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DECISION

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

FILE: B-214091

DATE: January 28, 1985

MATTER OF: General Services Administration Concession
Contract

DIGEST: The concession contract between the General Services Administration and Guest Services Inc. (GSI), which includes a clause requiring that a percentage of GSI's gross profits be credited to a reserve to be used by GSI for the replacement of Government property, does not violate 31 U.S.C. § 3302(b) (1982), because the reserve is not "money for the Government." Further, the contract does not violate 40 U.S.C. § 303b (1982) because of the historically unique nature of the GSA-GSI agreement.

This decision is in response to a request from the Inspector General of the General Services Administration (GSA). The Inspector General inquires regarding the validity of a food service concession contract entered into between Guest Services, Inc. (GSI) and GSA in view of 31 U.S.C. § 3302(b) (1982), which requires that money received for the Government be deposited in the Treasury, and 40 U.S.C. § 303b (1982), which requires that leases of Government property be for money consideration only and that no part of the consideration be "any provision for the alteration, repair, or improvement" of the property. As set forth below, we conclude that the contract in question violates neither 31 U.S.C. § 3302(b) nor 40 U.S.C. § 303b.

FACTS

Pursuant to a July 21, 1971 contract with GSA, GSI operates food concessions and other services in public buildings. GSA, in turn, provides appropriate space in Government buildings as well as certain equipment. Although no rent is charged, GSA assesses standard level user charges for the space used by GSI in Government buildings against the agencies occupying the buildings. The contract also includes a provision whereby GSI is to credit a certain percentage of its income to a reserve which is to be used for the purchase of new equipment. Contract clause IX provides, in part:

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"B. RESERVE FOR PURCHASE AND REPLACEMENT OF GOVERNMENT-OWNED EQUIPMENT:

GSI shall establish a Reserve in its accounting system for the replacement of Government-owned equipment which shall be used, with the approval of GSA, for the replacement of Government-owned equipment and its component parts. The Reserve shall also be available with the joint approval of the contracting parties for the purchase of new equipment, which shall thereupon become the property of the Government.

"C. At the end of each accounting period GSI shall credit to the Reserve on its books an amount up to one and one-half (1-1/2%) percent of its gross income under this Agreement for such periods, and such amounts shall be a general obligation of the Corporation for the above purpose. * * *"

The contract further provides that all equipment acquired under the reserve fund provision "shall become the property of the Government." (Clause VIIIC.) In the event of contract termination, the balance of the reserve is paid by GSI to GSA, either in cash or in assets. (Clause XVIIF.) Prior to contract termination, the reserve fund remains exclusively within the control of GSI.

DISCUSSION

The first statute to which the Inspector General addresses his inquiry is 31 U.S.C. § 3302(b) (1982) which reads:

"* * * [A]n official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."

This statute requires an agency to deposit into the General Fund of the Treasury any funds it receives from sources outside of the agency unless the receipt constitutes an authorized repayment or unless the agency has statutory authority to retain the funds for credit to its own appropriations. See, e.g., 62 Comp. Gen. 678, 679-80 (1983); 62 Comp. Gen. 70, 72-73 (1982).

The second statute for consideration is 40 U.S.C. § 303b (1982), which reads:

"* * * [E]xcept as otherwise specifically provided by law, the leasing of buildings and properties of the United States shall be for a money consideration only, and there shall not be included in the lease any provision for the alteration, repair, or improvement of such buildings or properties as a part of the consideration for the rental to be paid for the use and occupation of the same. The moneys derived from such rentals shall be deposited and covered into the Treasury as miscellaneous receipts."

This statute requires that Federal agencies lease their property for money consideration only. It expressly prohibits the Government from accepting agreements to alter, repair, or improve leased property as consideration. B-205685, December 22, 1981.

In 35 Comp. Gen. 113 (1955), we reviewed a somewhat similar concession contract covering Government buildings outside the District of Columbia. The contract in 35 Comp. Gen. 113 included a reserve clause, which, like the clause here under review, required that a fixed percentage of the contractor's gross revenue be set aside in an account to be used for the repair and replacement of Government-supplied equipment. However, unlike the reserve clause here under review, the reserve clause in 35 Comp. Gen. 113 required the actual deposit of funds in a "special account in a bank," rather than a simple book entry in the contractor's internal accounts.

We concluded in 35 Comp. Gen. 113 that the reserve clause there under review violated both 31 U.S.C. § 484 (now § 3302(b)) and 40 U.S.C. § 303b. We found that funds deposited pursuant to the reserve clause constituted "money for the use of the United States" within the meaning of section 484, and accordingly, those funds were required to be deposited as miscellaneous receipts.

