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UNITED STATES GENERAL ACCOUNTING OFFICE  
WASHINGTON, D.C. 20548  
Released

OFFICE OF GENERAL COUNSEL

DEC 22 1977

B-190519

*Subject Case*

Charles J. Stieber  
Attorney at Law  
2674 Colby Drive  
Bloomfield Hills, Michigan 48013

Dear Mr. Stieber:

This responds to your request for an explanation of the relationship of the Anti-Deficiency Act, paragraphs 1-4 and 1-7 of Army Regulation No. 37-21 (dated 26 May 1977), and the general principle that contracting officers have only delegated and not apparent authority.

The Anti-Deficiency Act, R. S. § 3679, as amended, 31 U.S.C. § 665 (1970) provides, in pertinent part, as follows:

"(a) No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law."

The purpose of the Act is to prevent public officers and employees from involving the Government in expenditures or liabilities beyond those contemplated and authorized by the Congress. 39 Comp. Gen. 422, 425 (1959). The Act also requires that all appropriations or funds available for obligation for a definite period of time be apportioned in order to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period. 31 U.S.C. § 665(c)(1) (1970). Additionally, the Act authorizes the administrative division and subdivision of such apportionments or reapportionments, and requires that the head of each agency, subject to the approval of the Director of the Office of Management and Budget, prescribe by regulation a system of administrative control which is designed to (a) restrict obligations to expenditures against each appropriation to the amount apportioned for a particular quarter; and (b) enable the agency head or his designee to fix responsibility for the creation of any

B-190519

obligation or the making of any expenditure in excess of an apportionment or reapportionment. 31 U.S.C. § 665(g) (Supp. V, 1975). In addition to the proscriptions stated in subsection 665(a), supra, violations of the Act occur if an officer or employee of the United States Government authorizes or creates an obligation or makes an expenditure in excess of an apportionment or reapportionment, or in excess of the amount permitted by regulations issued for the administrative control of funds. 31 U.S.C. § 665(h) (Supp. V, 1975).

Paragraph 1-4 of Army Regulation No. 37-21 is an example of an administrative provision which sets forth the conditions under which a violation of the Act occurs. That paragraph reads as follows:

"1-4. Commitments in excess of available funds.

As provided in AR 37-20, no officer or employee will authorize or create an obligation to incur an expenditure in excess of available funds. The issuance of a commitment authorizing an obligation to be incurred in excess of available funds is a violation of Section 3679 Revised Statute, as amended (31 U.S.C. 665).

Commitments will not be made in excess of the balances of uncommitted funds available in the allotment accounts or in excess of the uncommitted balances of the stock fund commitment authority. (Emphasis added.)

According to the definition in paragraph 1-3 of AR 37-21, a "commitment" is an "[a]dministrative reservation of funds, based upon firm procurement directives, orders, requisitions, or requests which authorize the creation of an obligation without further recourse to the official responsible for administrative control of funds."

Under paragraph 1-7 of AR 37-21, the amount of commitments which constitute contingent liabilities (as described therein) are reserved based upon "conservative" cost estimates set forth by the requesting activity in the commitment document. The requesting activity is required to reserve funds to allow for contingencies and to periodically adjust estimates as necessary for cost or quantity increases or decreases. If the requesting activity mis-estimates such contingent liabilities and does not set aside an adequate amount for the performance of a contract, there may be a violation of the Act if the obligation ultimately incurred is in excess of the unobligated balance of the appropriation, apportionment or allotment.

If there is an overobligation or overexpenditure within a particular apportionment or allotment, additional funds may be provided by the Office of Management and Budget or "higher headquarters" within the military

B-190519

department, as the case may be, as long as there are funds available within the appropriation. Even if the shortage is funded, there would still be a violation of the Act because the fund manager exceeded his limit; however the violation here would have no direct effect on the contractor. If an appropriation is exhausted, the Army may be required to seek a deficiency appropriation from Congress. As with all appropriation requests, there is no absolute certainty that Congress will appropriate the funds.

With regard to your question on contingent liabilities, while there is no guarantee that all contingencies which become obligations and exceed estimates will be funded, it is understood that the Army fund managers generally try to have funds available to cover all contingencies. It is really a matter of sound fund management. We should also point out that our Office has approved the approach reflected in paragraph 1-7 of AR 37-21, with the caveat that safeguards (such as reservations of funds) must be sufficient to avoid violations of the Anti-Deficiency Act. See 34 Comp. Gen. 418, ¶420-21 (1955); 55 Comp. Gen. 812, ¶824 (1976) (copies enclosed). While this approach does create some theoretical risk for contractors, we believe that nonpayment by the Government of valid contractual obligations is extremely unlikely as a practical matter.

With reference to your third question, when a contracting officer has the authority to incur obligations under a particular contract, and such obligations are valid under the terms of section 1311(a) of the Supplemental Appropriation Act, 1955, 31 U.S.C. § 200(a) (1970), the Government would as a general rule be contractually liable for payment notwithstanding the fact that the obligation may also constitute a violation of the Anti-Deficiency Act. Such overobligations, which may require a deficiency appropriation, are frowned upon by Congress because they represent a fait accompli and severely limit Congressional options. Should Congress choose not to appropriate the additional funds required by the agency, the contractor could seek recovery under the contract in court. If a judgment is recovered, it would generally be payable from the permanent indefinite appropriation made by 31 U.S.C. § 724a.

I hope that this letter answers your questions satisfactorily.

Sincerely yours,

Paul G. Dembling

Paul G. Dembling  
General Counsel

Enclosures

APPROPRIATIONS

Deficiencies

Antideficiency Act

Violations

Overobligations

CONTRACTING OFFICERS

Authority

Compliance with statutory  
requirements