



United States  
General Accounting Office  
Washington, D.C. 20548

Office of the General Counsel

B-227527, B-227325

October 21, 1987

Mr. Matthew K. McElhaney  
Department of the Navy  
Naval Facilities Engineering Command  
200 Stovall Street  
Alexandria, Virginia 22332-2300

Dear Mr. McElhaney:

You are concerned about a lease dispute between an Italian landlord and the United States Navy involving a lease for 205 units of military family housing in Sigonella, Italy. The Italian landlord has brought suit in an Italian Court, and currently the parties are discussing the possibility of a settlement. You ask whether there might arise individual or personal liability under the Antideficiency Act, 31 U.S.C. § 1341, for the Navy officials who unilaterally modified the lease by tendering a lower rental payment than called for by the lease. The Justice Department also is concerned about this issue and asks whether this Office would approve any judgment or compromise settlement for payment, and whether the Comptroller General's approval would be subject to any limitations or conditions.

For the reasons given below, we find that the Navy officials acted properly in unilaterally modifying the lease and that they would not be personally liable under the Antideficiency Act should the landlord obtain a judgment in an Italian court or should there be a compromise settlement. We also find that this Office would certify an adverse judgment or compromise settlement for payment, so long as it is properly certified by the United States Attorney General as required by section 2414 of title 28 of the United States Code, and it is final.

**BACKGROUND**

In a report on Leased Military Housing Costs in Europe, GAO/NSIAD 85-113 (July 24, 1985), we concluded that several leases under consideration violated the Antideficiency Act, 31 U.S.C. § 1341, because they obligated the United States to pay indefinite or indeterminate rental amounts. The Antideficiency Act prohibits United States officers and employees from subjecting the Government to liabilities and expenditures in excess of those authorized by law. In prior

years we had disapproved of agreements obligating the United States to a contingent liability in an indefinite or indeterminate amount. E.g., 58 Comp. Gen. 46 (1978). In the cited case, we held that an agency was prohibited by the Antideficiency Act from making payments in excess of funding limitations notwithstanding that the limitations were exceeded to make contract payments because of fluctuations in currency exchange rates. Id. at 47-48.

One of the leases in question was between the United States Navy and an Italian landlord. The lease called for the Navy to lease 200<sup>1/</sup> family housing units for housing for its personnel in Sigonella, Italy. The lease was entered into in March 1981, and was to run for 10 years. Subsequently, the lease was extended until May 1993. Rent and maintenance payments were to be made monthly in Swiss francs. The lease provided that the amount for rent and maintenance would be increased or decreased at the beginning of each year of the lease consistent with increases or decreases in the consumer price index.

The lease was entered into under section 2828 of title 10 of the United States Code which allows the secretaries of the military departments to lease family housing units in foreign countries, subject to various limitations. One of the limitations is that annual rental expenditures for an individual family housing unit, including costs of utilities, maintenance and operation, may not exceed the maximum amount specified by law, which currently is \$16,800. Id. § 2828(e).

Although the lease payments fell within the statutory limit when the lease was concluded,<sup>2/</sup> since the lease called for annual rent and maintenance payments based on potential indefinite increases in the Italian cost of living index, we said the lease violated the Antideficiency Act.

You inform us that on June 1, 1987, the rent payments due on the Sigonella lease in fact exceeded the \$16,800 maximum. Since the lease does not contain a termination clause and the lease extends until May 31, 1993, the Navy unilaterally

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<sup>1/</sup> The first modification to the lease, dated September 2, 1981, increased the number of units involved to 205.

<sup>2/</sup> At the time the lease was entered into the maximum amount was \$1,115 per month per unit. Pub. L. No. 96-418, 94 Stat. 1749, 1765.

modified the lease and tendered a rental consistent with the \$16,800 limit prescribed by section 2828. As a result, in July 1987 the landlord brought suit against the Navy in an Italian court.<sup>3/</sup> We understand that the parties are discussing the possibility of a settlement.

