



Comptroller General
of the United States

Washington, D.C. 20548

B-219338

June 2, 1987

The Honorable Glenn English
Chairman, Subcommittee on Government Information,
Justice and Agriculture
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

This is in response to your inquiry of September 4, 1985, concerning a price provision in the contract awarded in September 1984 between the Department of Agriculture (DOA) and Martin Marietta Data Systems (MMDS) for the development and operation of an electronic dissemination of information system (EDI). The contract contemplates the EDI being furnished to two separate user groups. Level 1 users consist of bulk data users in the private sector who generally are expected to remarket the data to private end-users. Level 2 users consist of the various components of DOA. Rates for data dissemination services to Level 2 users are fixed by the contract. Level 1 users pay MMDS directly based upon a price schedule developed by MMDS.

Under the contract, in addition to a volume discount offered DOA based upon DOA's Level 2 usage during an account period (monthly), the contract specifically provides for a further credit against billings to the Government based upon 10 percent of the revenues received by MMDS from Level 1 users during the prior accounting period.

You expressed concern as to the legal propriety of the arrangement under which the Department of Agriculture accepts a 10 percent credit against its billing based upon services provided to the public by MMDS, and asked whether this arrangement constituted a barter, a user fee or something else. You also asked that we determine the legality of the arrangement.

As a result of your inquiry we requested and received a report on this matter from the Office of Information

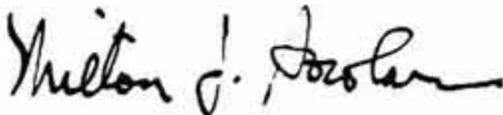
Resources Management, Department of Agriculture, which was considered in preparation of this response. It is our conclusion, as set forth in detail in the accompanying analysis, that the arrangement is authorized by section 1121 of the Agriculture and Food Act of 1981, as amended, 7 U.S.C. § 2242a (Supp. III 1985). We specifically found that:

--Section 1121 authorizes DOA to establish a fair market value or cost-related system for charging users of the EDI. The recovery of both direct and indirect costs from EDI users is authorized (including a reasonable amount of general administrative and overhead expenses). Front-end costs, such as special software development costs necessary for operation of the EDI system, are recoverable from users over the useful life of the system. However, fees recovered must be deposited to the credit of the appropriation which bore the expense regardless of when they are recovered.

--Section 1121 authorizes DOA to use any amounts it recovers directly from users to pay a contractor for providing EDI services to the public. Therefore, by extension it may permit the user to go directly to the contractor for EDI services (eliminating DOA as middle-man) and to pay the contractor for services rendered. The contractor may retain from the fees amounts to which it is entitled under the contract for rendering EDI services to public users. The balance must be remitted to DOA.

--DOA has stated that the credit based upon the volume of Level 1 usage will return to DOA less than the amounts which it is authorized to recover under section 1121. However, it has not demonstrated this. To the extent the amounts received exceed those authorized by section 1121, they would be improper. We recommend that DOA undertake to demonstrate that the credit, in fact, recovers no more than that authorized by section 1121, employing one of the acceptable methods for assessing fees recognized by relevant case law.

Sincerely yours,

for 
Comptroller General
of the United States

Enclosure

ANALYSIS OF PRICE PROVISIONS IN DEPARTMENT
OF AGRICULTURE'S EDI CONTRACT

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INTRODUCTION

This Analysis concerns a price provision in the contract awarded in September 1984 by the Department of Agriculture (DOA) to Martin Marietta Data Systems (MMDS) for the development and operation of an electronic dissemination of information (EDI) system. The contract contemplates the EDI system being furnished to two separate user groups. Level 1 users consist of bulk data users in the private sector who generally are expected to remarket the data to private end-users. Level 2 users consist of the various components of DOA. Rates for data dissemination services to Level 2 users are fixed by the contract. Level 1 users deal with MMDS directly and pay for services based upon a price schedule established by MMDS which was derived from a series of benchmarks based upon MMDS's standard commercial rates.

Under the contract, in addition to a volume discount offered DOA based upon DOA's Level 2 usage during an accounting period (monthly), the contract specifically provides for a further credit against billings to DOA based upon 10 percent of the revenues received by MMDS from Level 1 users during the prior accounting period.

This Analysis addresses the legal propriety of the arrangement under which the Department of Agriculture accepts a 10 percent credit against its billings based upon services provided to the public by MMDS.

