COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

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January 23, 1957

Honorable John L. McClellan, Chairman
Committee on Government Operations
Senate Permanent Subcommittee on
Investigations
United States Senate

Dear Mr. Chairman:

Further reference is made to your letter dated September 26, 1956, requesting our views on the legal authority of the Department of Defense to award a contract to Knott Hotels Corporation for management of the Pentagon Restaurants on a concession basis and the validity of the contention that bids were not required to be made public prior to such award since the contract involved non-appropriated funds.

In response to our letter of October 29, 1956, the Department of Defense has advised that there is no explicit Congressional enactment under which the Pentagon Building concession and food operation contracts are awarded by that Department, but that it is the view of the Department that such authority may be implied from the right of the Army to operate post exchanges and from the statutes appropriating monies for the erection of the Pentagon Building.

The contention that contractual authority may be implied from the authorization to operate post exchanges was set out by the Secretary of War in a letter to this Office dated November 6, 1944, as follows:

> "The food operation itself is not a concession, but a post restaurant, organized and operated by a Restaurant Council pursuant to A.R. 210-100. The Council finances the operation and merely employs the National Food Corporation as its manager.
>
> "As you are undoubtedly aware, a post restaurant so organized and operated is substantially analogous to an Army Exchange established under A.R. 210-65, which latter regulation governs the business practices and records of account of both types of installation, * * *."

However, it should be noted that A.R. 210-100, as constituted in 1944, authorized the establishment of restaurants for the service and convenience of enlisted men and of civilians at stations where it was inadvisable to establish exchanges because there were no enlisted personnel, because the number of enlisted personnel was small, or where the number of civilian employees was large enough to justify a restaurant in addition to an exchange. A.R. 210-65 authorized the establishment and operation of exchanges in any "post, camp, station, or installation" under certain conditions. These regulations were promulgated under the authority to publish regulations "for the Government of the Army" granted by section 20 of the act of July 15, 1870, as amended, 10 U.S.C. 16, and presumably contemplated the institution of such service only at field installations.

In considering the authority for establishment of post exchanges, the Supreme Court of the United States in the case of Standard Oil Co. v. Johnson, 316 U.S. 481, 483-4, said:

> "On July 25, 1895, the Secretary of War, under authority of Congressional enactments promulgated regulations providing for the establishment of post exchanges. These regulations have since been amended from time to time and the exchange has become a regular feature of Army posts. That the establishment and control of post exchanges have been in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the effect of law."

Aside from the question whether the Pentagon Building may properly be considered a "post, camp, station, or installation" within the meaning of those regulations, we have previously stated that it seems incongruous to apply regulations adopted primarily for military installations in the field to a building which, for all practical purposes, is located in the District of Columbia. Even the most cursory examination of the laws pertaining to the supervision and maintenance of public buildings discloses that the Congress has consistently distinguished between buildings located at the seat of Government and those located elsewhere. While the argument has been advanced that the present arrangements are necessary because of the "remote and isolated" location of the building, so that great incentives in the form of restaurants, stores, etc., must be offered employees who are asked to work there, there would appear to be no valid ground for concluding that such services, to be satisfactory, must be operated under the jurisdiction of the Department of Defense, or that the Congress intended to exempt the Pentagon restaurants and concessions from the normal controls exercised over foodservices by the General Services Administration in other Government buildings located at the seat of Government.

With respect to the contention that contractual authority may be implied from the statutes appropriating monies for construction of the Pentagon Building, the act of August 25, 1941, 55 Stat. 669, 685, appropriated $35,000,000 "for the construction by and for the use of the War Department * * * of an office building and appurtenances thereto, including interior facilities, fixed equipment, necessary services, * * * to be expended in accordance with laws relating to the construction of military post projects * * *." The same act provided that "maintenance and operation of such building shall be under the jurisdiction of the Public Buildings Administration * * *."

