B. Bedrich
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DECISION

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

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FILE: B-193005 DATE: OCT 2 1978

MATTER OF: Obligation of Funds for Purchase of Oil for Strategic Petroleum Reserve

DIGEST: Department of Energy (DOE) has funds available for obligation through December 31, 1978, to buy crude oil for Strategic Petroleum Reserve. Where DOE chooses to have Defense Fuel Supply Center (DFSC) contract for oil on its behalf, DOE may not obligate appropriations until DFSC awards contracts.

This is in response to a request from the Department of Energy. The Department (DOE) has an appropriation of approximately $1.1 billion to buy oil for its Strategic Petroleum Reserve (SPR) program. The funds are available for obligation through December 31, 1978. Preferring not to deal directly with commercial suppliers of oil, DOE has arranged to acquire the oil through the Defense Fuel Supply Center (DFSC), an agency of the Department of Defense. DFSC does not stock sufficient oil itself to meet DOE's needs. DFSC intends to procure additional oil on the open market.

The problem is when the DOE funds may be considered to be obligated. If DOE's appropriation may not be obligated until DFSC executes contracts with commercial sellers for purchase of the oil, then to the extent such contracts are not executed by December 31, the appropriation will lapse. DFSC has issued a solicitation which will enable it to enter into contracts with sellers obligating the full amount by December 31. However, both DOE and DFSC consider that procedure to be disadvantageous to the Government, primarily because of the haste with which the contracts must be awarded and the effect that could have on the market. If, on the other hand, the funds may be considered as having been obligated at the time DOE and DFSC agree that DFSC will acquire the oil for DOE, then DFSC can carry out the purchase in a more deliberate fashion and possibly upon terms more favorable to the United States. (DOE is enjoined to acquire petroleum products for the SPR consistent with minimization of cost, and minimization of the impact of the acquisition upon supply levels and market forces. 42 U.S.C. § 6240(b).)

The Federal Energy Administration (FEA) and DFSC entered into an interagency agreement in April 1977 which purports to be the authority for the purchase of petroleum for the SPR by DFSC. (FEA's

functions have since been vested in the Secretary of Energy. Pub. L. No. 95-91, 91 Stat. 565.) Under the agreement, the Administrator delegated his statutory authority to execute contracts for acquisition of petroleum for the SPR to the Secretary of Defense, with authority to redelegate within the Defense Department. (The Secretary of Defense has redelegated this authority to DFSC.) Defense agreed to acquire petroleum for the SPR in accordance with the provisions of the Armed Services Procurement Regulation. FEA agreed to provide Defense with purchase requests for its specific requirements and to advance funds to cover payment for the petroleum under contracts administered by Defense.

By its terms the interagency agreement establishes a procedure whereby, when DFSC awards a contract to a seller of petroleum, it does so on behalf of the Secretary of Energy. The interagency agreement is thus essentially an agency agreement, with the Administrator of the FEA as principal and the Secretary of Defense as agent. If the interagency agreement governs the purchase, then until DFSC awards a contract on behalf of DOE, there is apparently no binding agreement for the purchase of petroleum by DOE which could serve as the basis for an obligation of DOE funds. (For present purposes, we assume that DOE, as it represents, has statutory authority to delegate duties to another Federal Agency and that Defense has authority to accept the delegation.)

However, DOE argues that it should be permitted to obligate funds on the strength of its purchase request (termed by the agencies an Oil Acquisition Order), issued to and accepted by DFSC. The Order, a sample copy of which has been provided to us, calls for acquisition of a specific quantity of oil and makes available a specific sum of money for that purpose. It is signed by officials of DOE and DFSC, and appears to be a binding agreement between them. DOE contends, in essence, that the oil acquisition order is a binding agreement, no different from the kind of agreement it could enter into with a private broker of oil who, although he might not have the oil in stock, could contract to deliver a specific quantity at a specific price to DOE by an agreement which would be the basis for a recordable obligation.

The Order recites that it is entered into in accordance with the interagency agreement which, as noted above, contemplates that DFSC will act as DOE's agent. If the Order is governed by the interagency agreement, then it is no more than a principal's instructions to his agent, rather than a binding agreement between buyer and seller. However, if an order for oil, placed by DOE with DFSC, standing alone and without reference to the interagency agreement, can be construed to be a legally sufficient binding

agreement between Government agencies for the purchase of petroleum, and if authority exists for such an agreement independent of the delegation authority relied on in the Interagency Agreement, then, at least arguably, such an order could be the basis for recording an obligation. See 31 U.S.C. § 200(a)(1) (1970), providing that an obligation may be recorded, based on documentary evidence of a binding agreement between Government agencies for specific goods to be delivered, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability of the appropriation concerned.

