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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Army Corps of Engineers - Propriety of Depositing Liquidated Damages in Supervision and Administration Account

File: B-237421

Date: September 11, 1991

DIGEST

The portion of delayed performance liquidated damages that is attributable to increased supervision and administration (S&A) expenses may be reimbursed to the Corps of Engineers' S&A revolving fund.

DECISION

The disbursing officer for the United States Army Corps of Engineers, Fort Worth District, has collected $2,283,600 as liquidated damages for a contractor's delay in completing a military construction contract. The disbursing officer requests an advance decision on whether that portion of the liquidated damages attributable to increased supervision and administration (S&A) expenses incurred by the Corps may be used to reimburse the revolving fund available for such expenses. We conclude that the reimbursement would be proper.

In 1986, a contract was awarded for the construction of a fuel cell shop at Kelly Air Force Base, Texas, under solicitation No. DACA63-86-B-0020. The Corps supervised and administered the contract. Although the scheduled contract completion date was October 6, 1987, the contractor did not complete the facility until July 1989, a delay of 660 days.

The solicitation as issued contained a liquidated damages clause that established a liquidated damages rate of $1,060 per day for S&A expenses as provided for under Federal Acquisition Regulation § 12.203(b). Prior to bid opening, however, an amendment increased the rate to cover other expenses that would result from delay, such as storage of equipment at other facilities. The Corps believes that $669,600 of the $2,283,600 in liquidated damages (the amount representing liquidated damages for S&A expenses) should be returned to the S&A account, but asks whether this would be inconsistent with the views we expressed in 65 Comp. Gen. 838 (1986).

The Corps' S&A revolving fund was established by the Civil Functions Appropriation Act, 1954, Pub. L. No. 83-153 (July 27, 1953) 67 Stat. 197, 199. The Corps charges S&A expenses against the fund, which is reimbursed from appropriations of customer agencies.1/ The Corps charges an agency 5.5 percent of the contract price for S&A. The 5.5 percent rate is calculated so that, over time, the Corps will break even in providing S&A for agency projects. The Corps reports, however, that this uniform rate has not been calculated to cover the additional costs of project managers, construction inspectors and support personnel incurred by the Corps when a contractor is late in completing a contract. Therefore, when contract completion is late, as here, the Corps incurs S&A costs that are not reimbursed through the uniform rate.

In 65 Comp. Gen. 838 (1986), the Corps had collected $46,324 from an architect-engineer (A-E) firm as damages for faulty design work. Of this amount, $40,324 had been paid to the construction contractor to cover additional expenses incurred as a result of the faulty design. The remaining $6,000 represented additional S&A the Corps incurred under the construction contract. Of this $6,000, we held that $2,218 (the amount paid into the revolving fund by the customer agency) could be credited to the customer's appropriation. The remainder could not be credited to the revolving fund because amounts in excess of the 5.5 percent of the construction contract price already paid into the revolving fund by the customer agency would augment the revolving fund. We said that the remainder must be deposited in the general fund of the Treasury as miscellaneous receipts.

The question raised by the Corps is whether, in light of our holding in 65 Comp. Gen. supra., an impermissible augmentation would occur here if part of the liquidated damages were deposited in the S&A account to cover the additional costs the Corps incurred because the contractor was late in completing the contract. In our view, no such augmentation would occur.

We see the circumstances here as fundamentally different than those in the cited case. In that case, the contract price of a construction contract was increased by $40,324 to compensate the contractor for unanticipated expenses it incurred. In accordance with its practice of charging the agency a flat 5.5 percent of the contract price to cover anticipated supervision and administration, the Corps was only entitled to

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1/ Under 10 U.S.C. § 2851 (1988), agencies must use either the Corps or the Naval Facilities Engineering Command to direct and supervise contracts for military construction.

an additional $2,218 even though the amount of S&A expenses actually incurred was considerably higher. The Corps was not entitled to be reimbursed for expenses in excess of 5.5 percent because the theory underlying the flat rate is that while actual S&A expenses may be more or less than 5.5 percent of the contract price for any particular contract, these variations will balance out over time. Recovering expenses in excess of the flat rate results in an augmentation of the fund.

By contrast, there would be no augmentation here because this case involves S&A expenses that were never intended to be reimbursed through the 5.5 percent flat rate. Indeed, a portion of the daily liquidated damage rate set out in the contract specifically was intended to cover additional S&A expenses in the event of late contract completion. As we see it, these expenses are not related to the 5.5 percent fee charged the customer agency's appropriation; that amount was calculated to cover S&A expenses only through the completion date set out in the contract. Accordingly, recovery of additional S&A costs, above those incurred through the contractually required date of completion, would not cause an augmentation of the revolving fund.

In 62 Comp. Gen. 678 (1983), a case that involved excess reprocurement costs, we stated that it would be illogical to hold a contractor legally liable for excess costs and then not permit funds recovered from the contractor to be used for the purpose for which they were recovered. We agree with the Corps that this reasoning applies to the disposition of liquidated damages as well as to excess reprocurement costs. Neither situation would involve an impermissible augmentation.

Accordingly, we conclude that the $669,600 in S&A liquidated damages may be credited to the Corp's S&A revolving fund.

for Milton J. Socolar
Comptroller General
of the United States