

B-168707-O.M., May 11, 1970

UNITED STATES GOVERNMENT

GENERAL ACCOUNTING OFFICE

Memorandum

APR 2 1970

TO : The Comptroller General

FROM : Director, DD - C. M. Bailey

C. M. Bailey

SUBJECT: Request for Legal Opinion--Congressional Inquiry
on Amounts due the Government for Air Force Launch
Assistance to COMSAT (Code 87515)

Pursuant to a request from Senator Mike Gravel of Alaska, dated December 18, 1969, we have initiated a review into the question of whether the Communications Satellite Corporation (COMSAT) has received preferential treatment. This preferential treatment comprised unbilled costs in excess of \$4,000,000 for communications satellite launch services provided by the Air Force. The Senator requested that we (1) determine the best method to recover this or any other amounts for the U.S. Treasury arising from dealings between COMSAT and the Government and (2) recommend how to correct such a situation in the future.

We believe that the following references apply:

- User Charges Statute (31 U.S.C. 483a);
- National Aeronautics and Space Act of 1958 (July 29, 1958)
(42 U.S.C. 2451);
- Communications Satellite Act of 1962 (August 31, 1962) (47
U.S.C. 701);
- The President's Policy Memorandum of May 17, 1966;
- Bureau of the Budget Circular A-25 (September 23, 1959)
(amended October 22, 1963);
- Department of Defense Directive 7230.6 (August 31, 1961)
(cancelled by DOD Transmittal 66-31, December 20, 1966);
- Department of Defense Instruction 7230.7 (December 20, 1966).

The facts in this case are summarized in a report draft by our Atlanta Regional Office, forwarded to us on March 12, 1970. A copy of the draft report (less attachments) has been furnished to Mr. _____ of the General Counsel's office. Briefly, NASA and COMSAT have negotiated written agreements providing for NASA to furnish launch support services to COMSAT on a reimbursable basis. Some of the services NASA agreed to furnish are actually provided by the Air Force. The language of the agreements, however, does not specify which costs shall be reimbursable.

On the first launch (Early Bird), although the Air Force computed costs of \$922,110, only \$23,557 was billed to NASA and, in turn, to COMSAT. This billing was made on the basis that the launch was a research launch and, as such, should properly include only "out-of-pocket" costs. Excluded were direct costs of \$442,000 and indirect costs of \$457,000, including depreciation of \$153,000. Subsequently, Early Bird was used commercially and controversy arose as to the question of whether full user charges should have been collected.

Acting for the Air Force, the Department of Defense (DOD) agreed that the billing for Early Bird would not be changed and that only direct costs would be billed for the second, third, and fourth launches. Thus, all indirect costs were excluded. DOD and NASA further agreed that for subsequent COMSAT launchings, billings would include all direct and indirect costs with the exception of depreciation. Both NASA and the Air Force agree that depreciation is a proper charge but that in the absence of an auditable system for determining depreciation, the billings to COMSAT would not include amounts for depreciation.

Under current practices, Air Force billings to NASA are added to and included in NASA's billings to COMSAT. The NASA bill includes, for overhead and administrative expense, a surcharge of 15 percent of the costs of NASA launch services, project management, engineering support, and DOD contract administration; and a surcharge of one percent of all other costs, including those billed by the Air Force.

The payments received from COMSAT are placed in a deposit account with the U.S. Treasury, created for the purpose of holding these funds until final settlement. Within two years after the date of a launch, final bills for the costs of that launch are prepared. Bills are submitted to COMSAT and either NASA makes a refund or credit against the next launch, or COMSAT makes an additional payment, depending on the differences between the estimated and actual costs. Only then are funds released for reimbursement to the Air Force.

With the exception of the 15 percent and one percent surcharges, all funds received from COMSAT are used to reimburse NASA and Air Force appropriations accounts. The User Charges Statute provides that amounts collected shall be paid into the Treasury as miscellaneous receipts.

The User Charges Statute states that services or things of value provided by any Federal agency to any person or entity shall be provided on a self-sustaining basis to the full extent possible. However, the Statute also authorizes the head of a Federal agency to:

"*** prescribe therefore such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts***".

NASA believes that because of the provision in the NASA Act Sec. 203 (b) (6) that NASA is authorized to cooperate with public agencies in the use of services, equipment, and facilities without regard to reimbursement, the provisions of the User Charges Statute requiring reimbursement of full user charges are not appropriate. On the other hand, the more recent COMSAT Act requires NASA to provide services on a reimbursable basis for the establishment, operation, and maintenance of the communications satellite system.

It should be noted that, despite the stated NASA position, current arrangements apparently contemplate reimbursement of all costs, including depreciation, at such time as it can be accurately determined. However, NASA feels that, at this late date, it would not be proper to attempt to collect full charges for past launches. The Air Force has not commented other than to say informally that it would be "nice to get the money back." We are of the opinion that the User Charges Statute is applicable, and that an attempt should be made to recover full user charges on all past and future COMSAT launches. Should depreciation be found a proper reimbursable cost, under the statutes, we contemplate proposing that it be billed on an estimated basis, with the proceeds perhaps held in escrow until such time as the proper amount can be more accurately established.