One basis for interagency agreements is the Economy Act, 31 U.S.C. § 686 (1970). However, an arrangement such as the one between DOE and Defense would apparently not be permissible under the Economy Act because DOE, not being one of the agencies named in the Act, may not ask a requisitioned agency to contract for procurement of a commodity on behalf of DOE, but only to provide a commodity which it is currently in a position to provide. Moreover, under 31 U.S.C. § 686-1 (1970), funds credited to the requisitioned agency under the Economy Act are not available beyond the period provided in the Act appropriating them. Hence, even if this were a permissible Economy Act transaction, the funds would lapse after December 31 to the extent that DFSC had not awarded contracts for purchase of the oil. DOE therefore argues that its transaction with DFSC is not governed by the Economy Act. We agree.

DOE has authority, to the extent necessary to implement a SPR plan approved by the Congress, to acquire petroleum products for storage in the SPR by purchase, exchange, or otherwise, and to execute any contracts necessary to carry out the provisions of the SPR plan. 42 U.S.C. § 6239(f) (Supp. V 1975). The authority does not specifically cover contracts with other Government agencies. However, under section 201(a) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 481(a), the Administrator of General Services, to the extent that he determines that doing so is advantageous to the Government, is authorized to procure and supply personal property for the use of executive agencies in the proper discharge of their responsibilities. The Administrator is to provide the services specified in subsection 201(a) to any other Federal agency upon its request. Section 201(b), 40 U.S.C. § 481(b). It therefore appears that DOE may request the Administrator to supply its oil needs. Payment may be in advance or by reimbursement. Section 109(b), 40 U.S.C. § 756(b).

Moreover, the Administrator is authorized to delegate his functions under the Act to other executive agencies. Section 205(e), 40 U.S.C. § 486(e). The Administrator has delegated to the Secretary of Defense his authority to procure and supply fuel commodities, including petroleum. Under the delegation, DFSC, exercising GSA's general procurement authority, may procure crude oil for DOE. Based on these authorities, DOE may purchase, and DFSC may sell, crude oil without reliance on the existing interagency agreement between them.

In this case, however, it appears that whether the relationship between DOE and DFSC is characterized expressly as an agency or not, DFSC is essentially acting as an agent for DOE in awarding the purchase contracts. DFSC does not guarantee to supply the oil at the price stated in the Order; it must go to the market to determine whether the quantity sought can be acquired at the stipulated price. Thus, execution of the Order is not certain until DFSC awards a contract.

We have held that, in the case of interagency orders, an order for an item not stocked by the requisitioned agency (or not routinely on order, if out of stock) may not be recorded as an obligation until it purchases the item. 34 Comp. Gen. 705 (1955). In those instances, there is generally no binding agreement between the agencies; the order, in terms of contract law, is an offer which is accepted by the requisitioned agency's performance.

It is true that in several instances in the past, we have regarded orders placed with another agency as serving to obligate the requisitioning agency's funds even before the requisitioned agency had awarded contracts or even solicited bids for performance of the requested service. See 51 Comp. Gen. 766 (1972); 55 id. 1497 (1976); and HUD-Corps of Engineers Flood Insurance Studies, B-167790, September 22, 1977. In 55 Comp. Gen. 1497 and 51 Comp. Gen. 766, however, the performing agency was required by its own statutory authorities to accept the order and provide the requested service.

Moreover, at the time the interagency agreements were executed in those cases, there was apparently either a present ability on the part of the requisitioned agency to perform, or a readily available alternative in the form of contracting out for performance, the only question being price. In this case, DFSC can neither perform itself nor can it offer any assurance that the order can be filled through a contract at the price and for the quantity specified. If the quantity

bought is not available at that price, DFSC must go back to DOE, which must instruct it how to proceed. In this sense, DFSC is a procurement agency, not a supply agency, and is in a position to promise only to use its best efforts to secure the desired commodity from the private sector.

Moreover, if DOE chose to buy the oil itself, it is clear that the funds would lapse to the extent contracts were not awarded before December 31, 1978. We are reluctant, without further indication that such a result is warranted, to allow DOE, by having another agency act for it, to prevent the lapse of the funds at the time specified by the Congress.

Accordingly, we conclude that, to the extent that DFSC cannot fill DOE's orders from stock, its funds may not be obligated until DFSC awards contracts for the purchase of the required crude oil.

R. F. KELLER

Deputy Comptroller General
of the United States