



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Propriety of Entering into Certain Housing
Agreements with the Federal Republic of Germany
File: B-202121
Date: December 29, 1986

DIGEST

The Air Force may enter into agreements with the Federal Republic of Germany without a proviso specifically limiting yearly payments for rent, utilities, maintenance and operation per family housing unit to \$16,800, the maximum amount currently provided by law, since estimated costs are well within the statutory limit, and in light of other provisions in the lease which provide a safeguard against exceeding the limit in any event.

DECISION

The Department of the Air Force asks about the propriety of entering into two agreements with the Federal Republic of Germany (FRG) without inclusion of a proviso limiting the maximum yearly expenditure per family unit for rent, utilities, maintenance and operation to \$16,800, the amount prescribed by law. 10 U.S.C. § 2828(e)(1).^{1/} For the reasons given below, under the circumstances described the Air Force can enter into these agreements.

BACKGROUND

For over a year the Air Force has been negotiating with the FRG about the terms and conditions of several build-to-lease housing projects at Spangdahlem and Zweibrucken Air Bases in Germany. The agreements with the FRG are in the form of Real Property Obligation Documents. The Air Force states that a supplementary agreement to the NATO Status of Forces Agreement requires the FRG to enter into the actual leases.

^{1/} At the time of the Air Force submission, the maximum annual expenditure for rental housing was set each year in the Military Construction Authorization Act. The Military Construction Authorization Act, 1987, however, codified the \$16,800 maximum. Pub. L. No. 99-661, § 2702(e), 99 Stat. ____ (November 14, 1986).

The record suggests that the Air Force and the FRG are in accord on all terms and conditions of the agreements, except for a provision limiting expenditures to \$16,800, the maximum amount currently authorized by law for rent, utilities, maintenance and operation, per year per family housing unit, 10 U.S.C. § 2828(e)(1). Apparently, the FRG (1) considers the need for such a limiting provision to be a United States domestic restriction not required by any international agreements binding upon it; (2) maintains that the provision is not included in its agreements with the United States Army; and (3) regards such provisions as attempts to transfer financial responsibility to it for costs that are outside its control.

The Air Force states that the two leases involved will be for fixed terms of 10 years at an annual fixed rent per unit of \$7,257.78 for the Spangdahlem project and \$7,509.35 for the one at Zweibrucken.

The utility costs for both locations are estimated to be \$1,570.73 per unit annually. Utilities are handled under separate contracts and may be increased yearly, consistent with inflation.

The first year per unit maintenance costs are \$517.07 for the Spangdahlem project and \$546.23 for the Zweibrucken project. The maintenance costs are fixed for the first year and are increased yearly thereafter in accordance with a federally issued price index for maintenance. The maintenance charges are intended to cover routine day-to-day maintenance and change of occupancy maintenance such as painting. The Air Force states that while these costs are subject to inflation, they could be curtailed or eliminated if necessary to prevent exceeding statutory limits. Major repairs are the lessor's responsibility and those costs are absorbed in the rent, which is not subject to escalation.

Although the Air Force has not submitted the agreements, it states that it has a clause providing for unilateral termination for convenience by the United States Government. Under this clause the United States can terminate the agreements in whole or part. The payments for rent and some maintenance must continue independent of usage but the FRG will require the lessor to sell or rent the returned units so as to reduce or eliminate United States liability. The agreements also include buy-out options which give the United States Government the right to make lump-sum payments, consistent with a prearranged price schedule, and assume direct control of the projects.

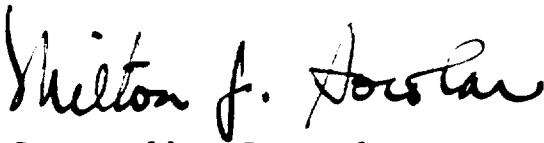
The Air Force would like to enter into these agreements without stipulating the \$16,800 limitation, suggesting that insistence on its inclusion could result in loss of the housing units. Among other things, it maintains that there is little or no chance of exceeding the \$16,800 limit because (1) rent is fixed for 10 years with no escalation; (2) maintenance and utilities would have to increase by approximately 280 percent before the limit is reached; (3) action can be taken to reduce, or, if necessary, eliminate maintenance and utility charges; (4) the buy-out options could be exercised; (5) the \$16,800 limitation could be increased in the future; and (6) the Real Property Obligation Documents can be terminated.

LEGAL DISCUSSION

The leasing of military family housing in foreign countries is governed by section 2828 of title 10 of the United States Code. Paragraph 2828(e)(1) provides that expenditures for rental of family housing, including costs of utilities, maintenance and operation, may not exceed \$16,800. As the Air Force does not want to include a proviso limiting payments for rent, utilities, maintenance and operation to the \$16,800 limit, a question is raised about whether the agreements conform to the Antideficiency Act.

The Antideficiency Act, 31 U.S.C. § 1341(a), prohibits United States officers and employees from making expenditures or incurring obligations in excess of available appropriations, or in advance of appropriations. As a general rule, an agency may not enter into a contract that could, in the future, obligate the United States to pay an indefinite or indeterminate amount, or an amount which could exceed available funds because of a known statutory ceiling. See 58 Comp. Gen. 46, 47-48 (1978).

Under circumstances as set forth above, however, where bona fide estimates of cost over the contract period are well below the statutory limitation here involved and where the agreement to be executed contains a clause allowing the Government to terminate it for convenience, the agreement may properly be entered into without inclusion of a specific provision limiting costs per unit to the statutory ceiling.

for 
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