

**DECISION**

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

Westfall  
GGM  
30035

**FILE:** B-215825

**DATE:** December 21, 1984

**MATTER OF:** Army's Multiple Launch Rocket System  
Multiyear Contract

- DIGEST:**
1. Advance procurement of economic order quantity (EOQ) materials and components is authorized only to support end items procured through authorized 5-year multiyear contract. Army improperly exercised option for procurement of EOQ items for the needs of a 6th year and is cautioned not to exercise an option for the needs of a 7th year as presently contemplated, unless it obtains specific statutory authority to do so.
  2. "Bona fide needs" statute, 31 U.S.C. § 1502(a), provides that an appropriation may only be used to pay for program needs attributable to the year or years for which the appropriation was made available, unless the Congress provides an exception to its application. The only exception for advance procurement of EOQ items is found in 10 U.S.C. § 2306(h) but the exception is limited to procurement of items needed for end items procured by means of a multiyear contract. Authorized multiyear contracts may not cover more than 5 program years. 10 U.S.C. § 2306(h)(8). Therefore, exercise of an option for advance procurement of EOQ items for a 6th or 7th program year is unauthorized. GAO does not accept Army contention that bona fide needs statute is inapplicable to multiple or "investment type" procurements.
  3. Although sufficient lump-sum missile procurement funds were appropriated in FYs 1984 and 1985 for this purpose, Army cannot rely on fact that cognizant congressional committees were aware of its intent to exercise options for advance procurement of EOQ items for 6th and 7th year end items. It cannot be said that the Congress as a whole intended to provide an exception to the bona fide needs

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statute in addition to the limited exception for 5-year multiyear contracts in 10 U.S.C. § 2306(h) where this purpose was never stated in the legislation itself or in the committee reports, and where the reports themselves created the impression that the funds were to be used for an existing multiyear contract.

By letter of February 14, 1984, the Chairman of the Subcommittee on Defense, House Committee on Appropriations, requested that we assess the Army's ongoing Multiple Launch Rocket System 5-year multiyear contract. As part of our examination of the contract, we considered the legality of the exercise of two options for the advance procurement of components and other materials required to support end items for the needs of a 6th and 7th year, respectively, which the United States has not yet committed itself to procure. (There are two additional options for the procurement of the end items needed for the 6th and 7th year, but there has been no attempt to date to exercise these options before the 5-year contract is completed.)

The Army exercised the first of these options on December 30, 1983, and expects to exercise the second before December 28, 1984. As will be explained below, we find that exercise of the first option was--and exercise of the second option would be--unauthorized. Since the contractor has already completed his obligations under the first option, and received payment, no useful purpose would be served by cancelling the exercise of the first option as void and seeking to recover the funds. However, we recommend that the Army refrain from exercising the second option unless or until the Congress enacts specific legislation authorizing it to do so.

#### Background

Public Law 97-377, December 21, 1982, appropriated \$422,100,000 for the purchase of the MLRS under a multiyear contract, to remain available for obligation until September 30, 1985. The Senate Committee on Appropriations had failed to approve any multiyear procurement authority for the MLRS, S. Rep. No. 97-580, 97th Cong., 2d Sess. 73 (1982), while the House Appropriations Committee had approved multiyear procurement with the proviso that the contract be no longer than 5 years in duration, with no options. The House report explained that the Army's plan to begin procurement of economic order quantity items for the 6th and 7th year options (fiscal years 1988 and 1989)

beginning in fiscal year 1984 resulted in a contract which was essentially 7 years in duration. H.R. Rep. No. 943, 97th Cong., 2d Sess. 108 (1982).

The accompanying conference report stated with regard to the MLRS contract that:

"\* \* \* The conferees are in agreement that the contract shall extend for no more than five years. The two additional option years proposed by the Army are unacceptable since procurement would begin for items to be funded in those years during the basic contract period. If the Army wishes to propose fixed price, fully funded, and severable options for years six and seven, the Committees on Appropriations of the House and Senate would consider such a proposal." H.R. Rep. No. 980, 97th cong., 2d Sess. 116 (1982).

