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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

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B-64487

APR 23 [redacted]

APR 23 1947

Mr. L. E. Lyman, Authorized Certifying Officer,
Soil Conservation Service,
Department of Agriculture,
Lincoln 1, Nebraska.

Dear Mr. Lyman:

Reference is made to your letter of February 25, 1947, forwarding for an advance decision as to whether certification thereof for payment is authorized, bureau voucher No. 13888, in the sum of $3,842.51 in favor of McKenzie County Grazing Association, Watford City, North Dakota, covering payment for a number of earth fill dams and dugouts constructed for the Soil Conservation Service under contract No. Asc (NB-O)-6931, dated September 23, 1946.

It is pointed out in your letter that, due to an oversight on the part of the contracting officer in the advertising and award of the contract, proper cognisance was not taken of the provisions of the Miller Act of August 24, 1935, 49 Stat. 793 (40 U.S.C. 270a), requiring the furnishing of performance and payment bonds, nor was there a compliance with the provisions of the act of August 30, 1935, 49 Stat. 1011, which amended the Davis-Bacon Act of March 3, 1931, 46 Stat. 1494 (40 U.S.C. 276a), requiring a stipulation as to the minimum wage rates payable to mechanics and laborers employed on the work,

both statutory requirements being applicable to contracts exceeding $2,000 in amount for the construction, repair or alteration of public works of the United States. In this connection you refer to office decision dated November 14, 1944, 24 Comp. Gen. 376, wherein it was held that in the absence of circumstances justifying the omission of provisions, penalties and stipulations of the eight-hour law of 1912, 37 Stat. 137, as amended by the act of September 9, 1940, 54 Stat. 884 (40 U.S.C. 324-326), the agreement there considered imposed no obligation on the United States to pay for the services rendered by the contractor. It is stated further that the work here contracted for has been completed in accordance with the contract specifications and that it has been determined that the wages paid by the contractor actually were the prevailing wage rates for the locality.

Under the terms of the contract, which is executed on U. S. Standard Form No. 33 (Revised)—ordinarily used only in making short form informal contracts involving small amounts—the contractor agreed to construct on Government-owned land in McKenzie County, North Dakota, the earth fill dams and dugouts specified, in accordance with the general conditions and stipulations set out in the contract, to be completed not later than December 21, 1946. The Government agreed to make payment upon completion and final acceptance of the work at specified unit prices per cubic yard of material excavated or removed under each item. Thus, the contract covered the construction, alteration or repair of public works of the United States, and, on

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the basis of the estimates specified for each item computed at the unit prices quoted by the contractor, exceeded $2,000 in amount. Therefore, the contract was subject to the requirements of the Miller Act, supra. See 43 Am. Jur., Public Works and Contracts, section 139; Cf. the cases collected in the annotation 101 A.L.R. 565; also, United States v. Irvin, 316 U. S. 23. For like reasons, the contract clearly was subject to the requirements of the Davis-Bacon Act, supra. 17 Comp. Gen. 283; id. 471; 18 Comp. Gen. 19; id. 285; id. 394; id. 446; 19 Comp. Gen. 467; id. 566; 20 Comp. Gen. 18; Alliance Construction Company v. United States, 79 C. Cls. 730, 735.

Examination of the contract terms, however, discloses that the work required was advertised on the basis of award for "any one or all of the items." Also, the contract did not provide for a fixed lump-sum price but for payment on the basis of the actual yardage excavated or removed under each item to be "computed by the engineer based on detailed surveys." Hence, it could not be definitely determined in advance that the items awarded to any particular bidder would exceed the aforementioned statutory minimum of $2,000, and this apparently accounts for the failure of the contracting officer to comply with the statutes, supra.

With respect to the decision, 24 Comp. Gen. 376, referred to in your letter, that decision may be distinguished from the instant case on the facts. The contract there considered had not been completed, and the record indicated that the provisions required by the eight-

hour law had been included in the advertised specifications but were deleted by the bidder when submitting his bid. In addition, the bid, in that case had been accepted by the contracting officer apparently without objection and the contractor later refused to agree to the inclusion of the required stipulations. On the other hand, it appears that the situation which has arisen in the instant case was due to inadvertence on the part of the contracting officer. It appears, also, that while the difficulty could have been guarded against and avoided by the inclusion in the specifications of a stipulation requiring the furnishing of performance and payment bonds and for the inclusion of the minimum wage rate provisions in the event the contract awarded should exceed $2,000 in amount, there was no intention to evade the statutory requirements involved. In fact, it appears that both parties acted in good faith. See, in this connection, 18 Comp. Gen. 394.

Accordingly, you are advised that in view of all the facts appearing with respect to the award of this particular contract, and inasmuch as the required work has been satisfactorily completed, and the contractor has paid the minimum wage rates prevailing in the locality, this office will not be required to object to the payment proposed on the voucher submitted with your letter because of the failure to comply with the above-cited statutory requirements.