We conclude that 35 Comp. Gen. 113 is distinguishable from the case at hand, and that the reserve clause here under review does not violate either 31 U.S.C. § 3302(b) or 40 U.S.C. § 303b. Here, the reserve constitutes a mere book-keeping entry in the internal accounts of GSI. Unlike the circumstances in 35 Comp. Gen. 311, there is no actual transfer of funds into a bank account for the future use of the Government. The reserve in this case does not constitute

"money for the Government," which would be required to be deposited as miscellaneous receipts pursuant to 31 U.S.C. § 3302(b) or 40 U.S.C. § 303b, (assuming that the GSA-GSI agreement is a "lease" under the latter section,) but rather constitutes a balance sheet indication of the extent of GSI's responsibility to repair and replace Government property. In the past we have taken the position that when a private party responsible for loss or damage to Government property agrees to replace it or have it repaired, the agency may accept the offer and is not required to transfer an amount equal to the cost of the repair or replacement to miscellaneous receipts. B-87636, August 4, 1949. See also 14 Comp. Dec. 310 (1907). (We note, however, that any reserve balance paid to GSA upon contract termination would be required to be deposited in the Treasury as miscellaneous receipts.)

On the question of whether the agreement under consideration in 35 Comp. Gen. 113 was a lease under 40 U.S.C. § 303b, we observed that:

"whether the contracts are leases or not, they partake of the nature of leases to such an extent that the provisions of 40 U.S.C. § 303(b) properly may be regarded as at least persuasive that * * * there should not be included in the consideration any provision for repair or improvement of the properties involved." 35 Comp. Gen. at 116.

We reached the same result and found agreements to violate section 303b in 41 Comp. Gen. 493 (1962) (concession contract for visitor services in national parks), 42 Comp. Gen. 650 (1963) (audio tour system in the National Zoo), and 49 Comp. Gen. 476 (1970) (management contract for parking garage in Federal building).

However, in view of the unique nature of the GSA-GSI agreement here under review, we conclude that the analysis in 35 Comp. Gen. 113, and subsequent cases, should not be applied in the instant case. As the submission of the GSA General Counsel points out, GSI historically has maintained a very close relationship with the Federal Government. During its early history, and until years after the signing of the agreement here in question, GSI served the Federal Government only, operated exclusively on Federal property and was substantially controlled by the Government. In a 1978 report, this Office reviewed the same GSA-GSI agreement here under review. General Accounting Office, Benefits General

Services Administration Provides By Operating Cafeterias In Washington, D.C., Federal Buildings, LCD-78-316, B-114820, May 5, 1978. In that report, we concluded:

"Although GSA could charge GSI for the use of cafeteria space, the July 21, 1971, agreement between GSA and GSI provides, in part, that GSA is to furnish suitable space and certain equipment at no charge other than the consideration of GSI's operating and using them for the benefit of the Government. GSA is given the right to review GSI's annual budget and the menu pricing structure for foods and beverages. We determined that the agreement between GSA and GSI does not involve a lease of space but, instead, is a license to use assigned space in consideration of the performance of the agreed to services. The agreement is not unlawful, improper, or contrary to public policy, even though GSI may appear to enjoy a competitive advantage over other food service operators in the vicinity of Federal cafeterias.

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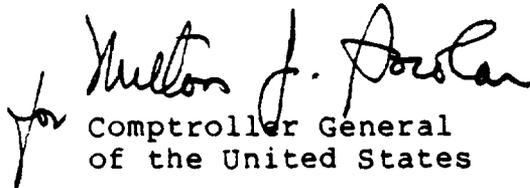
"If cafeteria operations were required to be fully self-supporting, the cost of food to the customer could increase considerably. These cafeterias cannot be compared to commercial ones, because operating hours are limited to breakfast and lunch during regular Government workdays only. A captive but limited clientele is served, and food prices must be approved by GSA. If the meal prices were set to cover full costs, the drop in patronage might be so great as to make the operations impractical.

"Without the substantial indirect assistance provided, GSA believes that the contractor could not provide reasonably priced food service in Federal buildings."
Id. at Appendix I, 3-4, 6 (emphasis added).

Our conclusion that the GSA-GSI agreement constitutes a license, not a lease, and was not unlawful was based on such factors as the absence of rent, absence of a specific term, limitations on the right of exclusive possession and control, and the right to revoke the permit at any time.
B-114820-O.M., December 14, 1977.

Therefore, we conclude that it would not be appropriate in the case at hand to apply the analysis of 35 Comp. Gen. 113, and subsequent cases, in view of the historically unique nature of the GSA-GSI agreement and our conclusion in our 1978 audit report, discussed above, that the agreement was not unlawful. Accordingly, we conclude that the 1971 GSA-GSI concession contract here under review violates neither 31 U.S.C. § 3302(b) (1982) nor 40 U.S.C. § 303b (1982).

We note that the submission of the GSA Inspector General indicates that the relationship between GSI and the Government has been evolving into a more arms-length relationship. For example, no active Federal employees are now on GSI's board, and GSI is now audited by a private firm, rather than by the General Accounting Office. We conclude, nonetheless, that enough of the unique relationship between GSI and the Government remains, such that our conclusion in our 1978 report that the 1971 GSA-GSI agreement is not unlawful continues to be valid.

for Milton J. Fowler
Comptroller General
of the United States