In a letter dated February 22, 1983, the Under Secretary of the Army informed the Chairman of the Subcommittee on Defense of the House Committee on Appropriations that the Army intended "to continue with execution of its acquisition strategy to award a 5-year multiyear contract which contains options," notwithstanding the conference committee's instruction. On September 15, 1983, the Army awarded a fixed-price multiyear contract to Vought Corporation. The 5-year contract contains four options: Options 1 and 2 are to purchase advance materials in FYs 1984 and 1985 respectively in support of end items needed in FYs 1988 and 1989; options 3 and 4 are to purchase the balance of the 1988 and 1989 end items.

#### ANALYSIS

The question is whether the Army is authorized to procure in advance economic order quantity (EOQ) items which are not needed for end items procured during the basic 5-year term of the MLRS contract. The Army has presented several interrelated arguments in support of an affirmative response to this question. The Army argues that:

--There is no statutory prohibition against the acquisition of EOQ outside the period of a multiyear contract.

--The advance acquisition of long lead items had been a feature of DOD acquisitions for many years prior to enactment of Public Law 97-86.

--10 U.S.C. § 2301(a)(2) authorizes the advance procurement of EOQ items.

--10 U.S.C. § 2306(h)(4) provides for the advance procurement of both long lead and EOQ under multiyear contracts, but does not in any way state that the advance procurement must be limited to the program years of the multiyear contract period.

--In any case, the Congress knew and approved the exercise of option 1 by making the necessary funds available for that purpose.

We will respond to these arguments in turn.

#### No statutory prohibition

We cannot agree with the Army's assertion that there is no statutory prohibition against the acquisition of economic order quantity items outside the period of a multiyear contract. 31 U.S.C. § 1502(a) (popularly known as the "Bona Fide Needs Rule") provides that an appropriation may only be used to pay for the bona fide needs attributable to the year or years for which the appropriation was made available. This funding restriction prohibits the advance procurement of components and materials for use in subsequent fiscal years, unless the Congress has otherwise provided for an exception to its application. It is accordingly incorrect to suggest that Congress has not prohibited the acquisition of EOQ outside the period of a multiyear contract because it did not explicitly state that such acquisitions were prohibited. Such acquisitions were already prohibited by 31 U.S.C. § 1502(a).

The Army does not regard the bona fide needs statute as having any application to "investment accounts such as the Procurement Appropriations." In its view, "the bona fide needs rule, from its inception, has been applicable to operating or expense accounts and \* \* \* those appropriations made for the operation of the departments and for the procurement of expendable items." However, the Army offers no evidence, either in legislative history or otherwise, to support its novel view of the limited applicability of the bona fide needs rule, a rule which first appeared in 1789 in the very first general appropriation act made for this

country. On the contrary, as Army acknowledges, the Comptroller General and his predecessor, the Comptroller of the Treasury, have issued a great many decisions on this topic, applying the rule to all types of procurements for which the Congress has seen fit to limit the period of availability of the funds it appropriates to support them. The Army contends that all these decisions are in error and should be reconsidered. We find the Army's arguments on this point unpersuasive and decline to do so.

Accordingly, the next question is whether the references cited by the Army constitute the necessary exceptions to the Bona Fide Needs Rule.

#### Long established practice

Army argues that advance procurement for long lead items is a well established DOD practice and has been annually funded by the Congress in most major systems acquisitions. We do not think that DOD policy with regard to the advance acquisition of long lead items has any relevance to the advance procurement of economic order quantities, which are immediately available and are simply stored until needed. (Long lead items are items described in DOD Directive 7200.4, September 6, 1983, as "component parts and material whose lead times are significantly longer than other components, parts and materials of the same end item or for effort that must be funded in an advance procurement timeframe to maintain a planned production schedule.") Army does not argue that it has a long-standing practice of advance EOQ procurement. Even if Army had so argued, it is our opinion that Public Law 97-86 would have supplanted any previous departmental policy, and thus, as discussed below, Army's authority to engage in the advance procurement of economic order quantities is limited to that provided in that statute.

#### Public Law 97-86, 10 U.S.C. § 2301(a)(2)

The Army's third argument is that 10 U.S.C. § 2301(a)(2) authorizes the advance procurement of economic order quantities without further limitations. Section 2301(a)(2), which was enacted as part of section 909 of Public Law 97-86, provides:

"It is also the policy of the Congress that contracts for advance procurement of components, parts, and materials necessary for manufacture or logistics support of a weapon

system should, if feasible and practicable be entered into in a manner to achieve economic lot purchases and more efficient production rates."

