

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON 25, D. C.

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ACCOUNTING AND
AUDITING DIVISION

B-134474-D.M., Dec 18, 1957

DEC 18

RELEASED

The Comptroller General

On June 30, 1956, the Bureau of Customs entered into a contract for the purchase and installation of conveyor systems at the Port of New York with The Spivey Co., Inc., of Philadelphia, Pennsylvania. (Copy of contract attached.) This contract was amended on July 12, 1956, July 20, 1956, and October 1, 1956. (Copies of the amendments to the contract of June 30, 1956, are attached.)

There are unusual provisions in the letter contract of June 30, 1956, and the July 20, 1956 amendment thereto, which require legal interpretation to determine the dating of obligations incurred by the Bureau of Customs. The contract of June 30, 1956, provides in part, as follows:

"3. The Government reserves the right to delete at any time prior to July 15, 1956 any, or all, of the 60 lines of gravity roller, referred to in Section Number 1 and Section Number 2, based on a unit price of \$342.4166 each; the Government further reserves the right to reorder up to and including July 21, 1956 any and all of these lines of gravity roller referred to in Section Number 1 and Section Number 2 at the same unit price."

The amendment of July 20, 1956, contains the following provision:

"In consideration of the foregoing The Spivey Co. Inc., has no claim and waives any and all rights, if any, for any damages or loss of earnings for the cancellation of any or all of the equipment previously accepted by the Government on June 29, 1956, and/or modified as a result of this new layout."

It appears that in the contract of June 30, 1956, the Bureau of Customs accepted items totaling \$53,606. On July 12, 1956, it exercised its cancellation option and deleted items totaling \$20,545 thereby reducing the accepted portion of the contract to \$33,061. The bookkeeping

records of the Bureau of Customs show that at June 30, 1956, the Bureau of Customs had obligated \$33,061 of its 1956 appropriation (2060602, Salaries and Expenses, Bureau of Customs) for this contract. If the additional obligations of \$20,545 had been recorded at June 30, 1956, and no reduction made in other obligations, the Bureau of Customs would have at that date overobligated its fiscal year 1956 appropriation by \$10,324.

On October 30, 1956, an obligation of \$20,545 for this contract was charged to the fiscal year 1956 appropriation, which by this date had credited to it more than \$20,545 derived from the reversal of obligations pertaining to other commitments. The Assistant Commissioner of Customs instructions of October 30, 1956, for recording the obligation of \$20,545 were as follows:

"The amount of \$53,606 was originally obligated for this construction in fiscal year 1956. This amount was subsequently reduced to \$33,060. In view of later developments, it is clear that the full original 1956 obligation should stand. Accordingly, the 1956 obligation should be restored to \$53,606. A 1957 obligation in the amount of \$45,090 should be established to cover the balance of the contract."

The unobligated balance of its appropriation (2070602, Salaries and Expenses) as of June 30, 1957, certified by the Bureau pursuant to section 1311 of Public Law 663, approved August 26, 1954, was \$19,645.22. At September 30, 1957, the bookkeeping records of the Bureau of Customs show that the unobligated balance of this appropriation was \$26,293.36.

In view of the possible violations of the statutes controlling the obligation of appropriations, and in order that a report, if appropriate, may be presented to the Congress, your decision is requested on the following questions:

1. At the close of business on June 30, 1956, was the Bureau of Customs' 1956 appropriation for "Salaries and Expenses" (2060602), as a consequence of the contract of June 30, 1956, with The Spivey Co., Inc., obligated for the total of the amounts shown in numbered paragraphs 1 and 2 of this contract, aggregating \$53,606?

2. Did the Bureau of Customs have the legal authority to charge \$20,545 to its fiscal year 1956 appropriation on October 30, 1956?

3. If you find violation of statutes controlling the obligation of appropriations in either question 1 or question 2 above, what action, if any, is now required of the Bureau of Customs?

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In view of our reporting requirements under section 1311, it will be appreciated if your reply could be expedited.

S. B. Savage, Jr.
Deputy Director, Civil Accounting
and Auditing Division

Attachments

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Director, Civil Accounting and Auditing Division

Returned. The letter contract of June 30, 1956, provides in pertinent part:

- "1. The Government accepts all of the items contained in Section Number 1 totaling \$38,609.33.
- "2. The Government accepts your offer on 40 lines of gravity roller in the sum of \$13,696.67 and one 30-inch wide belt conveyor from number one to number two \$1,300.00 contained in Section Number 2.
- "3. The Government reserves the right to delete at any time prior to July 15, 1956 any, or all, of the 60 lines of gravity roller, referred to in Section Number 1 and Section Number 2, based on a unit price of \$342.4166 each; the Government further reserves the right to reorder up to and including July 21, 1956 any and all of these lines of gravity roller referred to in Section Number 1 and Section Number 2 at the same unit price.
- "4. The Government reserves the right to accept at any time up to and including July 21, 1956 the following items of your offer contained in Section Number 2:"

The reservation in paragraph 3 by the Government of the right to delete at any time prior to July 15, 1956, its order for articles accepted in paragraphs 1 and 2, gives rise to some question as to whether there was a binding contract as to such articles so that their cost, \$20,545 (60 times \$342.4166), may be considered as an obligation of the 1956 appropriation under section 1311a(1) of the act of August 26, 1954, 68 Stat, 830. However, the promise of the Government to pay \$53,606 constitutes consideration for all of the promises made by the contractor and the contract is not void for lack of mutuality. As stated by the Court in Heurer Steel Barrel Co. v. Martin, 1 F.2d 687, 688--

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"Where there is no other consideration for a contract, mutual promises must be binding on both parties. But where there is any other consideration for the contract, mutuality of obligation is not essential." Moreover, a contract does not lack mutuality merely because * * * every obligation of one party is not met by an equivalent counter obligation of the other party."

