

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

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The Honorable Benjamin S. Rosenthal  
Chairman, Commerce, Consumer and  
Monetary Affairs Subcommittee  
Committee on Government Operations  
House of Representatives

Dear Mr. Chairman:

We refer to your letter dated July 31, 1975, requesting our Office to examine and report on the award of contract No. 5-36307 to the Advertising Council, Inc. (Ad Council), by the United States Department of Commerce (Commerce). This contract was executed on January 17, 1975, and it had the stated purpose of "enhancing public understanding of the American Economic System through the development of informational, educational and communications materials suitable for use in a national multi-media public service campaign."

The Ad Council is a nonprofit organization sponsored by the advertising industry. It conducts various public service advertising campaigns utilizing the volunteer services of the advertising industry and donated time and space from the communications and news media.

The contract was a cost-no-fee type, in view of the Ad Council's nonprofit nature. The January 17, 1975, contract was a letter contract. "A letter contract is a written preliminary contractual instrument which authorizes immediate commencement of \* \* \* performance of services." Federal Procurement Regulations (FPR) § 1-3.403(a) (1964 ed.). The contract, as initially executed, only obligated the Government in the amount of \$100,000. The contract also provided that when the contract was definitized, the resulting contract would have a maximum cost not in excess of \$150,000.

The contract also allowed for up to \$96,000 in "anticipatory costs" which were incurred by the Ad Council on or after October 23, 1974. That is to say, the contract provided for reimbursement of those otherwise allowable costs incurred subsequent to an address given on October 23, 1974, in Chicago, Illinois, to the Ad Council's Board of Directors by the then Secretary of Commerce Frederick B. Dent. In this address, the Secretary "challenged" the Ad Council to enter into an agreement with Commerce to participate in an effective advertising campaign to improve public understanding of the American economic system, and "pledged" Commerce cooperation and support to this endeavor.

The contract was initially funded with \$150,000 of the moneys appropriated by the Congress to the Economic Development Administration (EDA) of Commerce. When obligated for this contract, this money was contained in the Secretary of Commerce Reserve Fund. It is our understanding that the Secretary's Reserve Fund consists of a certain percentage of the moneys appropriated for the various subagencies within Commerce which the Secretary has reserved for projects which he finds incidental or necessary or desirable to further or implement those programs covered by the particular appropriations to be charged with the project's cost.

The initial \$150,000 funded the first phase of the "public understanding" campaign. In this phase, the Ad Council engaged in preparatory work, which included the assessment and analysis of the existing work which had been attempted in this informational area, and of existing background material bearing on the problem.

By letter dated March 21, 1975, the Ad Council stated that it would need to expend an additional \$39,000 to start the actual production and distribution of media materials. This work was to be the beginning of Phase II of this joint project, wherein the informational and educational aspects of the "public understanding" campaign were to be implemented.

Commerce amended the contract to reflect these increased costs and commitment on May 19, 1975. The Secretary obtained the funds to finance the Commerce "share" of Phase II of the campaign from funds designated for the Office of Minority Business Enterprise (OMBE) of Commerce in the Secretary's Reserve Fund. At the same time, the letter contract was definitized as a cost-no-fee contract in the total estimated amount of \$239,000 (which included the up to \$96,000 in "anticipatory costs").

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Apparently, approximately \$1,000,000 to \$1,500,000 is expected to be expended to implement the informational and educational phase of this program. The bulk of this money is supposed to be supplied by business organizations and perhaps some foundations and labor organizations. The funds put into this joint program by the Federal Government are intended to be essentially "seed money" to get the advertising campaign off the ground.

Besides the intangible product of fulfilling what it regards as its duty of instituting an advertising campaign to inform and educate the American public regarding the American economic system, the only tangible product which Commerce will receive for the money it pays under this contract is "camera-ready copy" of all materials developed and produced by the Ad Council. These materials will also be used by the Ad Council in the campaign, since this project is for the mutual benefit of the Ad Council and Commerce. Commerce officials have informed us that no material for public distribution or "hard copy" booklets are included in the contract price.

The bulk of the work required of the Ad Council under the contract apparently is and was performed by a volunteer advertising agency, Compton Advertising, Inc. (Compton), which has subcontracted with the Ad Council. Our review has revealed that Compton actively participated in the negotiations between Commerce and the Ad Council prior to the Secretary's October 23, 1974, address, which committed Commerce to participate in the advertising campaign.