This section is a statement of policy, and must be read in conjunction with the implementing provisions of the legislation which it introduces. No one would argue, for example, that because subsection 2301(a)(1) states that it is the policy of Congress that services and property may be acquired by multiyear contracts, Army may therefore enter into multiyear contracts whenever it deems this appropriate. The Congress imposed all sorts of restrictions and conditions in implementing the general policy in 10 U.S.C. § 2306(h). Similarly, the Congress implemented the policy which it set forth in 10 U.S.C. § 2301(a)(2) in 10 U.S.C. § 2306(h)(4). Accordingly, we turn to the Army's next argument.

10 U.S.C. § 2306(h)(4)

Army argues that 10 U.S.C. § 2306(h)(4) provides for the advance procurement of both long lead items and EOQ under multiyear contracts, but does not in any way restrict the advance procurement to the program years of the multi-year contract. We disagree, for the following reasons.

Section 909(b)(2) of Public Law 97-86, 10 U.S.C. § 2306(h), provides an exception to the Bona Fide Needs Rule, 31 U.S.C. § 1502(a), discussed, supra. It authorizes agency heads to enter into multiyear contracts (even though appropriations for all the years involved are not yet available), for the purchase of property, including weapon systems, and items and services associated with weapon systems, provided that certain findings (which are not relevant for our purposes) are made. However, Subpart (8) of subsection 2306(h) defines a multiyear contract for purposes of the entire subsection as "a contract for no more than five program years." Subpart (4) provides, in addition, that:

"Contracts made under this subsection may be used for the advance procurement of components, parts, and materials necessary to the manufacture of a weapon system, and contracts may be made under this subsection for such advance procurement, if feasible and practical, in order to achieve economic lot purchases and more efficient production rates." (Emphasis added.)

The references to "contracts made under this subsection" can only refer to the multiyear contracts which are defined by subpart (8) as limited to the needs of 5 program years. Moreover, the statute lends no support to a contention that the advance procurement can be "free standing;" that is, without relation to the basic 5-year multiyear contract for the weapon system.

We do not think that the legislative history of section 2306(h) supports the Army's contention that it authorizes the advance procurement of economic order quantity items which will not be used during the basic 5-year term of the MLRS contract, but which may be used in support of "a" weapon system in later years.

In its report accompanying the Department of Defense Appropriation Bill, 1983, the House Committee on Appropriations defined economic order quantity procurement as "the advance procurement of material for future year production requirements which is not required by material lead times but is desirable for economic reasons." (Emphasis added.) H.R. Rep. 943, 97th Cong., 2d Sess. 100 (1982). It is clear from this definition that economic order quantity items must support end items which are to be acquired during the basic term of the contract since these are the only years for which production requirements exist. There are no production requirements for option year quantities unless or until the options are exercised. Thus economic order quantity items may not be procured in advance for option year end items, the procurement of which has not yet been approved by the Congress.

DOD's own definition of economic order quantity procurement also indicates that economic lot purchases are to support items which will be produced during the basic term of a multiyear contract. In a Policy Memorandum on Multiyear Procurement addressed to the Secretaries of the Military Departments and Directors of the Defense Agencies, dated May 1, 1981, the Deputy Secretary of Defense described multiyear procurement with expanded advance buy authority as multiyear with "advance procurement of materials, components and their associated labor for end items in the outyear portions of the contracts." Pursuant to this definition, materials and components which are procured in advance must support end items which will be produced during the term of the contract.

We note that our interpretation of the scope of the exception to the bona fide needs rule is consistent with

that set forth in DOD Directive 7200.4. (Full funding of DOD Procurement Programs.) Under the heading "Advance EOQ Procurement (Multiyear Procurement)," the Directive states:

"\* \* \* It is the general policy of the Department of Defense not to create unfunded contract liabilities for EOQ procurements associated with multiyear contracts. Rather, funding for EOQ procurements shall be included in advance procurement budget requests unless an exception to the general policy is granted by the Assistant Secretary of Defense (Comptroller) (ASD(C)). The EOQ procurement may satisfy procurement requirements for no more than 5 program years. \* \* \* DOD components may not use the advance procurement exception to the full funding policy to fund EOQ procurements outside of multiyear contracts." (Emphasis added.)