As will be explained in greater detail later, it is our conclusion that a credit to DOA is legal since it is authorized by section 1121 of the Agriculture Food Act of 1981, as amended, 7 U.S.C. § 2242a (Supp. III 1985). DOA has stated that the amount of the credit based upon the volume of Level 1 usage will return to DOA less than the amounts which it is authorized to recover under section 1121. However, DOA has not demonstrated this. In the absence of such a demonstration, we cannot say whether the amount of the current credit is proper. We

recommend that DOA undertake to demonstrate that the credit, in fact, recovers no more than that authorized by section 1121, employing one of the acceptable methods for assessing fees recognized by relevant case law.

DESCRIPTION OF THE EDI SYSTEM

The EDI system was designed to electronically disseminate to system users a large range of perishable and time-sensitive agricultural data,^{1/} such as the Department's economic outlook and situation reports, weekly export sales reports, crop and livestock statistical reports, and press releases. The recipients of these data, the system users, include (1) the public, generally defined as agricultural information retailers, publishers, the news media, agribusiness establishments, etc., and (2) several DOA agencies.^{2/}

The primary objective of the Department of Agriculture's EDI system is to make available all the data in the system to users as soon as these data are received or at specified release times established by the Department's agencies. Each agency determines the extent to which it will use the system and what perishable or time-sensitive data to put into the system.

The system became operational in July 1985. A year later, 6 agencies were loading (entering) data into the system, and 10 agencies were accessing data in the

^{1/} Perishable and time-sensitive data is defined as data with a limited useful life, data which lose their significance if they do not reach the proper users in a timely manner, and data that, when replaced, are completely replaced. See Status of Agriculture's Electronic Dissemination of Information System n. 1 at 1 (GAO/IMTEC 87-7FS, B-225251, January 5, 1987).

^{2/} This description is based upon GAO/IMTEC 87-7FS, 1-2, 6.

system. These agencies are charged for loading and storing the data they enter into the system and for any data they retrieve from the system. The system's development cost was \$250,000 and the Department's fiscal year 1986 operating cost for loading, storing, and retrieving data was about \$7,900 per month, which was distributed among the agencies using the system.

The public user rates for accessing the system were established by and are paid directly to the contractor. The rates are contained in separate contracts between the contractor and each public user. Public user costs begin at a minimum of \$150 per month with higher rates charged depending on the extent of system use.

The system users, both public and government, have a choice of data delivery methods, protocols,^{3/} and what data they want to receive. However, public users are required to receive larger units of data than government users.

PERTINENT STATUTES AND LEGISLATIVE HISTORY

At the time DOA and MMDS entered into the EDI contract, section 1121 of the Agriculture and Food Act of 1981, provided:

"The Secretary of Agriculture may furnish upon request copies of pamphlets, reports or other publications prepared in the Department of Agriculture in carrying out agricultural economic research and statistical reporting functions authorized by law, and charge such fees therefor as the Secretary may determine to be reasonable: Provided, That the imposition of such charges shall be consistent with the provision of section 9701 of title 31, except that all moneys received in payment for work or services performed or for documents, reports, or other publications provided shall be deposited in a separate account or accounts to be available until expended and may be used

^{3/} A protocol is a formal set of transmission rules that permit computers to communicate with each other. GAO/IMTEC 87-7FS n.2 at 2.

to pay directly the costs of such work, services, documents, reports, or publications, and to repay or make advances to appropriations or funds which do or will initially bear all or part of such costs."^{4/}

Section 1121 was subsequently amended by section 1769 of the Food Security Act of 1985 to provide:

"(a) Authority of Secretary

"The Secretary of Agriculture may--

"(1) furnish, on request, copies of software programs, pamphlets, reports, or other publications, regardless of their form, including electronic publications, prepared in the Department of Agriculture in carrying out any of its missions or programs; and

"(2) charge such fees therefor as the Secretary determines are reasonable.

"(b) Consistency of charges with provisions of section 9701 of Title 31

"The imposition of such charges shall be consistent with section 9701 of Title 31.

"(c) Use and disposition of moneys

"All moneys received in payment for work or services performed, or for software programs, pamphlets, reports or other publications provided, under this section--

^{4/} Pub. L. No. 97-98, December 22, 1981, 95 Stat. 1273, 7 U.S.C. § 2242a (1982).

"(1) shall be available until expended to pay directly the costs of such work, services, software programs, pamphlets, reports, or publications; and

"(2) may be credited to appropriations or funds that incur such costs."^{5/}

It is clear that under section 1121 as amended by Pub. L. No. 99-198 the DOA may charge fees for providing information to the public, including information provided electronically.

