

13612 PL-Z

DECISION



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

[Use of FY 1980 Funds for FY 1979 Obligation

FILE: B-198204

DATE: May 1, 1980

MATTER OF: Department of the Treasury,
Customs Service

DIGEST:

Since Government agency did not mail acceptance of bid to contractor prior to expiration of period of availability for obligation of fiscal year 1979 appropriation, no "binding agreement" within meaning of 31 U.S.C. § 200(a) (1976) arose in fiscal year 1979 which would provide basis for recording obligation against fiscal year 1979 appropriation and, therefore, fiscal year 1980 funds must be used.

The Department of the Treasury, Customs Service, requests a decision regarding the propriety of recording an obligation in fiscal year 1979 (FY 79) where the document providing the basis for the obligation was misplaced due to an apparent distribution error and not discovered until the following fiscal year. A brief summary of the circumstances reported follows.

The obligation relates to a procurement for construction of certain employee residences. The project was identified as an FY 79 requirement, the project cost was included in Customs Financial Plan, and the project was approved on March 1, 1979. Invitation for bids (IFB) No. CS-79-42 was issued on August 9, 1979, and bids were opened on September 10, 1979. Gerrico Construction Inc. (Gerrico) submitted the low, responsive bid. During the week of September 17, 1979, the president of Gerrico was telephonically informed that his bid had been accepted and that award would be made to Gerrico. On September 22, 1979, Customs assigned FY 79 contract number Tc-79-54 to the Gerrico contract. On September 28, 1979, the contracting officer signed SF 23 (Construction Contract) which by reference incorporates the Gerrico signed bid. Upon signing the document, the contracting officer immediately relinquished control over it by placing it in the Customs

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distribution/mailing system. Due to an error, the document did not reach the Customs Accounting Division or the contractor in FY 79. The contractor's calls prompted an internal file search which disclosed the error. On October 18, 1979, the Customs Comptroller, at the request of the Procurement Officer, approved the obligation for FY 79.

On October 22, 1979, the contract document (SF 23) was mailed to Gerrico under cover of a letter entitled "Notice of Award." The purpose of this letter was to confirm the original telephonic notice of award and to transmit the misplaced written acceptance of the bid. Notwithstanding the Customs Comptroller's approval of the obligation of the FY 79 contract, the Accounting Division delayed action based upon the late mailing. On November 21, 1979, the Director, Logistics Management Division, formally requested that the Director, Accounting Division of the Office of Financial Management and Program Evaluation, record the FY 79 obligation. On December 11, 1979, it was determined that a formal Comptroller General decision should be obtained prior to recording of the FY 79 obligation and that the FY 80 appropriation be charged in the interim.

Customs requests that in reaching our decision we consider: (1) the requirements for recording an obligation set forth in 31 U.S.C. § 200(a) (1976); (2) that the award was executed within the period of availability of the appropriation and the contracting officer relinquished control of it by placing it in the distribution/ mailing system with the full intent of furnishing the document to the contractor in a timely manner; (3) if it is found that the signing of the contract award and relinquishing of control of it by the contracting officer on September 28, 1979, were insufficient to constitute a valid obligation of the Government, then the oral notification of award and the assigning of a contract number on September 22, 1979, would have constituted a valid Government obligation; (4) the amount of the contract (\$198,388) is a significant part of the FY 79 Customs construction budget and use of FY 80 funds will result in cancellation of another needed construction project; and (5) this construction project is a planned acquisition, a bona fide FY 79 need, not a last-minute attempt at obligating FY 79 funds.

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The applicable statute, 31 U.S.C. § 200(a), provides that after August 26, 1954, no amount shall be recorded as an obligation of the Government unless it is supported by documentary evidence of a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed. Before it can be concluded that there was a "binding agreement" for purposes of this statute, we have held that the following factors must be present:

1. Each bid must have been in writing.
2. The acceptance of each bid must have been communicated to the bidder in the same manner as the bid was made. If the bid was mailed, the contract must have been placed in the mails before the close of the fiscal year. If the bid was delivered other than by mail, the contract must have been delivered in like manner before the end of the fiscal year.
3. Each contract must have incorporated the terms and conditions of the respective bid without qualification. Otherwise, it must be viewed as a counteroffer and there would be no binding agreement until accepted by the contractor.

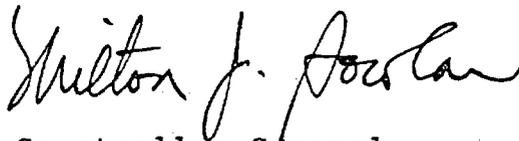
35 Comp. Gen. 319, 321 (1955). Here, the record indicates that factors 1 and 3 are present; thus, our consideration is directed toward factor 2, particularly as it concerns communication of the Government's acceptance to the bidder.

In the circumstances, the "binding agreement in writing" required by 31 U.S.C. § 200(a) came into existence when the Government mailed SF 23 to Gerrico.

See 35 Comp. Gen. 272 (1955) (based on theory of a common law rule in effect at least since Adams v. Lindsell, 1 B. & Ald. 681 (1818)). In general, an acceptance is mailed when it is placed within the control of postal authorities authorized to receive it; merely delivering it to a messenger with directions to mail it amounts to nothing until the messenger actually deposits it in the mail; here, mailing means handing the acceptance properly addressed and stamped to a postman and depositing it in a street mailbox or a letter chute in an office building. Williston on Contracts, 3rd ed. § 85.

It is well settled that the acceptance of a contractor's offer by the Government must be unconditional. See, e.g., Laurence Hall d/b/a Halcyon Days, B-189697, February 1, 1978, 78-1 CPD 91. The key to the Government's unconditional acceptance, where the acceptance is mailed, is the release of control of the acceptance by actually dispatching it; in other words, here, the contract was formed and the obligation arose when the Government released control of the acceptance by placing it in the Post Office's custody. See Kleen-Rite Corporation, B-190160, July 3, 1978, 78-2 CPD 2.

Since the acceptance was not mailed until FY 80, we must conclude that the obligation did not arise until FY 80, requiring the use of FY 80 funds.



For the Comptroller General
of the United States