



**Comptroller General
of the United States**
Washington, D.C. 20548

B-234326.15

December 24, 1991

The Honorable Michael B. Donley
Assistant Secretary of the Air Force
Financial Management and Comptroller

Dear Mr. Donley:

As you are aware, the General Accounting Office audited the Air Force's fiscal year 1989 reports to the Department of the Treasury. As part of this audit, we reviewed and tested transactions and accounts of the Depot Maintenance Service, an operating division of the Air Force Industrial Fund.

During the review of Depot Maintenance Service transactions at the Ogden Air Logistics Center (ALC), Hill Air Force Base (AFB), Ogden, Utah, we identified two instances where the Air Force Industrial Fund may have improperly financed military construction projects: the construction of an Investment Casting Facility at Hill AFB, and the replacement of twelve mobile home trailers at the Utah Test and Training Range (UTTR). On June 13, 1991, we asked the Air Force to explain its authority to finance these projects out of the Industrial Fund. We received a response to our inquiry from the Principal Deputy Assistant Secretary of the Air Force, Financial Management, dated September 12, 1991. We have now completed our analysis of these issues and conclude that both of these projects were improperly funded by the Industrial Fund.

**LEGAL REQUIREMENTS FOR CARRYING OUT AND FINANCING
MILITARY CONSTRUCTION PROJECTS**

Title 10 of the U.S. Code contains specific provisions governing the Air Force's ability to complete military construction projects. A "military construction project" consists of "all military construction work . . . necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility" 10 U.S.C. § 2801(b) (1988). "Military construction" is defined as "any construction, development, conversion, or extension of any kind carried out with respect to a military installation." 10 U.S.C. § 2801(a). Air Force Regulation (AFR) 86-1 implements these definitions within the Air Force and contains further guidance on what types of projects constitute military construction.

A "military construction project" must be specifically authorized by law in order to be carried out by a secretary of a military department. 10 U.S.C. § 2802. Once a military construction project is authorized, it must be funded from an appropriation available to pay for the cost of the project. 41 U.S.C. § 12; 63 Comp. Gen. 422 (1984). In general, Department of Defense appropriations are not available to finance military construction projects unless they are specifically made available for that purpose. See, 63 Comp. Gen. at 433. In this regard, 10 U.S.C. § 2805(c)(1) provides the Department of Defense with the authority to use appropriations available for operation and maintenance to finance military construction projects which cost \$200,000 or less. Department of Defense Directive 7410.4, July 1, 1988, provides that Defense industrial funds (including the Air Force Industrial Fund) are available to finance military construction work as provided in section 2805(c)(1).

INVESTMENT CASTING FACILITY

A. Factual Background

During testing at the Ogden ALC, we found two contracts to build an Investment Casting Facility within building 511 at Hill AFB. The first contract, No. F42650-87C0034, called for adding a pre-engineered addition to building 511, as well as remodeling and installing new utility and power sources to the building. The funding documents associated with this contract show that its \$324,046 cost was paid out of the Industrial Fund.

The second contract, No. F42650-89-B-0071, was to construct a pre-engineered building addition to building 511, including mechanical, electrical, and utility distribution systems. Documentation supporting the need for the new addition states that it was required to house special purpose air cooling equipment, and was essential to the completion of the Investment Casting Facility. This contract was awarded for \$146,800. The cost of the contract was charged to the Industrial Fund.

B. Legal Analysis

In response to our request for its views on these matters, the Air Force acknowledged that the two contracts to produce the Investment Casting Facility constituted a single military construction project which was improperly funded through the Industrial Fund. We agree with the Air Force. As a project costing less than \$1 million, the Air Force was authorized to carry out the project as a minor construction project under 10 U.S.C. § 2805(a)(1). However, because the

B-234326.15

project cost over \$200,000, the Air Force was not authorized to finance the project out of the Industrial Fund. 41 U.S.C. § 12; 10 U.S.C. § 2605(c) (1); DoD Directive 7410.4.

The Air Force stated in its September 12 response that it has initiated action to reimburse the Industrial Fund with military construction appropriations, and to notify the Congress of this action. The Air Force also stated that it will investigate whether the use of the Industrial Fund caused a violation of the Anti-Deficiency Act. We agree with the Air Force that these are appropriate actions to correct the improper use of the Industrial Fund.