Also, it has been held that--

"A contract which imposes on the vendors an obligation to sell, but puts no duty upon the vendee to buy, except at his pleasure, will be completely valid, if the vendee parts with sufficient consideration to support the vendors' promise; * * *"
Hunt v. Stinson, 23 F.2d 447, 450.

See, also, § 137A Williston on Contracts, page 485; Restatement of Law on Contracts, section 79, Illustration 4. The total cost of the first three paragraphs of the letter contract of June 30, 1956, \$53,606, therefore on June 30, 1956, properly represented an obligation of the 1956 appropriation and should have been so reported in the section 1311 report for that year. Question 1 is answered accordingly.

While your report indicated the bookkeeping records showed only the amount of \$10,221 in the total appropriation as being unobligated as of June 30, 1956, after only \$33,061 had been obligated under this contract, your memorandum states that on October 30, 1956, the appropriation had credited to it more than \$20,545--the additional amount of the obligation--which was derived from the reversal of obligations pertaining to other commitments. The amount of obligations recorded on the books is not controlling as to whether an appropriation is over-obligated in violation of the Antideficiency Act, as amended (31 U. S. C. 665), but is only prima facie evidence of such a violation. The amount of the actual obligations as of June 30 of the particular fiscal year is the governing factor. If the alleged overobligation on the bookkeeping records in this case was due solely to an overestimate of the amount of the actual obligations such as may have been revealed by the liquidation of obligations from July 1 to October 30, 1956, in amounts less than the recorded estimate--as we understand is probably the case here--there was no overobligation of the 1956 appropriation in violation of the Antideficiency Act. On the other hand, if the actual obligations as of June 30, 1956, were in excess of the amount of the appropriation plus valid accounts receivable, the Antideficiency Act was violated. Such a violation is not corrected by the reduction of such actual obligations to the amount of the appropriation plus valid accounts receivable by some action taken after June 30, 1956, and thereafter effective, such as the cancellation or modification of contracts, purchase orders, etc., and should therefore be reported as required by that act.

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By letter contract of July 12, 1956, the obligations of the Government under the June 30, 1956, contract were effectively reduced to \$33,061 by the deletion of certain items and, in no event, could the 1956 appropriation thereafter be charged any amount in excess of \$33,061 under this contract, notwithstanding that the amount of \$53,606 was properly obligated thereunder as of June 30, 1956. The provisions in paragraph 3 of the June 30 contract reserving the right to the Government to reorder any item so deleted and in paragraph 4 reserving the right to order certain additional items up to July 21, 1956, do not make items so ordered after June 30, 1956, properly chargeable to the 1956 appropriation. Such items ordered after June 30, 1956, should be charged to the 1957 appropriation. Hence the total amount of the contract as restated in letter contract of October 1, 1956 (\$98,696) less the amount of \$33,061, or \$65,635, should have been charged to the fiscal year 1957 appropriation. Your memorandum states that the amount of the unobligated balance of the 1957 appropriation certified pursuant to section 1311 of the Supplemental Appropriation Act as of June 30, 1957, was \$19,645.22 (which is less than the \$20,545 which should have been included as an obligation of that appropriation) but the bookkeeping records show that the unobligated balance of the 1957 appropriation as of September 30, 1957, was \$26,293.36. Neither the amount certified to under section 1311, nor that shown on the bookkeeping records, is sufficient to determine whether a violation of the Antideficiency Act has been incurred. As stated above, it is the actual obligations as of June 30 that are controlling.

As indicated above, the obligation in the amount of \$20,545 against the 1956 appropriation should have been recorded against the 1957 appropriation. If your review of the 1957 obligations certified pursuant to section 1311 of the Supplemental Appropriation Act, 1955, reveal that they were understated because of the noninclusion of that amount or otherwise, a report of this transaction may be included in our findings on the Treasury's section 1311 report.

If you determine on the basis indicated above that the provisions of the Antideficiency Act have not been violated, no action in regard to that statute appears necessary. If there appears to have been a violation, the matter should be brought to the attention of the Commissioner of Customs by letter over your signature so that appropriate administrative action may be taken under 31 U. S. C. § 665(i).

It is understood that the Government's obligations under the contract have now been satisfied, \$53,606 having been charged to the 1956 and \$45,090 to the 1957 appropriation. As indicated above, only \$33,061 properly was chargeable to the 1956 fund and the balance of \$65,635 was chargeable to the 1957 account. This under section 1(a)(2)

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of the act of July 25, 1956, 70 Stat. 648, would apparently result in a short deposit of \$20,545 to the general fund of the Treasury of the unobligated balance of the 1956 appropriation at the expiration of the period of its availability for obligation, and an overdeposit of \$20,545 to the general fund of the unobligated balance of the 1957 appropriation at the expiration of the period of its availability for obligation. Since the net result of the over and under deposit to the general fund left that account in balance and an adjustment of the matter would seemingly involve only useless bookkeeping, no action on the part of the Bureau of Customs appears necessary. However, the Commissioner should be advised of the views of this Office so as to bring the matter to his attention with the view of precluding similar erroneous obligations of appropriations which may result in violations of the Antideficiency Act. The same letter should advise him of any violation of that act in the instant case, as set forth in the preceding paragraph, if you find any violation of that act occurred.

FRANK E. WEITZEL

Assistant Comptroller General
of the United States

Attachment