Additionally, in our view, costs which related to dissemination of information electronically were properly recoverable under section 1121 as originally enacted so that recovery of appropriate costs by means of the September 1984 contract with MMDS for EDI system services was statutorily authorized. We think the term "publication" is broad enough to include making available information to the public generally, without necessarily connoting a technological limitation on the means of doing so. Secondly, the legislative history supports this conclusion. See the report of the Conference Committee on the 1981 Act, H.R. Rep. No. 97-377, 97th Cong., 1st Sess., 199 stating:

"(21) User fees for reports and publications
(Sec. 1121)

* * * * *

"The Conference substitute adopts the House amendment. The conferees intend that this provision shall empower the Secretary to furnish, upon request, copies of pamphlets, reports, publications, and other media prepared by the Department and to charge such fees therefor as the Secretary determines to be reasonable. * * *" (Emphasis supplied.)

We note that the 1985 amendment specifically includes electronic publications and software as items that are available for a fee from DOA while the 1981 provision is silent on this

^{5/} Pub. L. No. 99-198, December 23, 1985, 99 Stat. 1656, 7 U.S.C. § 2242a (Supp. III 1985).

matter. We also note that subsequent legislation reflecting the Congress' interpretation of an earlier act is entitled to substantial weight in determining the meaning of an earlier statute. Bell v. New Jersey, 461 U.S. 773, 784 (1983) and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-381 (1969). However, here the question is whether the 1985 amendment is intended to serve as a clarification or a change of the prior statute, or doing both. Barnes v. Cohen, 749 F.2d 1009, 1015 (3rd Cir. 1974). In our opinion it may properly be interpreted as both.

For example, section 1121 as initially enacted could be construed as limiting the recovery of fees to publications of the Economic Research Service and Statistical Reporting Service. The 1985 amendment would then be interpreted as having expanded the law to authorize DOA to recover fees for all information it receives and with respect to which dissemination is not otherwise precluded by law. See H.R. Rep. No. 99-447, 99th Cong., 1st Sess. 605 (1985) and S. Rep. No. 99-145, 99th Cong., 1st Sess. 338, 514 (1985) accompanying the 1985 amendment.

On the other hand, the reference to electronic data dissemination costs may be reasonably construed to clarify the appropriateness of collecting fees for disseminating information electronically under the earlier law. The issue of how to calculate fees for electronic data dissemination was given close congressional scrutiny in the context of user fees under 31 U.S.C. § 9701 during Hearings on the SEC: Oversight of the EDGAR System before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 99th Cong., 1st Sess. (1985) and the Hearings on Electronic Collection and Dissemination of Information by Federal Agencies before a Subcommittee of the House Committee on Government Operations, 99th Cong., 1st Sess. (1985). The difficulty in applying legislative requirements concerning dissemination of information generally to electronic dissemination, exemplified in the EDGAR hearings, suggests that the change in DOA's dissemination statute may have been intended as a clarification rather than as a change.

Finally, section 1121 has continuously required that DOA's charges for publications be "consistent" with 31 U.S.C. § 9701, which provides that:

"(a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States

Government) is to be self-sustaining to the extent possible.

"(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be--

(1) fair; and

(2) based on--

(A) the costs of the Government;

(B) the value of the service or thing to the recipient;

(C) public policy or interest served; and

(D) other relevant facts."^{6/}

Since section 1121 requires that the fees charged be consistent with 31 U.S.C. § 9701, the cases discussing the propriety of fees established under that law provide guidance as to the fees that may be assessed under section 1121.

RELEVANT COURT DECISIONS UNDER 31 U.S.C. § 9701

In National Cable Television Association v. United States (NCTA), 415 U.S. 336, 340-344 (1974), a case involving fees assessed by the FCC to recover costs incurred in regulating cable television stations, the Court held that fees assessed under 31 U.S.C. § 9701 must be based on "value to the recipient" and not on "public policy" or "interest served" or

^{6/} For an analysis of the problems which arise in attempting to set user fees for electronic dissemination of information under the authority of 31 U.S.C. § 9701, see the report on Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview, Twenty-eighth Report by the Committee on Government Operations, H.R. Rep. 99-560, 99th Cong., 2d sess., 36-43 (1986).

"other pertinent facts." Otherwise, the imposition of the fees may be in violation of the constitutional prohibitions dealing with the delegation of the authority to tax.

In a companion case, Federal Power Commission v. New England Power Co. (New England Power), 415 U.S. 345 (1975), the Court amplified its NCTA decision. In a case involving attempts by the FPC to recoup its costs incurred in regulating the interstate transmission and sale of electricity and the interstate delivery of natural gas, the Court held that whole industries are not in the category of those who may be assessed under the User Charge Statute, its thrust reaching only specific charges for specific services to specific individuals or companies. Id. 349-351.