Whether Congress contemplated that the cafeterias, lunch bars, etc., in the Pentagon Building should be operated or controlled by the War Department or by the Public Buildings Administration was debated in considerable correspondence between officials of the War Department and the Public Buildings Administration during the latter half of 1942. Such correspondence was concluded by a letter dated December 1, 1942, from the Commissioner of Public Buildings to the Secretary of War, which stated in part as follows:

> "It seems clear to me under the legislation authorizing construction of the Pentagon Building that it is the duty of the Commissioner of Public Buildings to operate these facilities. It seems equally clear that the War Department feels that it is its duty to do so and to control it. I see no way in which I can discharge the duty which I consider the law places upon me without further controversy with the War Department on the question of my authority. I do not consider that in time of war it would be in the public interest to engage in such a controversy. I am, therefore, writing to advise that I shall take no further steps to provide restaurant facilities in the Pentagon Building during the present emergency."

The interpretation of the provisions of the appropriation statute by the then Secretary of Defense appears to be adequately set out in a letter dated April 24, 1951, in which the Secretary advised the Honorable William E. Hess, House of Representatives, that such legislation originally authorized the Secretary of War to establish such services in the Pentagon Building as he thought necessary to the proper functioning of the War Department activities occupying the building. Apparently such claim of authority was based on the reference to "necessary services" in the cited act; however, it is our view that, while such reference may be construed to authorize the original installation of restaurant equipment and facilities as an integral part of construction of the building itself, the specific provision that maintenance and operation of the building should be under the jurisdiction of the Public Buildings Administration would appear to preclude any implication that Congress had excepted maintenance and operation of the restaurant facilities from such jurisdiction and authorized the Secretary of War to perform such functions.

In addition to the above bases of authority, the Department of Defense has advised that an overriding authority is to be implied from the responsibility of the Department of Defense to provide supplies and services essential to the welfare of the personnel of the Department serving in the Pentagon Building. While such responsibility undoubtedly must be assumed by the Secretary of Defense in his capacity as head of a governmental department, we are not aware of any reason why the responsibility of that official, with respect to the Pentagon Building, may be considered different or greater than the corresponding responsibility of the heads of the various other agencies whose employees are currently being furnished restaurant and cafeteria services under the jurisdiction and control of the General Services Administration. In this connection your attention is directed to the fact that under date of May 20, 1954, the Chairman of the Subcommittee on Independent Offices of the House Appropriation Committee addressed a letter to the Secretary of Defense requesting him to expedite the transfer of the handling of Pentagon Building concessions to the General Services Administration. We have no information as to the reply received.

In reply to our request for information regarding the authority to dispense with public opening of bids for the contract in question, the Department of Defense has advised that a public opening was not required by law, and that publication would have resulted in the disclosure of considerable private financial information relative to each bidder. Although the Department has failed to elaborate on its statement that a public opening was not required by law, it is our understanding that such contention is based upon the Department's view that the transaction in question involves the use of "non-appropriated funds" to which the existing statutes have no application.

The question of whether the so called "non-appropriated fund activities" of the several departments and agencies were subject to the various statutory restrictions and directions generally applicable to the receipt and expenditure of public funds was the subject of a special report by the Comptroller General of the United States dated August 10, 1949 (B-45101) to the Congress. The views of this Office on the questionable legality of the use of public property in such activities without express statutory authority, the withholding of monies, received as a result of such activities, from the Treasury, the diversion of such monies to purposes not specifically authorized by law, and the lack of accounting for the receipt, custody, or disbursement of such monies, are set out in detail therein.

Following the filing with the Congress of the above-mentioned report of August 10, 1949, various corrective measures were adopted by the Defense Department, including the consummation of an agreement with the General Services Administration under which there has been paid to that agency, since February 1950, an amount equal to $1.63 per square foot for space occupied in the Pentagon Building by concessions other than food service operations, and one and one-half percent of gross sales of the food service operations. In addition, payment is made for utility services in excess of those normally furnished for office space.

