



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Federal Communication Commission—Meals at Radio Spectrum
Auction

File: B-260692

Date: January 2, 1996

DIGEST

The Federal Communications Commission may not pay for meals and refreshments provided to government employees, bidders, contractors, and corporate executives attending FCC radio spectrum auctions, nor may it pay for refreshments for individuals attending a "kick-off ceremony" for the auctions. Neither the statute authorizing the auctions nor the FCC's salary and expenses appropriation authorizes the use of appropriated funds to pay for meals and refreshments. To the extent of the amount available, the Federal Communications Commission may use its fiscal year 1995 "reception and representation" appropriation to offset such costs.

DECISION

The Managing Director of the Federal Communications Commission (FCC) has asked for an advance decision on whether the FCC's appropriation is available to pay the costs of meals and refreshments provided to agency employees, contractors, and bidders during spectrum auctions conducted in 1994 and 1995 and for refreshments for agency employees, contractors, bidders, members of Congress, and other non-employees at a "kick-off ceremony" held in December 1994. We conclude that the FCC may not use its salary and expenses appropriations for the payment of any of these expenses. The FCC's fiscal year 1995 "reception and representation" appropriation is available to the extent it may offset some of the costs.

BACKGROUND

Beginning in October 1994, the FCC held radio spectrum auctions pursuant to the competitive bidding licensing procedures authorized by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 392 (1993) (codified at 47 U.S.C. § 309). A Washington Post article described the auction process as, "a radical new way of parceling out the electromagnetic spectrum — the airwaves over which everything from TV broadcasts to garage-door opener signals travel. Instead of giving away this valuable commodity, as the government has for

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more than 60 years, the measure orders that future users of the public spectrum must bid against one another for it." Paul Farhi, Across a Spectrum of Conflict, Washington Post, August 12, 1993, at D9.

During the preparations for the auction, the FCC personnel decided that it would be advantageous to provide food and refreshments to those attending the auctions. The FCC believed that it needed to have its employees and contractor personnel available at all times. The FCC notes that "the experimental simultaneous market, multiple round, electronic auctions are grueling, lengthy, and extremely complicated events To ensure successful auctions, auction personnel needed to be available both before, during and after the actual bidding took place, which usually went on for most of the day." Thus, it determined that its employees and contractor personnel would be precluded from taking meals or coffee breaks off the auction premises during the auctions. The FCC's Office of General Counsel informally advised the auction task force leader that appropriated funds are not generally available to provide free meals or coffee breaks for government employees at their duty stations. However, it also advised that, "away from the employee's duty station and particularly if he/she is carrying out some specific statutory function, coffee and even food may qualify as a 'necessary expense'. In your situation, both of the above elements appear present which should justify the expenditure."

Apparently acting on this advice, the auction task force leader entered into agreements with vendors for meals, box lunches, snacks and beverages to be provided to auction participants. The vendors have presented twenty-one invoices for payment for a total amount of \$22,658.60, consisting of dinners, box lunches, assorted snacks and beverages provided on thirty-one separate occasions. Dinners were provided to auction personnel working past 9 p.m. Meals were also provided to contractor personnel on an equal basis. Bidders, contractors, and agency personnel were all invited to partake in the coffee service.

The FCC also advises that the invoices include charges for four tea and coffee services for an auction "kick-off" ceremony held on December 5, 1994, (total cost \$4,864), which was attended by 450 people, including industry representatives, members of Congress, high-level officials of executive departments and FCC officials. The FCC argues that this expenditure is justifiable as a public relations expense in order to generate maximum public awareness of the auction.

ANALYSIS

In the absence of statutory authority, the government may not furnish free meals or refreshments to employees at their official duty stations. 65 Comp. Gen. 508 (1986). This rule applies even though employees may be working under unusual circumstances. 42 Comp. Gen. 149 (1962). The rationale is that the cost of meals

and refreshments is a personal expense which a government employee is expected to bear from his or her salary. 65 Comp. Gen. 738, 739 (1986). Thus, free food or refreshments normally cannot be justified as a "necessary expense".

Given this general rule, we are presented with three separate issues. First, does the FCC's specific statutory authority to conduct spectrum auctions authorize the expenses at issue here. If not, then second, does this situation fall into one of the exceptions permitting the use of appropriated funds to provide food to employees at their duty station. Third, does the FCC have authority to provide food to non-employees. We will address each of these issues separately.

FCC Auction Authority

To avoid delay in licensing procedures for the electromagnetic spectrum and the possibility of unjust enrichment of licensees who received free use of public airwaves, Congress authorized the FCC to issue licenses utilizing a system of competitive bidding (referred to here as auctions). As a part of this statutory scheme, Congress required that the FCC deposit "all proceeds" from the auction into the Treasury. 47 U.S.C. § 309(j)(8)(A). However, Congress authorized FCC to retain proceeds of the auction to the extent necessary to offset auction costs. 47 U.S.C. § 309(j)(8)(B). The FCC asks if this provision may be interpreted to permit payment of the meals, snacks and refreshments. It reads as follows:

"[T]he salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from [auction] proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be available for obligation subject to the same terms and conditions of the receiving appropriations account" 47 U.S.C. § 309(j)(8)(B).

The quoted language provides no more authority to the FCC than it already had because it subjects auction proceeds that FCC may retain to the same terms and conditions applicable to FCC's annual appropriations. Other than a small "reception and representation" appropriation, the FCC's salaries and expenses appropriation for fiscal year 1995 does not authorize FCC to incur costs for meals or refreshments generally or incident to conducting the auction. Pub. L. 103-317, 108 Stat. 1737-1738 (1994).