The Court pointed out that Office of Management and Budget Circular A-25 properly construes the Act where it states that chargeable services include agency action which:

"provides special benefits * * * above and beyond those which accrue to the public at large * * *. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

"(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g. receiving a patent, crop insurance or a license to carry on a specific business); or

"(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g. certificates or necessity and convenience for airline routes, or safety inspections of craft); or

"(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public, e.g. receiving a passport, visa, airman's certificate, or an inspection after

regular duty hours)." 415 U.S. 349, footnote 3 at 350.^{7/}

However, both of these cases address only the issue of setting fees in a regulatory environment.

These decisions of the Supreme Court generally have been construed by lower courts^{8/} to require that (1) no fee be charged to a private party where there is no identifiable beneficiary; that is, when the identification of the ultimate beneficiary is obscure and the service can therefore be primarily considered as benefitting broadly the general public; (2) the fee assessed cannot exceed the cost to the agency of providing the item or service^{9/} including direct and indirect costs^{10/} (unless a reasonable fee is established using an appropriate alternative methodology as discussed below); and, (3) expenses incurred to serve some independent public interest cannot be included in the fee. While it

^{7/} The problem with using OMB Cir. A-25 as a guideline for assessing fees for recovery of the cost of electronic disseminations of information is that well-founded concerns have been expressed as to whether the Circular contemplates or adequately addresses the issues involved in electronic dissemination of information that is collected to carry out a general agency function. H.R. Rep. No. 99-560, 38.

^{8/} See, for example, Mississippi Power v. U.S. (Mississippi Power), 601 F.2d 223, 230 (5th Cir. 1979) cert. den. 444 U.S. 1102; Electronic Industries Association, Consumer Electronics Group v. Federal Communications Commission (EIA), 554 F.2d 1109 (D.C. Cir. 1976) and National Association of Broadcasters v. Federal Communications Commission, 554 F.2d 1118 (D.C. Cir.).

^{9/} In Public Service Co. v. Andrus, 433 F. Supp. 144 (D.C. Colo. 1977), the court held that there is no requirement that such fees represent the exact cost of the service to the agency but need only bear a reasonable relationship to the cost of the service rendered by the agency.

^{10/} See Cent. and Southern Motor Freight Tariff Ass'n v. U.S., 777 F.2d 722, 736-738 (D.C. Cir. 1985); Public Service Co. v. Andrus, supra.

is clear that any expense incurred to serve the public generally must be excluded from a fee assessed under 31 U.S.C. § 9701, it is equally clear that a fee may be charged for an activity even though the general public secondarily or incidentally benefits from it. Mississippi Power, supra; EIA, supra, 1114-1115; National Cable Television Association, Inc. v. Federal Communications Commission, 554 F.2d 1095, 1104 (D.C. Cir., 1976); Public Service Co. v. Andrus, supra, p. 152; Customs Service Recovery of Preclearance (Including TECS) Cost Under User Charge Statute 31 U.S.C. § 483a, 59 Comp. Gen. 389 (1980).

Additionally, at least one court has ruled that full cost may be recovered under 31 U.S.C. § 9701, regardless of the fact that the service rendered serves an independent public benefit (not merely an incidental or secondary public benefit), Phillips Petroleum Co. v. F.E.R.C., 786 F.2d 370, 377 (10th Cir. 1986). See also Cent. & Southern Motor Freight Tariff Ass'n v. U.S., 777 F.2d 722, 731-732 (D.C. Cir. 1985) for a slightly different basis for justifying full cost recovery.

Yosemite Park and Curry Co. v. U.S., 686 F. 2d 925 (Ct. Cl. 1982), provides additional support for flexibly interpreting the authority an agency has under 31 U.S.C. § 9701 when setting fees. That case, unlike the cases discussed earlier which dealt with cost recovery in a regulatory or licensing context, addressed cost recovery in the context of the sale of an item or service. The court held that rates for the sale of electricity by the National Park Service must merely be reasonable and may be based on cost or comparable rate. The comparable rate was determined by using the average of rates charged by area utility companies. See 686 F.2d 935. The court held that this was permissible since such rates were reasonable.

The court pointed out that OMB Cir. No. A-25, as it applies to rates for the lease or sale of federally-owned resources, provides:

"Lease or sale. Where federally owned resources or property are leased or sold, a fair market value should be obtained. Charges are to be determined by the application of sound business management principles, and so far as practicable and feasible in accordance with comparable commercial practices. Charges need not be limited to the recovery of costs; they may produce net revenues to the Government.

* * * * *

In determining the charges for the lease and sale of Government-owned resources or property, [the agency shall] apply sound business management principles and comparable commercial practices. (Emphasis supplied.)"