The Congress knew and approved of the exercise of the EOQ option

We have been informed by DOD that a request for an exception to DOD Directive 7200.4 was submitted to the Assistant Secretary for Defense (Comptroller) on December 12, 1983. The OSD Comptroller responded on December 29, 1983, that a waiver was not required prior to exercise of the options for advance procurement in FYs 1984 and 1985, since the options had been "included in the congressional justification material, supported at the OSD level, and thoroughly examined by the Congress." He further noted that:

"The intent of the restriction on EOQ procurements outside of multiyear contracts is to preclude abuse of the EOQ strategy and limit advance procurement requests to those requirements which are based on procurement leadtimes. The FY 1984-85 EOQ options, though not technically within the basic MYP, were approved within the overall MLRS MYP acquisition strategy."

We disagree with the OSD Comptroller's contention that the "Congress" had considered and approved exercise of the advance procurement options in the MLRS contract. The Army also contends that the Congress appropriated FYs 1984 and 1985 MLRS funds with the full knowledge that they were to be

used by the Army to procure EOQ for FYs 1988 and 1989 end items. Therefore, Army believes that its appropriations were and are available for this purpose. We will respond to both the OSD Comptroller's argument and the Army's contention together.

As we noted in the background section of this decision, the conference report which accompanied the initial MLRS appropriation explicitly stated that:

"\* \* \* The conferees are in agreement that the contract shall extend for no more than five years. The two additional option years proposed by the Army are unacceptable since procurement would begin for items to be funded in those years during the basic contract period. H.R. Rep. No. 980, 97th Cong., 2d Sess. 116 (1982).

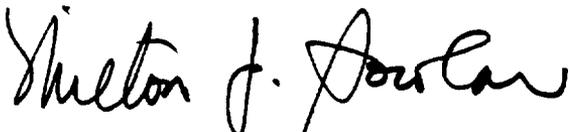
We recognize that the Under Secretary of the Army informed the four cognizant Congressional Committees that the Army intended to retain the advance procurement options despite the Conference Committee's instruction. We are also aware that the Army was questioned about the changes that it had made in its MLRS contracting strategy as a result of the Conference Committee's direction, and that the Army made it quite clear that it had not altered the structure of the contract. Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 98th Cong., 1st Sess., Part 5, 778-780.

Finally, we have given due weight to the fact that the lump-sum MLRS appropriation for fiscal year 1984 contains a \$114.1 million component which, according to the relevant committee reports, was intended for "advance procurement." We note further that this figure of \$114.1 million corresponds to the total amount requested for the purchase of advance materials, including the exercise of option 1, during FY 1984. However, it is not clear from the language of the House Armed Services Committee or the Senate Appropriations Committee reports (the only two reports which commented on the MLRS) how the rest of the Congress (including members who in the past have been reluctant to expand multi-year purchases beyond a 5-year term) could possibly realize that they were approving funds for the exercise of option 1.

The House Armed Services Committee report accompanying the Department of Defense Authorization Act for FY 1984,

stated that the budget request had included "\$114.1 million for advance procurement of long lead items." H.R. Rep. No. 107, 98th Cong., 1st Sess. 28-29 (1983). We do not see how this language could have alerted members of Congress to the fact that a portion of the \$114.1 million was intended to fund EOQ items for use in 1988. The Senate Appropriations Committee report, accompanying the Department of Defense Appropriations Act for FY 1984, recommended "\$114,100,000 to procure advance materials in economic order quantities as part of a multiyear procurement strategy approved for MLRS last year." S. Rep. No. 292, 98th Cong., 1st Sess. 84, 86 (1983). Since the multiyear procurement strategy approved for MLRS the previous year was a 5-year contract without options, we also do not see how this language can be viewed as having notified the Congress as a whole that a portion of the FY 1984 funds were to be spent on advance EOQ procurement for FY 1988. We must conclude that the Congress did not appropriate FYs 1984 and 1985 funds with the full knowledge that they were to be used by the Army to procure EOQ items for FYs 1988 and 1989 end items.

In our view, for all the reasons expressed earlier, a procurement for items needed for fiscal years not included in an authorized multiyear contract violates the prohibition in 31 U.S.C. § 1502(a) unless the Congress specifically enacted an exception. The mere fact that the requisite funds are included in a lump-sum appropriation does not constitute such an exception. We recommend that the Army seek explicit legislative authority before attempting to exercise the second option for EOQ procurements in support of the 7th year end items, as presently contemplated.

*for*   
Comptroller General  
of the United States