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DECISION



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

FILE: B-188770

DATE: February 24, 1978

MATTER OF:

Fortec Constructors--Reconsideration

DIGEST:

Where statute authorizes imposition of surcharge on sales of goods sold in commissaries and provides for specific use of funds collected, such funds are appropriated and subject to settlement by GAO. Therefore, GAO will consider bid protest involving procurement funded by commissary surcharge fund. Prior decision overruled.

Fortec Constructors (Fortec) requests reconsideration of our decision of April 14, 1977, in which we declined to consider its protest of the award of a contract under request for proposals (RFP) No. DACA21-77-R-0080 issued by the U.S. Army Corps of Engineers (Corps), Savannah District.

The RFP solicited proposals for the design and construction of a commissary at Fort Stewart, Georgia. Upon receipt of advice from the Corps that nonappropriated commissary surcharge funds were involved in this procurement, we dismissed the protest because this Office does not settle nonappropriated fund accounts.

Fortec asserts that our dismissal was inappropriate because in fact the funds involved are appropriated. In addition to several arguments made in support of that proposition, Fortec cites United States Biscuit Company of America v. Wirtz, 359 F. 2d 206 (D.C. Cir. 1966), which held that the revolving fund used for commissary purchases which is replenished by money received for goods sold to the military consumer is "in effect, an on-going appropriation."

In reconsidering this matter, we solicited the views of the Department of Defense (DOD) and the

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Corps of Engineers and have carefully considered the responses received from those agencies as well as appropriate legislative history and prior decisions of this Office and the courts. We conclude that commissary surcharge funds are appropriated funds and subject to the settlement authority of this Office under 31 U.S.C. § 71 and § 74 (1970).

BACKGROUND

A customer purchasing an item in the commissary pays the cost of the item, which is deposited to a stock fund which purchased the item for resale, plus an additional percentage charge (the surcharge). The amount of the surcharge is established pursuant to DOD regulations. The surcharge is deposited into a trust revolving fund account.

In the instant situation, the account identified as the source of the funds to be utilized was "Surcharge Collections, Sales of Commissary Stores, Army." Funds from this account were transferred by the Troop Support Agency, the requiring activity, to the Corps, which established an individual account referred to as a "P6700" account. A "P6700" account is a revolving reimbursable account which is maintained in connection with construction projects managed by the Corps for various commands and activities. The contractor is paid from the "P6700" account.

DISCUSSION

The commissary surcharge is based on a recurring general provision contained in annual DOD Appropriation Acts since 1952, e.g., section 714 of the Department of Defense Appropriation Act of 1977, Pub. L. No. 94-419, § 714 (September 22, 1976). The general provision prohibits the use of DOD appropriations to support certain commissary store operations unless such appropriations are reimbursed for the expense of such operations by increasing the sales price of the items sold in the stores to furnish sufficient revenue to make such reimbursements. Section 714 provides in pertinent part:

"No appropriation contained in this Act shall be available in connection with

the operation of commissary stores of the agencies of the Department of Defense for the cost of purchase (including commercial transportation in the United States to the place of sale but excluding all transportation outside the United States); and maintenance of operating equipment and supplies, and for the actual or estimated cost of utilities as may be furnished by the Government and of shrinkage, spoilage, and pilferage of merchandise under the control of such commissary stores, except as authorized under regulations promulgated by the Secretaries of the military departments concerned with the approval of the Secretary of Defense, which regulations shall provide for reimbursement therefor to the appropriations concerned and, notwithstanding any other provision of law, shall provide for the adjustment of the sales prices in such commissary stores to the extent necessary to furnish sufficient gross revenue from sale of commissary stores to make such reimbursement:..." (Emphasis added)

In 1974 Congress expanded the purposes for which a commissary surcharge could be imposed by enacting section 2685 of title 10, United States Code, which authorizes an adjustment of or increase in the surcharge for commissary construction as follows:

"(a) * * * the Secretary of a military department * * * may, for the purposes of this section, provide for an adjustment of, or surcharge on, sales prices of goods and services sold in commissary store facilities.

"(b) The Secretary of a military department * * * may use the proceeds from the adjustments or surcharges authorized by subsection (a) to acquire, construct, convert, expand, install, or otherwise improve commissary store facilities at defense installations within the United States* * *."

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We have consistently regarded a statute which authorizes the collection and credit of fees to a particular fund and which makes the fund available for specified expenditures as constituting a continuing appropriation. 50 Comp. Gen. 323 (1970); 35 Comp. Gen. 615 (1956). For example, in the latter cited case, involving the status of fees collected by Federal Credit Unions and deposited to a revolving fund for administrative and supervisory expenses pursuant to the Federal Credit Union Act, 12 U.S.C. § 1755 (1970), we stated that:

"The statutory authorization that the fees be credited to a special fund and the making of such fund available for expenditure * * * for the administrative and supervisory costs incident to the carrying out of [the Act] constitutes a continuing appropriation of such fees from the Treasury without further action by the Congress. * * * [S]uch funds, nevertheless, represent appropriated funds and in the absence of an express provision in the statute to the contrary, they are subject to the various restrictions and limitations on the uses of appropriated moneys." 35 Comp. Gen. at 518.

Similarly, as stated earlier, the court in United States Biscuit Company of America v. Wirtz, supra, regarded the statutorily authorized commissary stock fund as an ongoing appropriation.