Authority to Provide Food to Employees

There are a limited number of exceptions to the general prohibition against providing meals, snacks and refreshments to employees within the confines of their duty station. Two are for consideration here. The first permits meals at "meetings" concerned with functions which relate to agency missions, and the second relates

to emergencies involving danger to human life or destruction of federal property. We start with the "meetings" exception under the Government Employees Training Act, 5 U.S.C. § 4110. The FCC suggests that even if the entertainment expenses cannot be considered a "necessary expense" under the auction statute, these events qualify as meetings within the context of the Government Employees Training Act. That Act provides that agency appropriations are available for payment of the expenses of attendance at meetings concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision or management of the functions or activities. 5 U.S.C. § 4110.

The Training Act exception does not authorize the payment of meal expenses in connection with internal business meetings or conferences sponsored by government agencies. The legislative history of this provision shows that it was intended to dispense with the specific appropriation authorizations required by the predecessor of 5 U.S.C. § 5946 for the expenses of agency employees attending meetings as "members of any society or association." See 46 Comp. Gen. 135, 136-137 (1966).

In interpreting the Training Act, we have distinguished between the payment of meals incident to formal conferences or meetings, typically externally organized or sponsored, involving topical matters of interest to governmental and nongovernmental participants, and the internal business and day-to-day operations of government. 68 Comp. Gen. 604, 605 (1989); 68 Comp. Gen. 606, 608 (1989). The spectrum auctions were a basic governmental activity of the FCC. They were large, revenue-generating auctions administered by the FCC in carrying out the statutory mandate to conduct spectrum auctions as required by 47 U.S.C. § 309. The FCC employees were attending to assist in conducting the radio spectrum auctions, not to attend what is usually considered to be a conference or meeting. Thus, the auctions do not fall within the "meetings" exception under the Training Act. To hold otherwise would permit agencies to provide food and refreshments to employees and others at taxpayers' expense whenever they come together to conduct the business of the government, from administering oaths to new citizens to conducting tax audits. This clearly was not the purpose of section 4110.

The FCC also believes that exigent circumstances may justify the expenditure for food and refreshments since the auctions were large, complex and unique events which required personnel to be constantly available while working under severe time limits. Our Office has recognized an exception to the general prohibition where the government purchases meals for employees working in extreme emergency situations involving danger to human life or destruction of federal property. 53 Comp. Gen. 71 (1973) (food provided to federal protective officers required to remain in readiness for up to 24 hours to reoccupy a federal building which had been forcefully occupied); B-232487, Jan. 26, 1989 (employees working at the scene of a derailment of tank cars filled with toxic liquid assisted in the

evacuation of all people within a dangerous area and manned command posts, road blocks and waterways checkpoints for a 24-hour period). This exception does not justify the expenditures here, since the spectrum auction did not present any actual threat to human life or the possibility of destruction of federal property.

The FCC has a small "reception and representation" appropriation (\$4,000 for fiscal year 1995), which is not sufficient to cover the cost of these expenditures. See Pub. L. 103-317, 108 Stat. 1737-1738 (1994). Reception and representation funds are available for expenditures typically classified as, or in the nature of, entertainment or entertainment-related activities. 68 Comp. Gen. 222, 228 (1989); B-250988, Sept. 2, 1993. Typically, reception and representation appropriations are available for "official agency events, typically characterized by a mixed ceremonial, social and/or business purpose, and hosted in a formal sense by high level agency officials. B-223678, June 5, 1989. It appears that the "kick-off ceremony" would fit within this description. Thus, those funds are available to offset the cost of the meals and refreshments served at the "kick-off ceremony".

We are not aware of any other authority which would authorize food and refreshments for employees who attended the auctions.¹

Authority to Provide Food to Non-employees

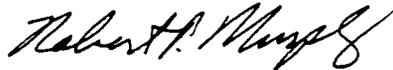
Just as the provision of meals and refreshments to government personnel is generally unauthorized, providing meals to non-government personnel is generally impermissible. The premise is the same—appropriated funds are not available to feed government contractor personnel and participants at the FCC sponsored auctions, absent statutory authority. 68 Comp. Gen. 226, 227 (1989). Although the FCC had ample authority to develop and run the auctions, the controlling salaries and expenses appropriation was not available for the expense of providing refreshments to bidders and other non-government personnel. However, as mentioned above, FCC may use its "reception and representation" funds to pay for such expenses.

Finally, the FCC asks what recourse is available to the vendors who provided services in good faith reliance on the actions of government officials. The government cannot be bound by the unauthorized acts of its officials. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947). Thus, where a government official procures goods or services in the absence of statutory authority,

¹The FCC's letter indicates that some of its personnel attended the auction from outside of the Washington, D.C. area, and were, therefore, on official travel status. Employees assigned to work the spectrum auction who were in a travel status were entitled to a per diem to cover the cost of meals and incidental expenses.

the government cannot be legally obligated to make payments for the goods or services. See Hooe v. United States, 218 U.S. 322, 334 (1910). Although this may on occasion produce a harsh result, the alternative of placing the Federal Treasury at the disposal of government employees entering into contracts obligating the United States for goods or services that are not the proper object of a procurement is even less acceptable. See Office of Federal Personnel Management v. Richmond, 496 U.S. 414 (1990); City of El Centro v. United States, 922 F. 2d 816, 820 (Fed. Cir. 1990), cert. denied, 501 U.S. 1230 (1991).

Innocent vendors of goods and services to the government may be paid under the equitable theory of quantum meruit where four conditions are met. Here, however, the first condition, namely, that the acquisition of the goods or services would have been permissible had correct procedures been followed, precludes use of this theory. 71 Comp. Gen. 145 (1992); B-230382, December 22, 1989. Again the reason is straight-forward—equitable doctrines should not be used to make the Treasury available for unauthorized procurements.



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