We have been informed that as of November 17, 1975, the Ad Council has submitted invoices totaling \$171,635.95 under the contract and \$150,000 has been paid. The payments have exhausted the EDA funds earmarked for this project. We have also been informed that none of the OMBE funds had been expended as of that date. Also, the Commerce officials we interviewed in the course of our investigation indicated that they were unaware of any plans for additional Commerce funding of the project beyond the \$239,000 already committed. The contractual obligations of Commerce are due to expire on December 31, 1975.

In your letter of July 31, 1975, you asked us to address six questions that were posed. In order to answer the questions, we have completely reviewed the contract files for this procurement as well as other documentation made available to us at Commerce. Also, we have interviewed Commerce officials associated with this procurement. We answer the questions below in the order posed.

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1. Who, inside or outside of Government, initiated the idea for the project which culminated in the award of the contract?

From our review of the testimony and documentary evidence made available to us by Commerce, it would appear reasonable to conclude that the idea for a joint public advertising campaign to promote "public understanding" of the American economic system, which culminated in this contract, came from Ad Council officials rather than from Commerce officials. We have been unable to ascertain with certainty specifically which Ad Council official may have broached this idea to Commerce.

2. Who in the Department [of Commerce] established the requirement and when was this done?

From our review, it would appear that Secretary of Commerce Dent established this requirement for Commerce. He apparently came to the conclusion during the summer of 1974 that it was viable and appropriate to provide "seed money" for the institution of a joint public advertising campaign with the Ad Council in order to promote public understanding of the American economic system. Later, after further negotiations, all parties concerned recognized that Commerce's formal commitment of financially backing the campaign would begin when Secretary Dent addressed the Ad Council's Board of Directors on October 23, 1974.

3. Are the services to be performed under the contract proper and legal in view of the [Commerce] Department's mission?

The basic mission and authority of Commerce is set forth at 15 U.S.C. § 1512<sup>1</sup>(1970), which states:

"It shall be the province and duty of said Department [of Commerce] to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, shipping, and fishery industries, and the transportation facilities of the United States; and to this end it shall be vested with jurisdiction and control of the departments, bureaus, offices, and

branches of the public service hereinafter specified, and with such other powers and duties as may be prescribed by law." (Emphasis supplied.)

We believe Commerce's authority to enter into a contract, the stated purpose of which is to promote public understanding of the American economic system, may reasonably be inferred from the broad language of 15 U.S.C. § 1512 (1970). It would be reasonable for Commerce to conclude that increased public understanding of how the American economy works would have the effect of fostering, promoting or developing domestic commerce.

In addition, 15 U.S.C. § 1525 (1970) specifically recognizes the propriety of Commerce entering into joint projects of mutual benefit with nonprofit organizations, such as the Ad Council. This statute, in pertinent part, states:

"\* \* \*In the case of nonprofit organizations, research organizations, or public organizations or agencies, the Secretary may engage in joint projects, or perform services, on matters of mutual interest, the cost of which shall be apportioned equitably, as determined by the Secretary, who may, however, waive payment of any portion of such costs by others, when authorized to do so under regulations approved by the Office of Management and Budget."

4. Is there a proper basis for allowing anticipatory costs from October 23, 1974?

It is clear from our review of the documentary evidence that Commerce and the Ad Council both intended that Commerce's obligation to reimburse the Ad Council's costs would begin on October 23, 1974, the date of Secretary Dent's address to the Ad Council Board of Directors. Prior to that date, the Secretary had determined that funds appropriated for EDA should be used to fund this contract, and that this contract was necessary or incidental to the performance of Commerce's and EDA's functions.

The Secretary has been given the authority to exercise all duties, power and authority conferred by law in Commerce's sub-agencies, such as EDA and OMBE. 15 U.S.C. § 1513 (1970). For the reasons stated below in response to your question numbered five, we found that this contract was necessary or incidental to EDA's and OMBE's functions. Moreover, the Secretary was granted express authority in 15 U.S.C. § 1525 (1970) (quoted above) to engage in joint agreements with nonprofit organizations, such as the Ad Council. In view of the foregoing, we conclude that the Secretary had the authority to bind the Government in a contract of this nature.

In view of the Secretary's authority and since there was an understanding between the involved parties, an agreement came into existence on October 23, 1974. In good faith and in reliance upon this unwritten agreement, the Ad Council commenced performance. Consequently, in view of the express recognition of liability for "anticipatory costs" up to \$96,000 in the letter contract, we believe the Government was required to reimburse the Ad Council in accordance with the terms of the contract. See FPR § 1-15.205-30 (1964 ed., Amend. 65).