The court reasoned that the provision of electricity to the plaintiff is the sale of a federally-owned resource. Therefore, Cir. No. A-25 expressly does not require NPS to use a cost-based system. Rather, it mandates a comparative-rate system based on the fair market value of the goods or services. It then concluded that the NPS rate system was in accordance with the Circular. 686 F.2d at 929. Thus, the fair market value system used by NPS for assessing fees was not in violation of the law's requirements.

In Mississippi Power, *supra*, the court held that cost elements representing technical and administrative support costs could be included in fees assessed NRC license applicants, stating:

" The petitioners further object to being charged for administrative and technical support costs. The Commission's position is that these costs must be included in the fee schedule because they constitute part of the total cost of providing a service; the petitioners contend that such costs should be excluded because they represent general agency expenses which do not benefit an 'identifiable recipient'.

"The cost of performing a service, such as granting a license to construct a nuclear reactor, involves a greater cost to the agency than merely the salary of the professional employee who reviews the application. The individual must be supplied working space, heating, lighting, telephone service and secretarial support. Arrangements must be made so that he is hired, paid on a regular basis and provided specialized training courses. These and other costs such as depreciation and interest on plant and capital equipment are all necessarily incurred in the process of

reviewing an application. Without these supporting services, professional employees could not perform the services requested by applicants.

"Such costs may be assessed against an applicant as part of the total cost of processing and approving a license; we emphasize again that the Commission may recover the full cost of providing a service to a beneficiary. Indeed, the IOAA [Independent Offices Appropriation Act, currently codified at 31 U.S.C. § 9701] itself urges federal agencies to assess fees taking into consideration both the 'direct and indirect cost to the Government.' 31 U.S.C.A. § 483a. Here, the Commission has carefully and thoroughly explained its method of calculating these administrative and technical support costs.* * * We find the Commission's formula to be a reasonable method of estimating such fees. Notwithstanding the petitioners' assertions to the contrary, the NRC in estimating its costs is only obligated to come forth with reasonable approximations, not precise calculations. National Association of Broadcasters v. F.C.C., 180 U.S. App. D.C. 259, 271 n. 28, 554 F.2d 1118, 1130 n. 28 (1976)." 601 F.2d at 232.

It is clear, therefore, that to be recoverable by an agency, the cost of providing an item or service need not result in an incremental increase in the cost otherwise incurred by an agency in its daily operation. Thus, general administrative and overhead costs are recoverable. The agency need only have a reasonable, explained method for calculating and relating these costs to the identifiable item or service provided.

ISSUES

Based upon our review, we identified the following issues surrounding the legal propriety of the credit offered by MMDS against Level 2 billing to the DOA, amounting to 10 percent of the revenues received by MMDS from Level 1 users.

1. What is DOA authorized to recover through fees charged under section 1121 of the Agriculture and Food Act of 1981, as amended?
2. Is DOA authorized to recover part of its costs from fees charged Level 1 users by MMDS?
3. May MMDS retain a portion of these fees?
4. May DOA recover its EDI software development cost through fees charged Level 1 users?
5. May DOA recover its EDI operating costs through fees charged Level 1 users?
6. Must MMDS immediately reimburse DOA the agreed upon portion of the fees or may MMDS offer a credit against future billings to DOA for Level 2 use instead?

THE DEPARTMENT OF AGRICULTURE'S POSITION

The DOA has at various times maintained that the 10 percent credit represents a partial reimbursement to it for either (1) the costs it incurred in developing the software necessary to permit the data to be marketed to the public users and/or (2) the ongoing operating costs DOA incurs in furnishing data to MMDS for release to users, including the public, through EDI. DOA^{11/} has most recently emphasized

^{11/} DOA has reported to this Office that in its view, MMDS is acting as its agent for collecting fees for public information dissemination purposes. As will be explained later, MMDS is authorized to retain a portion of the fees as its payment for providing services rather than depositing them to the Treasury as miscellaneous receipts as "agents" receiving funds on behalf of the Government and regarding as so by 31 U.S.C. § 3302(b).

the appropriateness of recovering ongoing operating costs under the law^{12/} since, as will be explained below, this cost is funded out of the current appropriation at the time the credit is received and thus affords DOA a legal basis for retaining the benefit of the credit in its current appropriation account. However, we will analyze both arguments in order to determine whether either will support the credit from a legal standpoint regardless of whether DOA may realize this as a benefit in its current appropriation account.

DOA has testified that its need to develop software was a result of attempting to make EDI serve Level 1 users.