The voucher, together with its accompanying papers, is returned herewith.

Respectfully,

(Signed) Lindsay C. Warren

Comptroller General
of the United States.

Enclosures.

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

B-64491

APR 23 1947

APR 23

The Honorable,

The Secretary of the Navy.

My dear Mr. Secretary:

Reference is made to your letter of March 7, 1947, file JAG: II:HCT:nbr, as follows:

"Mrs. Iris G. B. Vaughan was employed at the Naval Operating Base, Bermuda, from May 19, 1942 until October 30, 1945, when she resigned and returned to the United States following completion of her employment contract. Thereafter she was taken up on the rolls of the U.S. Naval Officer Personnel Separation Center, First Naval District, 150 Causeway Street, Boston, Massachusetts, as a Clerk-Stenographer, CAF-3, $2298 per annum.

"On January 7, 1946, the Commandant, Naval Operating Base, Bermuda, advised Mrs. Vaughan by despatch that a position was available at the Naval Operating Base as secretary to the Commandant, CAF-4, and requested to be advised when she would arrive. Mrs. Vaughan wired her acceptance on January 8, 1946. By letter dated January 22, 1946, the Naval Officer Personnel Separation Center, Boston, Mass., informed the Commandant, U.S. Naval Operating Base, Bermuda, that it interposed no objections to the transfer of Mrs. Vaughan.

"Mrs. Vaughan did not await the issuance of travel orders but proceeded to Bermuda at her own expense. She reported for duty and was taken up on the rolls of the Naval Operating Base on January 31, 1946. Form NAVEXOS 1200 dated January 31, 1946, was issued to Mrs. Vaughan by the Naval Operating Base, Bermuda, effecting her appointment as Clerk-Stenographer, CAF-4, as of that date. On the same date, the Officer Personnel Separation Center, Boston, Mass., was notified by despatch of the action taken and was requested to drop her from the rolls of that activity as of January 30, 1946. This was done by execution of Form NAVEXOS 1200, Transfer, by the Officer Personnel Separation Center.

"Copies of the correspondence, despatches and Form NAVEXOS 1200, referred to above, are enclosed.

"Mrs. Vaughan, who is still employed at the Naval Operating Base, Bermuda, requested soon after her arrival in Bermuda (1) reimbursement for her travel to the Naval Operating Base, Bermuda, and (2) the issuance

of an employment agreement whereby she would agree to remain in employment at her present station for a period of eighteen months from January 31, 1946.

"The Act of February 21, 1942, (56 Stat. 97; 5 U.S.C. Supp. V, 75c-1 note), provides as follows:

"'That during the continuance of the present war and for six months thereafter, any appropriations heretofore or hereafter made available for expenses of travel of civilian officers and employees of the War and Navy Departments and the Coast Guard shall be available also for expenses of travel performed by them on transfer from one official station to another when authorized, by such responsible officer or officers of the Department concerned as the head thereof may designate for that purpose, in the order directing the travel: PROVIDED, That such expense shall not be allowed for any transfer effected for the convenience of the officer or employee.'

"The Comptroller General in his decision of April 10, 1946 (25 Comp.Gen. 708), held that in order to entitle an employee to reimbursement of travel or other expenses incurred between official duty stations, it is mandatory under the provisions of the above-quoted act that orders 'directing the travel' and authorizing reimbursement for the expenses thereof be issued in advance and that there is no authority to waive the statutory requirement whether upon the ground of administrative inadvertence, or otherwise. On the basis of this decision, the Navy Department denied Mrs. Vaughan's request for reimbursement for her travel from Boston to Bermuda.

"Some doubt has arisen in the Navy Department as to the correctness of the action taken in denying Mrs. Vaughan's request for reimbursement for her travel to Bermuda and also as to the authority of the Navy to pay her return transportation as requested by her.

"The denial of Mrs. Vaughan's first request was based entirely on the Comptroller General's decision of April 10, 1946, construing the Act of February 21, 1942, supra. Consideration was not given to the provisions of the Act of April 9, 1943 (57 Stat. 61; 34 U.S.C. Supp. V, 602), which are as follows:

"'The Secretary of the Navy is hereby authorized to pay the costs of transportation of civilian employees to places of duty in the Naval Establishment outside the continental United States, or in Alaska, and return, upon relief therefrom, to the places at which they were engaged or from which they were transferred for such duty: PROVIDED, That nothing herein shall be construed as authorizing the Secretary of the Navy to transfer such employees from one station to another without their consent.'