Should the lessor prevail and an adverse judgment be entered or a settlement reached, you are concerned that the Navy officials responsible for unilaterally modifying the lease could be personally liable under the Antideficiency Act, 31 U.S.C. § 1341, since the amount of the judgment or settlement when added to the rent payment already made would exceed the \$16,800 maximum established by section 2828.

The Justice Department suggests that the landlord could well prevail in the litigation since the Antideficiency Act defense would probably not be recognized under Italian law. The Department points out that under section 2414 of title 28 of the United States Code "[p]ayment of final judgments rendered by a . . . foreign court or tribunal against the United States . . . shall be made on settlements by the General Accounting Office after certification by the Attorney General that it is in the interest of the United States to pay . . . ." In this regard, Justice asks whether we would approve any adverse judgment or settlement and whether our approval would be subject to any conditions or limitations.

#### LEGAL DISCUSSION

United States employees who knowingly and willfully violate the Antideficiency Act are individually subject to fines up to \$5,000, a maximum of two years imprisonment, or both. 31 U.S.C. § 1350. As we have stated, from its inception the Sigonella lease did not comply with the Antideficiency Act. The Navy officials who were responsible for unilaterally modifying the lease by making rent and maintenance payments that did not exceed the \$16,800 limit were acting in accordance with the Act's requirements.

Amounts the United States is obliged to pay by virtue of a court judgment or compromise settlement cannot be considered payments for rent and maintenance under a lease. They are damages awarded by a court or obtained through litigation by compromise settlement. We find no basis for adding amounts

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<sup>3/</sup> The lease provides that disputes under it are to be heard in an Italian court. An Italian counsel retained by the United States Department of Justice has concluded that the lease is valid and enforceable under Italian law.

awarded by judgment or obtained through settlement to those paid under the lease to determine whether the \$16,800 limit was exceeded. Accordingly, the Navy officials who tendered the lower rent to conform to the Act would not be subject to personal liability under the Act should an Italian court decide the United States is liable to pay the rent and maintenance payments provided for in the lease.

Should the Italian lessor obtain a judgment in an Italian court, or should there be a compromise settlement, the payment would be made pursuant to section 2414 of title 28 of the United States Code. That section provides for payment of judgments and compromise settlements rendered by foreign courts or tribunals against the United States upon settlement by this Office after certification by the United States Attorney General that it is in the interest of the United States to pay.

The permanent judgment appropriation described in section 1304 of title 31 is used to pay judgments and awards described in section 2414 which are "not otherwise provided for," that is, which cannot be paid from some appropriation or fund under the control of the agency whose activities gave rise to the claim. In this case, we assume Navy would continue to pay amounts due under the lease up to the statutory ceiling. To the extent a judgment or compromise settlement represents amounts in excess of the statutory ceiling -- amounts with respect to which the Navy could not have validly obligated its appropriations -- we are not aware of any Navy funds which would be available for payment. To this extent, the judgment appropriation would be available.

The only condition or limitation upon payment other than that the Attorney General certify that it is in the interest of the United States to pay<sup>4/</sup>, would be that the judgment or compromise settlement be final. We have held that generally we have no authority to make partial or intermediate payments, and that a judgment is not final for payment purposes until the appellate process is complete with respect to all elements of the litigation. B-198029, May 19, 1980. For further discussion of the payment of foreign court judgments, see B-206443, June 25, 1984, copy enclosed.

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<sup>4/</sup> Although there is no evidence of this here, if a judgment was awarded or compromise settlement reached through bad faith, presumably it would not be in the interest of the United States to pay it.

We hope we have been of assistance.

Sincerely,



*for* Rollee Efros  
Associate General Counsel

cc: David Epstein  
Director, Office of Foreign Litigation  
United States Department of Justice  
Washington, D.C. 20530

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**DIGESTS**

1. United States Navy officials acted properly in unilaterally modifying a lease for foreign military family housing between an Italian lessor and the Navy, and they would not be personally liable under the Antideficiency Act should the landlord obtain a judgment in an Italian court.

2. The General Accounting Office would certify an adverse judgment or compromise settlement for payment under section 1304 of title 31 of the United States Code, so long as it is properly certified by the United States Attorney General as required by section 2414 of title 28, and it is final.