paid for a share of the purchased power as, presumably, have the Company's other customers. There does not appear to be any impediment to a subsequent rate adjustment, if the Company has not already done so, to cover such operating expenses.

In any event, it seems clear that the need for the Company to purchase alternative power arose out of the requirement for it to meet its contractual obligations to supply power to various customers rather than from its relationship with the Army established by the use agreement. Accordingly, the use agreement cannot provide a basis for the Army to reimburse the Panama Canal Company for the costs claimed.

In so deciding, as noted above, we take no position on the valuation of the plant for purposes of the proposed transfer. While the Army should, of course, make every effort to comply with the wishes of the Senate Committee, the language in the Committee report does not make transfer of the power plant a requirement of law. Therefore, if the parties are unable to reach the agreement necessary to consummate the transfer, the present agreement will have to be either continued, revised, or terminated. In this regard, under the present agreement, the Company receives the same benefits from using the power plant as it would receive if the transfer

were consummated under the proposed agreement except that the accounting treatment is significantly different: in the event the proposed plan, whereby the Company would pay the Treasury in annual installments, went into effect, the unpaid balance of the transfer value would, as described above, become part of the United States' net investment in the Company; the Company would reimburse the Treasury for the interest cost of that portion of the transfer value, and the cost of interest and depreciation would presumably be charged to operating expenses. Therefore, if the retroactive transfer is not consummated, the Army, rather than assuming responsibility for the plant's operation, could negotiate an arrangement whereby the Company pays a rental charge, for deposit as miscellaneous receipts into the Treasury, equivalent to the interest and depreciation on the plant.

R.F.KELLER

Deputy Comptroller General
of the United States