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### CONTRACTS IN EXCESS OF APPROPRIATIONS.

Where the Secretary of the Treasury is authorized by Congress to "cause to be erected" a public building within a certain limit of cost, he is authorized to enter into a contract in excess of the appropriation made, but within said limit of cost for the construction of said building, provided it specifies that no money is contracted to be paid under it in excess of the appropriations made and available therefor and that any payment in excess of said appropriations will be subject to future appropriations to be made by Congress, and such contract will not be in violation of section 9 of the act of June 30, 1906, nor section 3733 of the Revised Statutes, nor section 3679 of the Revised Statutes as amended.

*(Comptroller Tracewell to the Secretary of the Treasury, May 6, 1908.)*

I have the honor to acknowledge the receipt of your letter of April 27, 1908, in which you request my decision of a question which you therein present as follows:

"Section 14 of the act of Congress entitled 'An act to increase the limit of cost of certain public buildings, to authorize the purchase of sites for public buildings, to authorize the erection and completion of public buildings, and for other purposes,' approved June 30, 1906 (34 Stats. U. S., p. 785), provides:

"That the Secretary of the Treasury be and he is hereby authorized and directed to dispose of the Federal building at Grand Rapids, Michigan, now used as a post-office, courthouse, and for other Governmental purposes, at such a time, in such a manner, and upon such terms as he may deem for the best interests of the United States, and cause to be erected upon the site thereof a suitable building, including fireproof vaults, heating and ventilating apparatus, elevators, and approaches, complete, for the use of the United States post-office, courts, and other Governmental offices in said city, at a limit of cost for said building not to exceed five hundred thousand dollars, and in case of the sale of the old building the limit of cost hereinbefore fixed for said new building is hereby increased by a sum equal to the net proceeds derived from said sale."

"Appropriations aggregating \$160,000 have been made toward the objects and purposes of said section 14, as follows:

"Act of June 30, 1906 (34 Stats. U. S., p. 796), \$10,000.

"Act of March 4, 1907 (34 Stats. U. S., p. 1298), \$150,000.

"While the Secretary of the Treasury is authorized and directed to cause a new building to be erected on the site of the old Federal building at Grand Rapids, section 14 of the act of June 30, 1906, above referred to, does not specifically authorize the entering into a contract within the limit of cost fixed by Congress.

"It is the Department's understanding of the meaning of section 3679 of the Revised Statutes of the United States, as amended by the act of Congress of February 27, 1906 (34 Stats. U. S., p. 49), that it has authority to enter into contracts for the construction of public buildings to the full limit of cost fixed by Congress, notwithstanding the fact that the total appropriation for the purpose has not been made, provided such contract is authorized by law.

"The act of June 30, 1906, will be found to consist of several sections in which certain work is classified. For in-

stance, section 1 increases the limits of cost of certain public buildings; section 2 authorizes the enlargement, extension, remodeling, or repairing of certain public buildings; section 6 authorizes the construction of buildings on land already acquired by the Government; section 8 authorizes the acquisition of sites and the construction of buildings thereon, etc., and in all these cases the Secretary of the Treasury is specifically authorized to enter into contracts within the limits of cost therein fixed for each building enumerated. On the other hand, sections 15, 16, and 20 fix the limits of cost of certain public buildings, but prohibit the entering into contracts beyond the amounts therein respectively limited. So that there are in the same bill instances in which the Secretary of the Treasury is specifically authorized to enter into contracts within the limit of cost fixed, where he is prohibited from entering into contracts to the full amount of the limit of cost, and where no direction on the subject is given at all.

"The Department has caused the old Federal building at Grand Rapids, Mich., to be torn down, has advertised for proposals for the erection of a new Federal building, and is ready to let the contract if it is authorized under existing law to do so, the amount of the lowest bid being well within the limit of cost fixed by Congress, but in excess of the amount of the appropriations for the purpose so far made.

"I have the honor to inquire whether, in your opinion, this Department has authority to enter into a contract, in excess of the appropriation made but within the limit of cost fixed by Congress, for the construction of the new Federal building at Grand Rapids, Mich., if the proposal is accepted and the contract made on the distinct understanding that any payments in excess of appropriations presently available will be subject to future appropriations to be made by Congress.

Section 3679 of the Revised Statutes, as amended by the act of February 27, 1906 (34 Stat., 48, 49), provides as follows:

"No Executive Department or other Government establishment of the United States shall expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations, unless such contract or obligation is authorized by law. \* \* \*"

Section 3733 of the Revised Statutes provides:

"No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public im-

provement, which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

Section 9 of the act of June 30, 1906 (34 Stat., 764), also provides as follows:

"No act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed."

In applying these statutes to an act, dated June 20, 1906, authorizing the construction of a light and fog-signal station at or near Southwest Ledge, Connecticut, under the Department of Commerce and Labor, I held (13 Comp. Dec., 478) that said authorization was not affected by section 9 of the act of June 30, 1906 (34 Stat., 764), the latter provision having been enacted subsequent to the former, and that section 3733 of the Revised Statutes did "not preclude the entering into a contract for the full completion of an object authorized within the limit of cost therein fixed, although such limit of cost is greater than the amount appropriated, provided the payment therefor is limited to the amount in the Treasury appropriated therefor, exclusive of other obligations or expenditures, and made subject to future appropriation;" such conclusion having been reached in connection with the provisions of amended section 3679 of the Revised Statutes.

The question to be decided, these statutes being of equal date, is whether the proposed contract limited, as you intend, by a specific provision that no money is contracted to be paid under it in excess of the amount now appropriated and available for the erection of this building, is in violation of said section of the act of June 30, 1906, *supra*.

Such a contract, in my judgment, is in no sense a violation of said section. It does not assume in any wise to declare that any money has been appropriated for the purpose of erecting the building to be contracted for in excess of that specifically appropriated for such purpose, nor will it be a contract involving the payment of money in excess of the

appropriations specifically made by law for the purpose of erecting the building contemplated by the contract.

The very fact that Congress under similar general authority to the Secretary of the Treasury to erect a building, no method being specifically pointed out, prohibits the entering into contracts beyond the amounts therein appropriated, where general authority only is given to erect a building and the limit of cost fixed, presupposes the fact that without such prohibition such authority was given to contract within the limit of cost.

A different construction of this act would be unbusinesslike and result in the proposed building costing the Government an amount, if let by piecemeal, much in excess of what it will cost if let at one time and under one contract. The Government cannot possibly be injured by this construction, as the contractor under the terms of the proposed contract will have no rights under it beyond the amount now appropriated, and must depend upon future appropriations for remuneration for any work or materials furnished beyond the amount now appropriated.

For such latter work and materials the proposed contract merely fixes their price, subject to be paid if Congress shall in the future appropriate therefor. I am of opinion that the proposed contract with the limitations aforesaid violates no law, and is in consonance with long usage and practice of this Department. I therefore answer your question in the affirmative, but further suggest that it be specifically stated in the contract that the Government shall in no wise be bound in damages to the contractor, if there be delay in future appropriations to complete said work.