Nevertheless, we believe it was inappropriate for Commerce to enter into a contractual agreement with the Ad Council on October 23, 1974, without reducing the agreement into written form prior to the incurrence of any costs by the Ad Council under the contract. See FPR § 1-1.203 (1964 ed., Amend. 9); 31 U.S.C. § 200(a)(1) (1970); United States v. American Renaissance Lines, 494 F.2d 1059 (1974). In this regard, FPR § 1-15.107 (1964 ed. Amend. 112) recognizes that where precontract "anticipatory" costs must be incurred, a written preagreement should be made between the Government and the prospective contractor before the contractor incurs the costs, in order to avoid disputes regarding the costs' allowability.

5. Is it proper and legal for funds from the Economic Development Administration and the Office of Minority Business Enterprise to be used for this contract?

a. Economic Development Administration.

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The appropriation for economic development assistance programs administered by EDA, from which \$150,000 was used to fund this contract, is contained in the Departments of State, Justice and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1975, Public Law 93-433, 88 Stat. 1186, October 5, 1974. The pertinent section of this Act, located at 88 Stat. 1196, in relevant part, states:

"For economic development assistance as authorized by titles I, II, III, and IV of the Public Works and Economic Development Act of 1965, as amended, \$184,200,000 \* \* \*"

The Public Works and Economic Development Act is administered by EDA and codified at 42 U.S.C. § 3121 *et seq.* (1970). The basic mission of EDA under the Act is to aid in the long-range economic development and programming for areas and regions with substantial and persistent unemployment, and underemployment, or with low family income through the creation of new employment opportunities by developing new facilities and resources and expanding existing ones. The Act authorizes Federal financial assistance for areas designated as redevelopment areas and centers. This assistance includes loans for industrial or commercial facilities; direct and supplementary grants and loans for public works and development facilities; working capital loan guarantees; and technical, planning and research assistance.

It is a well-settled rule that, where an appropriation is made for a particular purpose, by implication, it confers authority in the agency concerned to incur expenses which are necessary or proper or incident to the proper execution of this purpose, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law. 29 Comp. Gen. 419 (1950); 50 *id.* 534 (1971). Therefore, funds appropriated for EDA may be used to fund a contract which is reasonably found to be necessary or proper or incident to the execution of any of the legally authorized EDA programs.

Commerce officials have informed us that the money from the Secretary's Reserve Fund used to fund this contract was budgeted for Title III of the Public Works and Economic Development Act, 42 U.S.C. §§ 3151-3153 (1970). Title III is the section of the Act authorizing EDA to provide technical, planning and research assistance to carry out the Act's purposes. 42 U.S.C. § 3151(c) (1970) of Title III, in pertinent part, provides:

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"To assist in the long-range accomplishment of the purposes of this chapter, the Secretary, in cooperation with other agencies having similar functions, shall establish and conduct a continuing program of study, training, and research to (A) assist in determining the causes of unemployment, underemployment, underdevelopment, and chronic depression in the various areas and regions of the Nation, (B) assist in the formulation and implementation of national, State, and local programs which will raise income levels and otherwise produce solutions to the problems resulting from these conditions, and (C) assist in providing the personnel needed to conduct such programs. The program of study, training, and research may be conducted by the Secretary through members of this staff, through payment of funds authorized for this section to other departments or agencies of the Federal Government, or through the employment of private individuals, partnerships, firms, corporations, or suitable institutions, under contracts entered into for such purposes, or through grants to such individuals, organizations, or institutions, or through conferences and similar meetings organized for such purposes. \* \* \*"

We believe it was reasonable for the Secretary to find that this contract was necessary or incidental to the EDA technical assistance and research function. In this regard, we note that the \$150,000 funded from the EDA appropriation went only to finance Phase I of the campaign, i.e., the preparatory or research stage of the project. We believe it would be reasonable for the Secretary to conclude that this contract came under the Title III authority, and that performing research as to the most appropriate methodology of informing and educating the public with regard to the American economic system could well assist in promoting economic development and finding solutions to the economic problems of underdeveloped areas, which are primary objects of EDA's mission.

b. Office of Minority Business Enterprise.

Public Law 93-433, October 5, 1974, at 88 Stat. 1197, appropriated funds for OMBE as follows:

"For necessary expenses of the Department of Commerce in fostering, promoting, and developing minority business enterprise, \$52,000,000, of which \$42,347,000 shall remain available until expended: Provided, That not to exceed \$10,653,000 shall be available for program development and management."

We have been informed that the \$89,000 in the Secretary's Reserve Fund and appropriated for OMBE which was earmarked for this contract was budgeted for OMBE's program development and management.

