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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES

WASHINGTON, D. C. 20548



LM095920

FILE: B-192859

DATE: April 17, 1979

[Request By Nonappropriated Fund Instrumentality For]
MATTER OF: Consolidated Post Housing Fund - [Reimbursement
From Appropriated Funds]

- DIGEST:
1. Nonappropriated fund instrumentalities differ significantly from other Government activities. From appropriation and procurement standpoint, obtaining goods or services from nonappropriated fund instrumentality is equivalent to obtaining them from nongovernmental commercial sources.
 2. Although selling goods or providing services to regular governmental activities is outside scope of proper activities of nonappropriated fund instrumentality, there may be circumstances in which it is necessary for Army to procure from such instrumentality. In such instances Army must prepare appropriate sole-source justification establishing its need for such procurement.
 3. Obligation of the United States exists when there is binding agreement imposing liability on both parties. Such binding agreement requires clear manifestation of assent by both parties. There must be definite offer and positive unequivocal acceptance of it.
 4. Minutes of Consolidated Post Housing Fund Governing Council meeting, in which council recommends that Housing Fund be reimbursed from appropriated funds for costs of custodial and maintenance services it provided for common use areas of Army quarters, do not constitute definite offer to enter into binding agreement. Base commander's approval of such minutes is not positive unequivocal acceptance which would create binding agreement.
 5. Since there is no binding agreement between Consolidated Post Housing Fund and Army, Housing Fund voucher may not be paid. However, to extent that Army has benefited from Housing Fund services, and if arrangement is ratified by authorized contracting officer, Housing Fund may be paid on quantum meruit basis.

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The Finance and Accounting Officer, at Fitzsimons Army Medical Center, Denver, Colorado, ~~seeks our~~ ^{requested} opinion on the propriety of paying a voucher. The voucher, in the form of a request for reimbursement, was presented by the Custodian of the Consolidated Post Housing Fund (Housing Fund), a nonappropriated fund instrumentality, for salaries paid to Housing Fund employees and other costs incurred in providing maid service, custodian services, yard cutting and watering, maintenance of exterior roads and grounds, snow removal in entry ways and general policing of common use areas in transient quarters.

At Fitzsimons, responsibility for providing these types of services is divided between the Directorate of Facilities Engineers (DFAE), and the Directorate of Industrial Operations (DIO), both parts of the official command structure. DFAE did provide nominal maintenance services, including trash collection, but did not provide any of the other services to the housing areas in question. The Governing Council of the Housing Fund decided to provide these services itself, and paid for them by collecting service charges from permanent residents of bachelor officer quarters and bachelor enlisted man quarters. DFAE did not supervise the work performed by the Housing Fund, nor did it approve the costs incurred.

At its meeting of May 25, 1978, the Governing Council of the Housing Fund recommended that about \$12,000 of fiscal year 1978 appropriated funds be made available to reimburse it for costs it had incurred and would incur during the year in maintaining common use areas. It also recommended that about \$13,000 be included in the fiscal year 1979 Command Operating Budget to cover the cost of the services the Fund would provide. At the same meeting, the Governing Council voted to reimburse residents for the service charges collected in the past if the Housing Fund was reimbursed for the services performed in fiscal year 1978.

These recommendations of the Governing Council were reported in its minutes dated May 31, 1978. On June 15, 1978, the Acting Commander of Fitzsimons sent a memorandum to the President of the Fund stating that the minutes of May 31, 1978, were "reviewed" and "approved."

On June 21, 1978, the Custodian of the Housing Fund submitted a request for reimbursement to the Finance and Accounting Officer of Fitzsimons. The request was submitted on DA Form 2496, which is designated "Disposition Form."

The Finance and Accounting Officer asks (1) whether payment for these services can be considered a proper use of appropriated funds; (2) whether the Disposition Form, ~~as prepared by the Housing Fund Custodian,~~ meets the requirements of AR (Army Regulation) 37-21 to

establish and record a commitment and obligation of appropriated funds; and (3) whether the commanding officer's approval of the Housing Fund Council minutes constitutes the creation of a valid contract and obligation.

Under 31 U.S.C. § 628, appropriations can only be used for the purpose for which they were appropriated. Without specific statutory authority, appropriated funds are not available to support activities of a nonappropriated fund instrumentality, whether or not a Government official approved an expenditure for this purpose. In this case, however, many of the services provided were the responsibility of the Government, rather than activities of the Housing Fund. See AR 210-16, paragraph 2-2.a; AR 420-72, paragraph 2-1; and AR 210-52, paragraph 502.c(1), Table 5-1. There is no question that the procurement of these services was a "proper use of appropriated funds", if the procurement was otherwise properly made.

An answer to the contracting officer's second question is perhaps unnecessary since we conclude, infra, ^{State} that no valid contract was ever made with the Fund. However, we must point out that a "Disposition Form", according to AR 340-15, is the equivalent of an inter-office memorandum. In a recent decision, we were faced with several similar instances of Department of the Army operating activities obtaining goods or services from nonappropriated fund instrumentalities. See 58 Comp. Gen. 94 (1978). One of the cases, B-148581, also involved the provision of custodial services to common use areas of quarters by employees of the nonappropriated fund instrumentality. In that decision we discussed the status of nonappropriated fund instrumentalities (NAFI). We concluded:

"* * * Thus, for all practical purposes from an appropriation and procurement standpoint, the obtaining of goods and services from a NAFI is tantamount to obtaining them from non-Governmental, commercial sources."