UTAH TEST AND TRAINING RANGE

A. Factual Background

Our review of minor construction projects at Hill AFB included two contracts for the acquisition and installation of trailers at the UTTR. The UTTR is located in the Great Salt Lake Desert, 120 miles west of Hill AFB, and is used for various training and testing missions. The UTTR is operated by the 6545 Test Group, a unit under the Air Force Flight Test Center, Edwards AFB, California. However, the UTTR facility is under the real property jurisdiction of the Ogden ALC at Hill AFB. Because the 6545 Test Group is not under the operational jurisdiction of the Ogden ALC, the Test Group is considered to be a "tenant" activity on a facility where the Ogden ALC is the "host."

According to the background documentation we reviewed, the Air Force determined that it needed to house about 48 personnel on temporary or permanent assignment to the UTTR. This need arose because a number of 30-year old mobile home trailers being used to house personnel had deteriorated and were judged to be uninhabitable. The first formal request for approval of a project to meet this need was made on May 28, 1986. That request stated:

"Due to the severity and complexity of our housing shortage, we strongly recommend a two part solution. The immediate purchase of modular/mobile home facilities to house our personnel until a Major Construction Project can permanently solve our housing shortfall."

The request to purchase 12 trailers to provide immediate housing was approved. On December 1, 1987, a final contract cost estimate stated that the 12 trailers could be procured for \$188,000. However, the first contract solicitation seeking offers on 12 trailers failed to produce a bid of \$200,000 or less. Air Force officials had determined that the Industrial Fund would not be authorized to award a

contract to purchase the trailers at a cost exceeding \$200,000. Accordingly, the Ogden ALC issued a new solicitation allowing offerors to submit bids either for all 12 trailers or for a number of options for providing fewer trailers, but each bid had to be lower than \$190,000 in order to be considered for award. This solicitation resulted in the award of the first contract, No. F42650-88-C0143, for seven trailers at a price of \$187,222. The contract was financed by the Industrial Fund.

On August 26, 1988, shortly after the first contract to install seven trailers was awarded, a Base Civil Engineer Work Request was prepared to seek additional funding for the other trailers. This request stated "[w]e recently requested twelve deteriorated mobile homes at [UTTR] be replaced. Due to fund limitations, a contract has been let to replace only seven." In July 1989, a second contract was awarded to replace trailers at UTTR. This contract, No. F42650-89-C0128, was to provide five trailers at a price of \$184,178.58 and also was financed out of the Industrial Fund.

B. Legal Analysis

The Air Force's response to our inquiry acknowledged that the work called for under the two contracts to provide trailers at the UTTR was military construction. However, the Air Force asserts that it was authorized to carry out these contracts as separate military construction projects because

"[t]he total cost for each project was considerably less than the \$200,000 limit for minor construction requirements. The trailers were sited separately, not physically connected, and were managed as separate facilities. Accordingly, each trailer represented a separate minor construction project as stipulated in AFR 86-1 paragraph 5-3.b." (Emphasis in original.)

For several reasons, we do not agree that each trailer constitutes a separate military construction project.

First, the Air Force's position misconstrues the definition of a military construction project. As stated above, a project consists of all military construction work "necessary to produce a complete and usable facility." 10 U.S.C. § 2801(b). We do not disagree with the Air Force's characterization of each trailer as a separate

"facility".¹ However, we do not agree with what must be a necessary component of the Air Force's position: that each trailer/facility can be considered "complete and usable" within the meaning of section 2801(b). To view each trailer as a "complete and usable facility" in this case ignores the Air Force's need for which the contracts were awarded.

Our cases have pointed out that the construction of a single "complete and usable facility" may involve the construction of several interrelated buildings, structures, or other improvements to real property. The key factor in these cases is that a single building, structure, or other improvement could not satisfy the need that justified carrying out the construction project. For example, in B-213137, Jan. 30, 1986, we noted that the Army's construction of separate facilities such as a runway, control tower, and hanger constituted a single project to produce a complete and usable new airfield. Similarly, in B-159451, Sept. 3, 1969, we stated that the construction and renovation of a number of separate facilities at the Grand Hotel in Nha Trang, Vietnam, constituted a single project to produce a complete and usable Field Force I headquarters. Thus, when multiple interrelated buildings, structures, or other improvements are being constructed to meet a need for a single "complete and usable" facility, they typically will constitute one construction project.

The facts in this matter reveal that the Air Force officials involved considered the acquisition of the 12 UTTR trailers as a single construction project to produce a complete and usable facility to house 48 people. Air Force officials initially anticipated that all the trailers would be purchased at a cost of less than \$200,000. It was only after the initial solicitations failed to produce a bid to provide 12 trailers for \$200,000 or less, and the Air Force awarded the first contract for seven trailers, that the Air Force attempted to justify using two separate purchases to acquire 12 UTTR trailers.