Our specific questions are:

- (1) What costs are NASA and the Air Force required to obtain reimbursement for on COMSAT launches, including the Early Bird launch and continuing through launches covered by the current NASA/COMSAT agreement?
- (2) If reimbursement of full user charges is required, does the agreement between NASA and DOD not to recover full user charges from COMSAT preclude their subsequent reopening of the matter and the recovery of full user charges?
- (3) If the answer to question (2) is in the negative, should an attempt be made to recover the unrecovered or unbilled Air Force costs involved in the COMSAT launches? If so, how?
- (4) Should reimbursements received from COMSAT be credited to miscellaneous receipts or to the appropriation from which the funds were expended?

Attachments to the Atlanta Regional Office draft report, referred to above, are available for your review. We also have available for your review copies of the agreements between NASA and COMSAT for launch services.

cc: PD&E (2)
Director, FOD
Regional Manager, Atlanta
Director, Civil Division

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Indorsement

Director, Defense Division

Returned. The so-called User Charges Statute, 31 U.S.C. 483(a), was approved on August 31, 1951, and consequently was on the books of the Government at the time when the Congress was considering the legislation which ultimately was enacted as the Communications Satellite Act of 1962. The User Charges Statute is general in scope and states therein that it is the sense of the Congress that all services etc., provided to any person or corporation, except those engaged in the transaction of official Government business shall be self-sustaining to the full extent possible and that the fee or charge therefor shall be "fair and equitable taking into consideration direct and indirect costs to the Government, value to the recipient, public policy or interest served, and other pertinent facts." Consequently, since the Communications Satellite Act specifically provides that the services furnished to Comsat shall be on a reimbursable basis, and there being nothing in the act or in its legislative history to indicate to the contrary, our opinion is that the charges for such services should be determined in accordance with the User Charges Statute. In this connection, we note that Bureau of the Budget Circular A-25 and DOD Instruction 7230.7, both issued pursuant to the User Charges Statute, include as a charge to be made for the furnishing of special services the maintenance and depreciation of property and equipment.

Accordingly, while it is our view that the amount of "full user charges," including depreciation, should be used as a base for considering the amount to be charged Comsat for services provided by the Government, we believe that the actual amount to be charged is not an inflexible amount but one that may be negotiated by the parties.

There is for consideration the fact that Comsat is a private corporation specifically authorized to be created by the Congress through enactment of the Communications Satellite Act of 1962. Section 102 of that act sets forth the declaration of policy and purpose of the Congress in providing for the creation of such corporation as follows:

"Sec. 102. (a) The Congress hereby declares that it is the policy of the United States to establish, in conjunction and in cooperation with other countries, as expeditiously as practicable a commercial communications satellite system, as part of an improved global communications network, which will be responsive to public needs and national objectives, which will serve the communication needs of the United States and other countries, and which will contribute to world peace and understanding.

"(b) The new and expanded telecommunication services are to be made available as promptly as possible and are to be extended to provide global coverage at the earliest practicable date. In effectuating this program, care and attention will be directed toward providing such services to economically less developed countries and areas as well as those more highly developed, toward efficient and economical use of the electromagnetic frequency spectrum, and toward the reflection of the benefits of this new technology in both quality of services and charges for such services.

"(c) In order to facilitate this development and to provide for the widest possible participation by private enterprise, United States participation in the global system shall be in the form of a private corporation, subject to appropriate governmental regulation. It is the intent of Congress that all authorized users shall have nondiscriminatory access to the system; that maximum competition be maintained in the provision of equipment and services utilized by the system; that the corporation created under this Act be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public; and that the activities of the corporation created under this Act and of the persons or companies participating in the ownership of the corporation shall be consistent with the Federal anti-trust laws.

"(d) It is not the intent of Congress by this Act to preclude the use of the communications satellite system for domestic communication services where consistent with the provisions of this Act nor to preclude the creation of additional communications satellite systems, if required to meet unique governmental needs or if otherwise required in the national interest.

In view of such declaration of policy and purpose it is evident that in determining the amount to be charged for the services furnished by the Government situations may arise when there properly may be considered the "public policy or interest served" and "other pertinent facts" as provided in the User Charges Statute.

In summary and in answer to your first question it is our view that full user charges as contemplated by the User Charges Statute, and implemented by BOB Circular A-25 and DOD Instruction 7230.7 should be taken

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into consideration in determining the charges to be made to Comsat for launching services. However, in view of the administrative flexibility in determining charges, we cannot say that Articles IV and V of the December 17, 1964, and July 22, 1966, agreements, respectively, between NASA and Comsat providing for recovery of all "identifiable additional costs" and certain other costs are illegal.

Concerning your second and third questions, we see no legal basis whereby Comsat now may be held liable to pay additional charges for past satellite launches in excess of those theretofore agreed to or which might result from a change now made in the manner in which such charges were to be computed, Articles IV and V of the agreements being binding on both parties. Moreover, it appears that the parties have understood the billings made and paid as being in accordance with the terms of the agreements. We should recommend, however, that NASA renegotiate this matter in an attempt to recover full costs on future launches.

As to your fourth question there is for consideration section 203(b)(5) of the National Aeronautics and Space Act of 1958, 42 U.S.C. 2473(b)(5), which provides in part that the National Aeronautics and Space Administration is authorized " * * * to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution. * * *" (Underscoring supplied.)

It is our understanding that the term "cooperative agreements" was included in this legislation to assure that--based on decisions of our Office concerning cooperative agreements--the reimbursements received pursuant thereto properly could be used to credit the appropriations involved. See 23 Comp. Gen. 652.

Accordingly, it is our view that the reimbursements received from Comsat properly may be credited to the appropriations from which the funds were expended.

J. E. Welch

Deputy, General Counsel