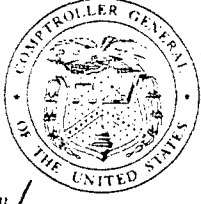


Proc II

DECISION



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

[Request by Navy for Interpretation of Lease Agreement] ^{10,456}

FILE: B-194353

DATE: June 14, 1979

MATTER OF: Department of the Navy--
Request for Advance Decision

DIGEST:

1. Where lease agreement bases yearly rental adjustments on fluctuation of "cost of living index," and past performance of parties to the agreement exhibits an intent to be bound by an index which is made up of all segments of the economy, even though a more specific and relevant housing index existed, GAO has no legal objection to the application of the overall index. However, GAO recommends modification of lease agreement to base future rental extensions and adjustments on the more appropriate index relating specifically to rental housing.
2. Advance payments by the Department of the Navy for rent in foreign country is not illegal if such payments are necessary to accord with local custom, as provided by law.

AGC0001

The Department of the Navy requests our advance decision as to the correctness of rental payments made by the U. S. Naval Support Activity, Naples, Italy. *DLG 01796*
Specifically, we have been asked to interpret lease agreement language which controls the amount of increase or decrease in yearly rental adjustments. The Navy has further requested our determination regarding the propriety of making advance payments under the provisions of this lease.

On May 15, 1975, the Navy, on behalf of the United States of America, entered into a yearly renewable lease agreement with the Societa' N. C. Coppola Pinetamare of Naples, Italy, to provide 101 apartments and parking spaces for U. S. Government personnel in Italy. This lease provides that, upon yearly renewal, the rental *DLG 0197*

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charges will be adjusted according to the increase or decrease of the cost of living index as published by the Instituto Italiano di Statistica (ISTAT).

In accordance with the most recent ISTAT overall cost of living index, which indicates a 12% increase, the Navy has prepared a voucher for payment of rental charges amounting to a 12% increase over the previous rent. Noting that ISTAT also published a cost of living index specifically relating to the rental and housing sector of the Italian economy which indicated only a 7.9% increase, the Navy, fearing a possible overpayment situation, is withholding payment of the 12% increase voucher pending our decision as to which cost of living index (overall-12% or specific-7.9%) is applicable here.

The lease agreement's rental adjustment language refers only to "the cost of living index published by * * * ISTAT" with no description of what segments of the Italian economy are to be included in the makeup of that index.

In our opinion, neither the general index nor the specific index is beyond the scope of the lease's rental adjustment provision. In such circumstances, the parties to the agreement are in the best position to know and exhibit what application they intended. Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the terms of that agreement. Restatement (Second) of Contracts, § 228 (1973). The Court of Claims, for example, gives great, if not controlling, weight to the interpretation placed upon the contract provisions by the parties themselves prior to the time when the contract becomes the subject of controversy. Dittmore-Freimuth Corporation v. United States, 182 Ct. Cl. 507, 530, 390 F. 2d 664, 679 (1968).

In this regard, the Navy's correspondence indicates that previous rental adjustments during the life of the lease were made at the overall cost of living

index rate. Because it is evident from enclosures to the correspondence that ISTAT has been issuing overall as well as specific rental and housing indices during the entire life of the lease, we believe that the parties' choice of the overall cost of living index for use in all previous rental adjustments ^{is} ~~is~~ the best indication of their intent to be bound by that index when they ^{Navy} entered into the lease agreement in May 1975.

Moreover, Navy has advised us that during the period of lease negotiations only an overall cost of living index was in existence, and that the first specific rental and housing index (for May 1975) was not released by ISTAT until June 1975, after execution of the lease. Navy considers it unlikely that those who negotiated the lease were aware of ISTAT's planned issuance of specific indices. We view this to be further indication of the parties' intent to be bound by the overall index.

Therefore, we have ^{there was} no legal objection to the payment of the voucher, if otherwise proper, based on the 12% increase in the overall cost of living index because the parties to the lease appear to have agreed to be bound by that index. However, we recommend that the Navy ^{should} attempt to modify the lease agreement so that for future extensions, rental adjustments will be based on the more relevant specific rental and housing cost of living index published by ISTAT.

The Navy's second question to our Office concerns the legality of making advance payments of rent under the terms of the lease. ^{Further payment may be made in advance,}

31 U.S.C. § 529 (1976) provides:

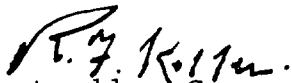
"No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment * * *."

in accordance with local custom

An exception to this prohibition is provided in 31 U.S.C. § 529i for rent in foreign countries, as follows:

" * * * Section 529 of this title shall not apply in the case of payments made from appropriations to the Department of Defense * * * to payments for rent in such [foreign] countries for such periods as may be necessary to accord with local custom * * *."

The record submitted by the Navy contains no basis for concluding whether the rental payment agreed to by the parties is in accord with local custom. Therefore, upon a determination that the payments are in accord with local custom, the vouchers may be paid.


Deputy Comptroller General
of the United States