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 OMBE was established by Executive Order 11458, <sup>Mar. 5, 1969</sup> 34 Fed. Reg. 4937 (1969), and its responsibilities were redefined by Executive Order 11625, 36 Fed. Reg. 199 (1971). OMBE's basic purpose is to develop and coordinate a national program directed at encouraging the establishment, preservation and strengthening of minority business enterprises.

We believe it was reasonable for the Secretary to conclude that informing and educating the American public with regard to the American economic system was necessary or incidental to the implementation of OMBE's mission. In this regard, it may reasonably be concluded that increased public awareness of the American economy may act to encourage the successful participation of minority group members in business enterprises, and may act to strengthen existing minority business enterprises.

c. "Publicity or Propaganda."

Section 701 of Public Law 93-433, October 5, 1974, 88 Stat. 1186, 1203, which appropriated the EDA and OMBE money used to fund this contract, states:

"No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by Congress."

Although we have not expressly been asked to review the Ad Council contract's compliance with this requirement, we will do so here inasmuch as it is a specific limitation that has been placed on the expenditure of EDA and OMBE money.

We have, in interpreting this language, taken the position that it was intended to prevent "publicity of a nature tending to emphasize the importance of the agency or activity in question." 31 Comp.

Gen. 311, 313 (1952). We have also consistently expressed our belief that a provision such as this does not provide adequate guidelines under which to judge the activities of an agency, especially when balanced against the agency's legitimate interest in communicating with the public and with members of Congress for permissible purposes. We have thus believed it was inappropriate to conclude that such a provision has been violated where the agency could provide reasonable justification for its activities. See B-178528, July 27, 1973.

In the present case, we have found no indication that the campaign was intended to aggrandize Commerce. Moreover, we note that the contract as executed emphasizes the importance of "objectivity" and "credibility" in any use of the media to promote better public understanding of the American economic system. Therefore, we are unable to find that this contract violates the Appropriation Act's "publicity or propaganda" prohibition.

6. What controls have been established by Commerce to assure that the costs submitted by the Advertising Council are valid?

The Ad Council proposed and the cost-no-fee contract awarded provides that the Ad Council was only to be reimbursed for "out of pocket" costs incurred in the research and production of campaign materials and related promotional items up to \$239,000. "Out of pocket" costs are defined in the contract to be travel costs, material costs and costs of services purchased from suppliers by the Ad Council and by Compton (the volunteer agency subcontractor). Direct labor costs of Compton and the Ad Council, and costs related to the media's time and space are not reimbursable under the contract. In addition, the Ad Council is to be reimbursed for its indirect or overhead costs at the rate of 8.5 percent of the allowable direct costs, subject to subsequent redetermination.

Commerce officials have informed us that no special controls or extraordinary provisions to assure the validity of the Ad Council costs have been instituted for this contract and the ordinary Commerce procedures governing the reimbursement of costs under cost-type contracts presumably would be applied. Commerce officials indicated that the ordinary audit procedures are primarily set out in Commerce Administrative Order 213-4, dated March 21, 1968. Commerce officials have indicated that prior to the payment of invoices submitted by the Ad Council, they are to be reviewed by Commerce program and contractual personnel to insure that the costs are of the nature allowable under the terms of the contract, and that the costs are being incurred by

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the contractor at a rate compatible with the anticipated life of the contract.

Also, although preaward audits are ordinarily performed by Commerce before awards are made of cost-type contracts, no such audit was performed in the present case. In this regard, a Commerce official has explained that since the validity of indirect cost rates proposed by the Ad Council were verified by Commerce after consulting with the Department of Health, Education and Welfare, which had a somewhat similar type of contract with the Ad Council, and in view of the nonprofit nature of the contract awarded, the contracting officer, in his discretion, determined that there was no real reason for a preaward audit. In view of this explanation, we believe the contracting officer acted reasonably in waiving the preaward audit.

Commerce's ordinary procedures also provide for an interim audit. The audit had not been performed at the time we reviewed this matter in the agency.

Also, a final audit is supposed to be performed. Commerce officials have indicated that the final audit will in all likelihood be made. This final audit would normally involve going to the contractor's location and performing a financial audit of all contract costs.

#### CONCLUSION

In summary, although Commerce's action of entering into an agreement with the Ad Council without reducing the nature of the agreement into writing prior to the incurrence of costs was inappropriate, the contract is not illegal. We hope the foregoing answers the questions you posed and satisfies the purpose of your inquiry.

Sincerely yours,

R. F. KELLER

[Deputy] Comptroller General  
of the United States

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