By Department of Defense Directive of October 30, 1951, the Department of Defense Concessions Committee, which theretofore had functioned as a purely advisory body, was made virtually autonomous, with power to make contracts in the name of the United States, subject to approval by the Director of Administration, Office of the Secretary of Defense. The Committee was charged with the responsibility of providing for the administration, operation, and control of services deemed essential to the health, welfare, and morale of employees and Department of Defense activities at the seat of Government, and specifically authorized to operate, directly or through an independent contractor, restaurants, cafeterias, snack bars, and dining rooms in the Pentagon Building, and to provide such commercial type concessions as come within the purposes above stated. The Committee was further authorized to provide for the payment to the Public Buildings Service for space occupied of an amount to be agreed upon, based upon a percentage of sales from food service operations and an annual charge per square foot for other concessions; to make payments from surplus funds derived from concession operations to authorized welfare funds of the Office of the Secretary of Defense and of the three military departments; and to deposit in the Treasury "all monies not required in the conduct of the business of the Concessions Committee or otherwise paid out as described above."

We are advised that the over-all amount paid in to the Treasury since the establishment of the Concessions Committee in 1950, either through GSA or directly into Miscellaneous Receipts, has been slightly in excess of two million dollars. We have no information as to the total receipts of the Concessions Committee or as to the amounts used by it for "welfare activities" or other purposes.

Section 321 of the act of June 30, 1932, 47 Stat. 412, 40 U.S.C. 303(b), provides as follows:

> "Except as otherwise specifically provided by law, the leasing of buildings and properties of the United States shall be for a money consideration only * * *. The moneys derived from such rentals shall be deposited and covered into the Treasury as miscellaneous receipts."

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Since 1928 the decisions of this Office have consistently held that the operation of a concession utilizing Government-owned facilities constitutes a valuable privilege for which the Government should be compensated, and that contractual and other arrangements relating to the establishment and operation of such activities should be subject to existing statutory provisions governing public contracts. 7 Comp. Gen. 806; 19 id. 887; A-95642, March 19, 1943 and November 18, 1943; A-51624, March 25, 1944. The fact that the establishment and operation of such commercial enterprises may be administratively determined to be essential to the transaction of official business of the Government, or the characterization of payments for the use of space and facilities as "commissions" or "percentages", certainly should not change the intrinsic character of such payments as rental paid for the use of Government property. Conceding, arguendo, that the day to day transactions arising out of the operation of the Pentagon restaurant are accomplished with the use of non-appropriated funds which are not properly classifiable as "public funds," the monies accruing to the United States pursuant to a contract for the use of space and facilities in the Pentagon Building should be classified as public funds and in the absence of express statutory authority therefor we believe there is no justification for the diversion from the Treasury of any part of the receipts from concessions of the Department of Defense Concessions Committee.

While there is no specific statutory direction that space rental agreements or concessions of this type must be let on a competitive bid basis by the Concessions Committee--since its operations are without any statutory sanction--we believe the protection of the interests of the United States and the prevention of fraud and favoritism sufficiently support such a rule as a matter of public policy exemplified in Section 3710, Revised Statutes, 41 U.S.C. 8, which provides as follows:

> "Sec. 3710. Whenever proposals for supplies have been solicited, the parties responding to such solicitation shall be duly notified of the time and place of opening the bids, and be permitted to be present either in person or by attorney, and a record of each bid shall then and there be made."

The contract executed with Knott Hotels Corporation--made in the name of the United States of America and approved by an authorized representative of the Secretary of Defense--provides for payment of $150,000 annually by the contractor to the Department of Defense Concessions Committee for use of the premises, fixed furniture and equipment, and machinery, in addition to the payment of 66 2/3 percent of his annual net profits, before taxes, on the first $150,000, plus 100%

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of the annual profits in excess of $150,000. It is our opinion that the arrangement under the present contract constitutes the grant of a privilege substantially equivalent to a lease of Government-owned property by the Department of Defense, for a compensation in the nature of rent, estimated by the Committee at $199,400 per year. In view thereof, your attention is invited to the possible application of the provisions of section 601(c) of the act of September 28, 1951, 65 Stat. 365, 40 U.S.C. 551(c), which requires the Secretaries of the Army, Navy, and Air Force to come into agreement with the Committee on Armed Services of the House and Senate with respect to leases of Government-owned real property where the estimated annual rental is in excess of $25,000.

Sincerely yours,

JOSEPH CAMPBELL

Comptroller General
of the United States