The first attempt to justify a separate purchase occurred in September 1988, when Ogden ALC officials decided to characterize the second trailer purchase contract as a "repair by replacement" rather than a construction contract. At that time, some Ogden officials expressed concern about the legality of this action.² All the documentation

¹A "facility" is any "building, structure, or other improvement to real property." 10 U.S.C. § 2801(c)(1).

²In response to our request for its views on these matters, the Air Force asserted that the Ogden ALC official's legal concern was limited to the improper use of Industrial Fund

available to us, including that provided by the Air Force, indicates that no one within the Air Force considered the 12 trailers to be 12 separate military construction projects prior to our inquiry. It is evident that characterizing each trailer as a separate project is an attempt to split the single UTTR construction project into smaller projects in order to meet the \$200,000 limitation. This type of project splitting is inconsistent with the intent of 10 U.S.C. § 2805(c)(1), S. Rep. No. 474, 97th Cong., 2d Sess. 17 (1982) and H.R. Rep. No. 612, 97th Cong., 2d Sess. 15 (1982), and is prohibited by AFR 86-1, para. 5-6.

Second, paragraph 5-3.b of AFR 86-1, which the Air Force cites as supporting the contention that each trailer is a separate project, is not applicable to the acquisition of the UTTR trailers. That paragraph gives specific guidance on how to handle special minor construction situations, and states that

"[t]he upgrading of one building is one [military construction] project, and the upgrading of a separate but similar building is a second separate [military construction] project. For example, installing separate new cooling systems in each of several dormitories simultaneously constitutes a separate project for each building."

AFR 86-1, para. 5-3.b. However, the introduction to this paragraph states that "[e]ach paragraph below applies only to the special situation described, and cannot be used by analogy to cover different situations" AFR 86-1

moneys budgeted for maintenance and repair to finance a construction project. The Air Force states that since Industrial Fund moneys budgeted for capital acquisition (including construction costing \$200,000 or less) were used to finance this project, the legal concern raised by the Ogden officials is no longer an issue. As discussed above, the issue in this matter is whether any Industrial Fund moneys in excess of \$200,000 (regardless of how they are internally budgeted) were used to finance a single construction project. In our view, the legal concern of the Ogden officials is directly relevant to this issue. It appears that the characterization of the second contract as trailer repairs rather than construction was intended to remove the second contract from the \$200,000 limit on industrial fund financing of construction projects. This attempt evidences the belief of the Ogden ALC officials that characterizing the second contract as construction would mean that the two contracts constituted a single project subject to the \$200,000 limit.

para. 5-3 (emphasis in original). In addition, the general instructions to Air Force managers on how to implement AFR 86-1 state that the regulation "is not intended to be liberally construed. When it says an act is not permitted, it means 'no', and ingenious formations to evade this result will not be sanctioned." AFR 86-1, para. 1-8.

The UTTR trailers were not "upgraded" in the manner discussed in paragraph 5-3.b.; they were replaced. Further, even if the Air Force were to argue that paragraph 5-3.b. supports its position because the acquisition of a trailer is analogous to the upgrading of a building discussed in paragraph 5-3.b., AFR 86-1 itself precludes the application of paragraph 5-3.b. by analogy and admonishes Air Force officials to strictly construe the regulation. We therefore conclude that paragraph 5-3.b. is not applicable to acquiring the UTTR trailers.

Finally, paragraph 3-3.f. of AFR 86-1 is applicable to acquiring the trailers, and appears to instruct Air Force officials to treat replacing all of the UTTR trailers as a single project. This provision states "[i]f it can be done, consolidate facilities that are similar or have related functions into one 'composite' structure and program them as a single project." AFR 86-1, para. 3-3.f.

We conclude that the contracts to replace the UTTR trailers constituted a single military construction project costing about \$371,000, and that the Air Force Industrial Fund was not available to finance these contracts.³ We therefore

³We note that even if we accepted the Air Force's argument that each trailer was a separate project, financing the trailers out of the Industrial Fund would still have violated Department of Defense policy. The Department of Defense Directive which authorizes industrial funds to finance construction costing \$200,000 or less, specifically excludes funding construction projects for tenant activities on industrial fund facilities. DoD Directive 7410.4, Encl. 4, Para. C.2.c(3); AFR 170-10, para. 2-2.g. As discussed above, the UTTR was a tenant activity on an Ogden ALC facility. Therefore, Industrial Fund financing of the trailer replacement contracts violated DoD policy, even if it complied with the requirements of 41 U.S.C. § 12.

further conclude that the Air Force improperly financed these two contracts in violation of 41 U.S.C. § 12, and should undertake the same corrective action with regard to the UTTR trailer contracts as it has already begun with regard to the Investment Casting Facility contracts discussed above.



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