"USDA had to levy some special requirements on the EDI system that could not be satisfied by any existing software. These were primarily related to the time-sensitive nature of our data. The \$250,000 was the negotiated charge for

^{12/} The 10 percent credit was initiated by MMDS which stated in its best and final proposal that:

"Sharing of Development and Operating Costs

"MMDS considers the development and operation of the EDI System to be a joint effort by USDA and MMDS to serve the Government and the agriculture industry. As a partner with USDA, MMDS desires to share the value of the EDI System with USDA. This will provide a significant reduction in the initial investment by USDA for system development and will offset the ongoing operational costs.

"Therefore, each accounting period, MMDS will reduce the invoice amount to USDA. This reduction will be equal to 10 percent of the revenues from all Level 1 users for transactions and connect time received by MMDS during the prior period."

However, regardless of who initiated the concept of the credit or their reasons for doing so, the only question appropriate for our consideration is whether the credit can be interpreted as falling within the scope of statutory authority under which DOA is operating.

development of the required special software."^{13/}

Among the special requirements identified were an auto-dial feature to automatically disseminate DOA releases to subscribers; dedicated line interface for public users that required this level of service; multi-level menus to classify releases for easy search and retrieval; the ability for preset or variable menu headings to permit all agencies to participate thereby expanding the data base available to the public; the need to support various communications protocols to accommodate users as well as a variety of loading equipment; a time-release capability for specific information; an ability to delete specific reports automatically or on command; and, an ability to support multiple versions of a report. In addition, the \$250,000 charge included user training, manuals, system cards and brochures.^{14/}

DOA testified that:

"The specialized software is specifically to meet the needs of the public users. If we were only concerned with meeting the needs of data sharing within the Department, we would probably install the system on our own Departmental Computer Centers which are not open to the public at large. The EDI system is specifically for the public. We will use it internally also so that our Agencies don't have to duplicate the data for access by our own personnel. Our own needs could be met more easily by simpler software that is already available if that were our only requirement."^{15/}

^{13/} Statement of Glenn P. Haney, Director, Office of Information Resources Management, Department of Agriculture, provided during Hearings on the Electronic Collection and Dissemination of Information by Federal Agencies held before a Subcommittee of the Committee on Government Operations, House of Representatives, 99th Cong., 1st Sess. 444 (1985) (hereafter referred to as: Hearings).

^{14/} Hearings, 444-445.

^{15/} Hearings, 447-448.

The DOA has also indicated that it incurs other costs related to the continued operation of the EDI system, some portion of which it feels is attributable to the public. The DOA report to this Office states:

"* * * The USDA incurs substantial costs in furnishing the subject information to MMDS for release to the public through EDI. Such costs are in addition to the costs of collecting and collating such information. It is these USDA incurred operational costs, not the software costs, upon which the USDA relies for its conclusion that the 10 percent credit is authorized. Therefore, we believe that the credit is received for the 'furnish[ing]' of such information." 16/

LEGAL ANALYSIS

A. Recoverable Fees Under Section 1121 of Agriculture and Food Act of 1981, as amended

Nothing in the language of section 1121 or its legislative history explains what the Congress intended by the requirement that fees under that section be "consistent" with those assessed under 31 U.S.C. § 9701. In the absence of this requirement, to be "consistent," it is clear that the narrow interpretation given by the courts to an agency's authority to establish fees under 31 U.S.C. § 9701 would be unnecessary when interpreting DOA's authority to establish fees under section 1121. See Bunge Corporation v. U.S., 5 Cl. Ct. 511 (1984). At a minimum, however, we take it to mean that the charges may be cost-related under any of the various formulations sanctioned by the decisions of the courts, or, in the absence of a cost based fee schedule, reasonable. Also, the requirement that fees be "consistent" with section 9701 fees clearly does not mean that they

16/ See also Hearings, 445 where the additional costs DOA incurs under the EDI system contract are outlined:

"The contract with MMDA is for computer use. The Department will, therefore, pay for costs associated with loading our data, storing, and managing it. We will also pay any costs for our own employees to access data on the system."

must be identical to those that would be imposed under section 9701 or that they must have been promulgated in accordance with all the procedural requirements entailed in promulgating a fee under 31 U.S.C. § 9701.^{17/}

Although the earlier decisions seemed to require in the context of section 9701 a rigorous separation between public and private benefits in order to include an item as an element of cost in the fee charged under a cost-based fee system, later cases have been more flexible in this regard. They have permitted recovery when the public interest served is merely incidental or secondary, or in some instances when the degree of public interest is substantial. They also permit some form of proportional allocation of the costs based upon the percentage of public versus private benefit resulting from the item or service provided. Full cost recovery has also been authorized. Furthermore, where comparable rates are employed and the fair market value is recovered by the sale of an item or service in a non-licensing or non-regulatory environment, it appears that the question of public versus private benefit is irrelevant. Finally, where a cost-based fee system is used, section 9701 permits recovery of both direct and indirect costs incurred in providing the requested item or service including a reasonable allocation of general administrative and overhead expenses.