DOD's position, however, is that the commissary surcharge fund should not be categorized as appropriated. In this regard, DOD points out that these decisions deal with revolving funds while the surcharge fund here at issue is merely a "temporary accumulation" and is not a true revolving fund. According to DOD:

"A revolving fund is generally defined as a fund established to finance a continuing cycle of business type operations through amounts received by the fund. (See definitions in Budgetary

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Definitions by the Comptroller General of the United States, November 1975). The commissary surcharge funds are merely used to reimburse appropriated funds for expenses incurred on behalf of commissary customers. They are not used to finance a continuing cycle of operations; nor do they finance on-going operations thus perpetuating the fund. Commissary operations are financed by Department of Defense appropriations. As expenses are incurred for certain of these operations they are required to be reimbursed by the commissary customers. The commissary surcharge is the vehicle by which the reimbursement is made by the customer to the appropriation incurring the expense on his behalf. The commissary surcharge is unique. In each of the decisions cited above the fund under consideration was a fund explicitly provided for by statute. There is no comparable statute with respect to the commissary surcharge. Section 628 and its successor provisions, and section 2685 merely provide for a charge on commissary sales for specified purposes; they do not explicitly provide for the establishment of a fund.

DOD further relies on the legislative history of 10 U.S.C. § 2685, which, according to DOD, "indicates that Congress considered that the funds generated by the surcharge were nonappropriated funds." In this regard, the conference report stated:

"Section 610 of the Senate bill (Section 611 of Conference bill) was added by the Senate. It is designed to amend existing law to permit the adjustment of and the use of the surcharges on commissary sales for the construction, acquisition and improvements to the commissary stores, which are now paid for out of appropriated funds." H.R. Rep. No. 93-1545, 93d Cong. 2d Sess. 40 (1974).

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In addition, the Senate Report referred to "measures to increase the use of commissary surcharge money or other nonappropriated funds for the construction of commissary facilities." S. Rep. No. 93-1136, 93 Cong. 2d Sess. 6 (1974).

We do not find this language persuasive in support of DOD's position. Although the language is susceptible to the reading urged by DOD, we think, in view of the previously established law as to what constitutes appropriated funds, that the Congress referred to these surcharge monies as nonappropriated funds because such monies did not come out of the general funds. (The Corps in this case has made the same assumption, i.e., that any monies not contained in an annual appropriation were "nonappropriated".) Of course, regardless of the language used in the legislative history, what the Congress actually did was to authorize an increase in the surcharge in order to generate funds for a new purpose--commissary construction. Without this authorization, no commissary receipts, regardless of the Treasury account or fund they were placed in for accounting purposes, could be used for construction. As recognized by DOD:

"Once monies are covered into the Treasury regardless of the nomenclature that may be applied to the account in which they are deposited, they are bound by the constitutional inhibition that 'No money shall be drawn from the Treasury but in consequence of appropriations made by law.'" (Emphasis added.) H.R. Rep. No. 73-1414, 73rd Cong., 2d Sess. 12 (1934).

Thus, it is clear that by authorizing imposition and use of the surcharge, the Congress "appropriated" the surcharge monies for commissary construction.

With regard to the distinction drawn by DOD between actual revolving funds and the commissary surcharge funds, we point out that revolving fund accounts are only one of several different kinds of "Federal Fund Accounts" in which "the Government credits receipts which it collects, owns, and uses solely for its purposes." Comptroller General, Terms Used in the Budgetary Process, p. 15 (July 1977). The surcharge fund account

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seems to meet the definition of one kind of Federal Fund Accounts known as a Special Fund Receipt Accounts: "accounts credited with receipts from specific sources that are earmarked by law for a specific purpose." Terms, id., p. 15. We are aware of no reason why a statute authorizing the imposition and collection of specific charges, as well as the use to be made of the funds collected, must also specifically create a fund into which the funds collected are to be deposited, in order for the funds thus authorized to be regarded as appropriated. So long as funds are deposited into a special fund account for a specified purpose as authorized by statute, they must be considered a continuing appropriation within the ambit of our decision in 35 Comp. Gen. 615 (1956).

DOD also asserts that United Biscuit is inapposite to this situation because the case only addresses commissary stock funds and not the status of the commissary surcharge fund. We believe this is a distinction without a difference. The designation "stock fund" and the designation "surcharge funds" are accounting labels. The funds for each are derived from sales to military customers, are deposited in the Treasury where they are assigned Federal symbols, and may only be disbursed for specified purposes in accordance with Congressional authorizations. In light of our prior decisions and the rationale of the United Biscuit decision, we believe that the "surcharge fund" is an appropriated fund.

Accordingly, to the extent that our prior decisions held that commissary surcharge funds were nonappropriated, and that this Office would not consider protests involving procurement financed with such funds, they are expressly overruled. See Data Terminal Systems, B-187606 February 2, 1977, 77-1 CPD 85; Data Terminal Systems-Request for Reconsideration, B-187606, June 7, 1977, 77-1 CPD 400; Fortec Constructors, B-180770, April 13, 1977, 77-1 CPD 260. In view of our holding, we will consider Fortec's protest in accordance with our Bid Protest Procedures upon timely receipt of a detailed statement of Fortec's grounds of protest.


Deputy Comptroller General
of the United States