"This latter act does not require that the expenses of travel be authorized in the order by which the travel was directed, and in fact makes no reference to travel orders. It does not require that the cost of transportation be paid or authorized in advance, nor does it require that an employment agreement be entered into, nor specify any time which the employee must serve in order to be entitled to return transportation. As an administrative practice, the Navy Department has required that employees who are furnished transportation to a station outside the continental limits of the United States execute an agreement whereby the employee, in consideration of the furnishing of transportation, agrees to remain in employment at the extra-continental station for a specified period (usually eighteen months), or such part thereof as his or her services may be required. The agreement further specifies that upon its completion the employee will be furnished return transportation to the mainland point from which appointed or transferred.

"It is believed that the correspondence in this case leading up to Mrs. Vaughan's employment at the Naval Operating Base, Bermuda, copies of which are enclosed and which was outlined above, establishes that the travel performed by Mrs. Vaughan from Boston, Massachusetts, to the Naval Operating Base, Bermuda, was undertaken at the request of and for the benefit of the Government.

"Your decision is requested as to whether on the facts of this case and the correspondence and official actions pertaining thereto, the Navy Department would be authorized, under the provisions of the Act of 9 April 1943, supra, or any other Act, to reimburse Mrs. Vaughan for the cost of her transportation to Bermuda, and upon completion of an eighteen month's tour of duty, to pay her return transportation to the United States.

"Should you hold that the Navy Department is not authorized to reimburse Mrs. Vaughan the cost of her transportation to Bermuda, your decision is requested as to whether the Navy may approve her second request, namely the issuance of an employment agreement whereby she will agree to remain in employment for eighteen months from date of appointment in return for which the Navy Department will agree to pay her return transportation. In this connection, it should be borne in mind that the request was made shortly after Mrs. Vaughan's arrival in Bermuda when the time element offered adequate consideration to the Government which might not be considered the case were the request being made now for the first time.

"Decisions of the Comptroller General construing the Act of April 9, 1943, supra, and similar provisions of law applicable to the War Department (sec. 3c of the Act of June 5, 1942, 56 Stat. 314; 50

Appendix, U.S.C. Supp. V, 763), indicate, although not actually deciding the point, that the right of civilian employees to return transportation to the United States at the expense of the Government is limited to those employees who made the outward journey at the expense of the Government. (23 Comp. Gen. 280; 25 Comp. Gen. 480.) Since this point has not actually been decided, it is submitted that this rule should be otherwise where the outward journey was made at the request of and for the benefit of the Government and was performed under circumstances, as was the case here, where the Navy would have had the authority to pay the cost of outward transportation had the employee made the request beforehand. In this event, the Government is gaining all the benefits it would have obtained by paying both the outward and the return transportation at the cost of the return transportation only."

The act of April 9, 1945, 57 Stat. 61, quoted in your letter, relating, among other things, to transfer of employees outside the continental limits of the United States or in Alaska appears to have been intended for application, primarily, to transfer of employees from other departments and agencies as a part of the program of recruiting personnel for duties at bases or projects outside the United States, inasmuch as authority already existed under the act of February 24, 1942, 56 Stat. 97, for transfers of official stations of employees within the Navy Department.

The facts set forth in your letter respecting the transfer of Mrs. Vaughan from the Naval Officer Personnel Separation Center, Boston, Massachusetts, to the Naval Operating Base, Bermuda, clearly and definitely establish that the action taken in that connection involves a transfer of official station under the act of February 21, 1942, and not a transfer within the meaning of the act of April 9, 1945. Accordingly, the decision of April 10, 1946, 25 Comp. Gen. 708, is for application, that is to say, since no advance orders were issued directing the travel, reimbursement for the cost of the

employee's transportation to Bermuda is not authorized.

With respect to execution of an employment agreement with Mrs. Vaughan providing for her return to the United States at Government expense upon completion of 18 months' service it is assumed that such an agreement is contemplated under the act of April 9, 1945. But, as the 1945 statute is not applicable to a transfer of official station in the first instance, no proper basis is perceived for invoking the statute to assure the employee's return to the United States at Government expense after completion of a particular period of service. A transfer of official station denotes a change of an employee's permanent duty station; and under existing statutes an employee who reports to a new station outside the continental limits of the United States for permanent duty is in no different status with respect to being entitled to return to the place from which transferred at Government expense from that of an employee who has had his official station changed within the continental limits of the United States. In other words, in the absence of a clear indication that a second transfer of official station was involved and was not primarily for the convenience or benefit of the employee within the meaning of the applicable statute in effect at the time--see in that connection section 1 (a) of Public Law 600, 60 Stat. 806--the expenses incurred by an employee in returning to the old official station would be considered as purely personal and, as such, would not be reimbursable by the Government.

Accordingly, I have to advise that the execution of an agreement with Mrs. Vaughan, such as contemplated, would be of no legal effect.

Respectfully,

(Signed) Lindsay C. Warren

Comptroller General
of the United States.