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"* * * NAFIs exist to help foster the morale and welfare of military personnel and their dependents. * * * Providing regular Defense Department operating activities with goods or services is not directly related to that purpose. * * * Thus, as a general proposition, we would view the sale of goods and services by NAFIs to regular Governmental operating activities to be outside the scope of the NAFIs' proper function. * * *

"We recognize, however, that there may be circumstances where, as a practical matter, procurement through a NAFI may be necessary. For example, there may be organizational or functional reasons which dictate the impracticability of having services furnished by other than a NAFI. * * * In such cases, appropriate sole-source justifications should be prepared, and * ** regular purchase orders, i. e. DD Form 1155, should be utilized rather than intra-agency orders."

Although the "Disposition Form" is not the proper document to record a purchase order obligation of this type, according to Army regulations, its use is not necessarily in violation of 31 U. S. C. § 200(a) which precludes the recording of an obligation unless it is supported by documentary evidence of a binding agreement between the parties. As explained in the report of the Committee of Conference:

"* * * It is not necessary, however, that this binding agreement be the final formal contract on any specified form. The primary purpose is to require that there be an offer and an acceptance imposing liability on both parties. * * *"

H. R. Rep. No. 2663, 83d Cong., 2d Sess. 18 (1954).

This brings us to the contracting officer's third question about the effect of the commanding officer's approval of the Housing Fund Council minutes in creating a binding contractual obligation.

A manifestation of assent by both of the parties is necessary to create a binding contract. There must be a definite offer and an unequivocal acceptance of it. Youngstown Steel Erecting Co. v. MacDonald Engineering Co., 154 F. Supp. 337, 339 (N. D. Ohio 1957). To bind the offeror, the acceptance must be positive and unambiguous. United States v. Braunstein, 75 F. Supp. 137, 139 (S. D. N. Y. 1947); 35 Comp. Gen. 272, 274 (1955).

There is no indication in the record that any officer of the United States, authorized to do so, requested the Housing Fund to provide the services in question. Rather, it seems clear that the Housing Fund provided these services at its own initiative. Until the end of May 1978 it did not even request that it be paid for these services. The record does not contain any documentary evidence of an agreement covering the period October 1977 through May 1978, which required the Housing Fund to maintain the billeting areas and required the Army to pay for these maintenance services.

For the period after May 1978, the only documents which could possibly create a written binding contract are the May 31 Housing Fund Governing Council minutes and the June 15 approval of those minutes by the Acting Commander of Fitzsimons. The Disposition Form, signed only by the Custodian of the Housing Fund, who has no authority to obligate appropriated monies of the United States, certainly does not create an agreement binding on both the Army and the Housing Fund. The contract, if it exists, must be contained in the minutes and the Acting Commander's approval.

The crucial language of the minutes is contained in paragraph 6a and paragraph 8. Paragraph 6a states, in part:

"* * * The council recommended that a total of \$12,045.15 be made available from appropriated funds for FY 78 to off set costs associated with maintaining common use areas. This amount to be cost shared by DIO (\$9,997.15) and DFAE (\$2,048.00).

"The council further recommended that an estimated amount of \$13,250.50 be included in the FY 79 Command Operating Budget (COB) to cover this expense to be cost shared by DIO (\$10,988.00) and DFAE (\$2,252.50) (see inclosure number 3 for explanation of expenses)."

Paragraph 8 states:

"Recommend approval of paragraphs 6a and b and paragraphs 7a, b, and c, above."

We are unable to construe the minutes as a definite offer by the Housing Fund to enter into a binding agreement. There is no indication in the minutes that the Housing Fund intended to obligate itself to perform maintenance services. The Governing Council merely recommended that appropriated funds be made available to offset the costs of maintaining common use areas. These are not the clear words of assent necessary to create a contract.

Even if we were to decide that the language of the Governing Council minutes was an offer, it is clear that the Acting Commander's action of June 15, 1978, does not constitute a positive, unambiguous, and unequivocal acceptance. The Acting Commander's endorsement indicates only that he has reviewed the minutes and the March 1978 Housing Fund financial statement and has approved them. There is no indication that

he intended to legally bind the Army to pay for maintenance from appropriated funds. Moreover, an examination of Army Regulation 230-1 indicates that in approving the minutes, the Acting Commander was presumably acting as supervisor of the Housing Fund rather than as a contracting party. See paragraphs 1-14a.(2) and 1-14g.(3).

In fact
~~We conclude that~~ neither the Disposition Form as prepared by the Custodian of the Housing Fund nor the Acting Commander's approval of the Governing Council's minutes creates a binding contract. There is no other basis in the record to find that an obligation of the United States was created. Therefore, the Finance and Accounting Officer may not pay the Housing Fund on the basis of the Disposition Form as a voucher.

In 58 Comp. Gen. 94, discussed *supra*, we also held that vouchers for goods and services supplied to the Army by nonappropriated fund instrumentalities could not be paid. However, in an accompanying letter to the Secretary of the Army we stated that in light of the lengthy period of time that had elapsed since the goods and services were provided to the Army, and since it appeared that the Army had the use and benefit of the goods or services, the nonappropriated fund instrumentalities could be paid on a quantum meruit/quantum valebant basis, provided the purchases were ratified by an appropriate contracting official of the Army. We think a similar result is justified in the present case as well.

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However, we should point out that part of the costs for which the Housing Fund seeks reimbursement was for services which were not the responsibility of the Army and thus cannot be paid for from appropriated funds. See AR 210-52, paragraph 5-1b, and Table 5-1 (Central Accounting Support and Central Personnel Administration to be paid from non-appropriated funds); AR 420-72, paragraph 2-4. a.(6); AR 420-74, paragraph 3-2. a. The Housing Fund may be paid on a quantum meruit basis for the services which benefited the Army, provided that the purchase is ratified by an authorized contracting officer.

R. M. Katten
Deputy Comptroller General
of the United States