^{17/} Thus we avoid the question of the legality of DOA's fees based solely upon the fact that they were neither determined in accordance with the specific procedure set forth in EIA, supra, 1117 nor set forth in DOA's regulations as required by 31 U.S.C. § 9701. See Alyeska Pipeline Service Co. v. U.S., 624 F.2d 1005, 1010 (Ct. Cl. 1980) and compare Bunge Corporation v. U.S., 5 Cl. Ct. 511 (1984).

Also, since we are considering fees for information services provided pursuant to specific statutory authority other than the Freedom of Information Act, 5 U.S.C. § 552, we are not constrained to hold that DOA may recover only the nominal fees authorized under FOIA. See Retention of Fees Recovered by EPA Contractors Providing Information Service to the Public, B-166506, October 20, 1975; SDC Development Corporation v. Mathews, 542 F.2d 1116 (9th Cir. 1976) rehearing and rehearing en banc denied; and National Library of Medicine's Medical Literature Analysis and Retrieval System (HRD 82-66, B-207120, April 19, 1982).

Accordingly, DOA, when setting fees under section 1121, has flexibility as to how to calculate such fees.

B. DOA's Cost Recovery Through Its EDI Contractor

Under the law, DOA may disseminate information (including electronic dissemination) directly in response to requests. It may use its equipment and personnel and recover the costs associated with that dissemination or it may do this through a contractor. When using a contractor to disseminate information, DOA's cost would include the amount charged to it by the contractor to disseminate the information, and this amount would include a reasonable element of profit to the contractor as well as any costs DOA otherwise incurs to benefit public users.

Furthermore, we are aware of nothing that would preclude DOA from having the user deal with the contractor and pay the contractor directly. The contractor may retain from these payments amounts to which it is entitled under the contract and may remit to DOA amounts to which DOA is entitled for the services provided to the contractor which benefit public users.^{18/}

C. Propriety of Fees Charged Public Users by MMDS

Based upon the cases previously discussed, it appears that if DOA provided the information dissemination services directly, it could recover fees based upon either full cost recovery or on the basis of a system which is essentially unrelated to costs incurred such as the fair market value of the item or service provided. If the fair market value system were employed, then assessing fees comparable to those charged by other electronic information dissemination services would be reasonable (as would be any other system designed to recover the fair market value). This same flexibility in setting fees available to DOA similarly is available to its contractor.

^{18/} Since the law authorized DOA to use the fees it receives to pay costs of dissemination, this would make the fees available to pay amounts the contractor charges to DOA for providing the information to the public.

Thus, the fact that users pay fees pursuant to a price schedule established by the contractor, based on the contractor's standard commercial rates, does not render them illegal or improper per se under section 1121.

So long as the fees reflect either (1) the contractor's full cost, plus the cost DOA is entitled to recover through the contractor, plus a reasonable profit or (2) the fair market value of the service provided, they would be legally supportable. Our survey of the public users found that the majority of them consider the fees to be reasonable,^{19/} and we have no basis for a different conclusion.

D. Propriety of the Credit Generally

Based in part upon the requirements set forth in 31 U.S.C. § 9701, we recently concluded that the SEC could not have a portion of its cost for its internal data processing needs shifted to the public through fees assessed by the contractor for providing electronic dissemination of information. These costs were not proper for inclusion in fees paid by public users because they represented costs to meet an independent public purpose.^{20/} However, there is nothing in the present case to indicate that DOA is financing its internal functions from fees charged public users. Both the Government and the public users are paying MMDS charges related to the cost of the requested services.

^{19/} GAO/IMTEC-87-7FS, 15-17.

^{20/} GAO, ADP Acquisition, SEC Needs to Resolve Key Issues Before Proceeding with its EDGAR System at 25-28 (GAO/IMTEC 87-2, B-222177, October 9, 1986). Furthermore, nothing in SEC's initial proposal attempted to apportion this element of cost between the public and private interests served by this item.

As discussed below, there is nothing of which we are aware indicating that MMDS has subsidized the DOA in meeting its own needs by shifting costs to public users.^{21/}

1. Software Development Costs

From the information provided by DOA it is clear that the cost of the development of the special EDI software was the result of the need to provide the public better access to, and use of, DOA collected information and that this benefited DOA only incidentally. As previously noted, DOA testified that less expensive software was already available to meet its needs for information usage. Thus, DOA is authorized to recover its software development cost from public information users. This is true even though, at the current time, public users are not availing themselves of all the functions offered by DOA through EDI which resulted from the software development.^{22/} This is because there was no way of knowing at the time the software was developed in order to serve an anticipated public need that certain features of the system might not be used by the public.

Had DOA established the fee schedule, it would have been proper to include the software development as an item of cost in determining the fee to be recovered from prospective public users. However, under the contractual arrangement the cost could only be recovered from public users if MMDS passed this cost on under the contracts with the public users. Assuming that MMDS did this, then it would be entirely appropriate for MMDS to repay to DOA a portion of the fees it collected which represented the software development cost. Of course, once received by DOA the law would require that such payments be deposited to the credit of the account that

^{21/} See also H.R. Rep. No. 99-560 concerning The Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Review, by the House Committee on Government Operations, 99th Cong., 2d Sess. 41 (1986).

^{22/} As noted in GAO/IMTEC-87-7 FS at 9, none of the 16 public users were using the automatic dial-up feature on any of the available protocols. The primary reasons given for this were that (1) most public users currently accessing the system use the teletype protocol and no automatic dial-up feature is available and (2) the additional costs associated with the automatic dial-up feature, such as the cost of dedicated communications line, were too high. GAO/IMTEC-87-7FS at 9.

incurred the cost. In this case it would be the DOA appropriation account against which the \$250,000 payment for the special software was charged. However, under the contract in question the DOA is merely receiving a credit against future billings. Therefore, to the extent that DOA is recovering software development costs as part of the credit, the appropriation that paid that expense is not being reimbursed.

Therefore, the appropriation out of which DOA pays MMDS for its own information needs would be augmented to the extent that the credit includes amounts representing software development costs. To the extent that any portion of the credit is properly attributed to software development, DOA should make an adjusting entry between its current appropriation benefiting from the credit (that is the appropriation out of which it pays MMDS for DOA's use of EDI) and the appropriation which funded software development. We have no reason to object to the credit if the appropriations are the same however.

While we concur with DOA that the law authorized the recovery of front-end costs such as software development to be allocated among users over the expected useful life of the system, the provisions governing deposit of any fees received for recovery of these costs make it clear that the payments must be deposited to the credit of the appropriation which bore the expense. The Congress could have authorized DOA to deposit all fees to the credit of current appropriations for the payment of any costs incurred in disseminating the information, but it did not do this. Consequently, the intent as manifested in the legislation must be complied with.

2. Annual Operating Expenses

DOA has also relied on the fact that it is entitled to recover annual operating expenses it incurs in providing information to MMDS for inclusion in the EDI system. Since these costs are funded out of current appropriations, they may be used to justify the credit against current billings to DOA without any adjusting entry as described above.

However, unlike the software development costs, DOA has not identified the specific ongoing operating costs that it deems recoverable or their amount. Furthermore, it has not (1) determined that these costs were incurred solely to serve Level 1 users (with no benefit accruing to Level 2 users);

(2) determined that even if Level 2 users benefit, it is only an incidental public benefit; or (3) attempted to allocate these costs on a reasonable basis between both Level 1 and Level 2 users on the grounds that both benefit thereby.

Since the 10 percent credit originated with MMDS, it is not clear that DOA considered these issues at the time it selected MMDS as the contractor. However, this does not mean that DOA could not identify and determine its costs for the purpose of recovering future credits. For example, DOA has indicated that it is paying MMDS for DOA's loading more information into the system than is necessary to meet DOA user needs. A portion of this cost is recoverable. Therefore, we recommend that DOA demonstrate that the credit, in fact, recovers no more than that authorized by section 1121.

CONCLUSION

In summary we hold that:

--Section 1121 authorizes DOA to establish a fair market value or cost-related system for charging users of the EDI. The recovery of both direct and indirect costs from EDI users is authorized (including a reasonable amount of general administrative and overhead expenses). Front-end costs, such as special software development costs necessary for operation of the EDI system, are recoverable from users over the useful life of the system. However, fees recovered must be deposited to the credit of the appropriation which bore the expense regardless of when they are recovered.

--Section 1121 authorize DOA to use any amounts it recovers directly from users to pay a contractor for providing EDI services to the public. Therefore, by extension it may permit the user to go directly to the contractor for EDI service (eliminating DOA as middleman) and to pay the contractor for services rendered. The contractor may retain from the fees amounts to which it is entitled under the contract for rendering EDI services to public users. The balance must be remitted to DOA.

--DOA has stated that the credit based upon the volume of Level 1 usage will return to DOA less than the amounts which it is authorized to recover under section 1121. However, it has not demonstrated this. To the extent the amounts received exceed those authorized by section 1121, they would

be improper. We recommend that DOA undertake to demonstrate that the credit, in fact, recovers no more than that authorized by section 1121, employing one of the acceptable methods recognized by relevant case law.