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WASHINGTON, D.C. 20548933
Subject card

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AUG 18 1967

Dear Mr. Secretary:

This is in reference to your letter dated August 11, 1967, requesting an advisory opinion whether, under the facts and circumstances hereinafter related, a proposed course of action may be taken concerning contingent liabilities for termination costs on contracts for the development of a civil supersonic aircraft (SST), without being considered in violation of the following statutes:

Section 3679, Revised Statutes, 31 U.S.C. 665 (Anti-Deficiency Act) provides in part that:

"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."

Section 3732, Revised Statutes, 41 U.S.C. 11, provides in pertinent part:

"No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment * * *."

Section 3733, Revised Statutes, 41 U.S.C. 12, provides:

"No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

Your question concerns a proposed change in the present procedure requiring the reserving of funds sufficient to meet termination costs, in the event of termination, under two current Federal Aviation

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Administration (FAA) contracts with the Boeing Company and the General Electric Company for the development of the SST. These contracts were entered into under authority of 49 U.S.C. 1353(b) empowering FAA "to undertake or supervise such developmental work and service testing as tends to the creation of improved aircraft * * * to make purchases * * * by negotiation, or otherwise, of experimental aircraft * * * which seem to offer special advantages to aeronautics," and are funded by appropriations provided by Congress.

The circumstances requiring the proposed change are related in your letter as follows:

"The contracts provide for the contractors to share contract costs with the Government. However, in the event the contracts are terminated for the convenience of the Government, the Government is contractually obligated to refund the contractors' cost shares, plus their cost shares under three prior SST contracts. The contracts contain a clause permitting termination for the convenience of the Government. In addition, the contract terms require such termination for convenience if the Government fails to incrementally fund the contracts within a specified time. The contracts also require the refund of a percentage of the contractors' cost shares if the Government fails to fund a contract overrun. Attached as Exhibit A are copies of the two contracts.

"In past fiscal years, the FAA has budgeted for and received appropriations sufficient to cover the contractors' cost shares. A different approach, however, is planned this year in view of the House of Representatives' action on the SST appropriation in the FY-1968 Department of Transportation Appropriations Bill (H.R. 11456). The House approved \$142,375,000 for the SST program, a reduction of \$55,625,000 from the \$198,000,000 requested. Of the \$55,625,000 reduction, \$54,213,000 represents the amount which would have been reserved for possible refund of the contractors' cost shares under the current and prior contracts. (This amount includes \$16,836,000 for the prior contracts, and \$37,377,000 for the current contracts through the end of FY 1968. Because the \$54,213,000 would not have been expended unless necessary for refund of the contractors' cost shares, this reduction should have no substantive effect on the SST program.

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"The appropriation containing funds for development of a civil supersonic aircraft is for that purpose only, and is separate and distinct from appropriations for other FAA and DOT programs. Since only about \$9,700,000 of the \$142,375,000 approved by the House is programmed for expenditure on other than the two Boeing and General Electric contracts, there is no reprogramming flexibility within the SST appropriation sufficient to cover the Government's contingent liability of \$54,213,000 for refund of the contractors' cost shares.

"In its Report on H.R. 11456, the House Appropriations Committee specifically directed the FAA not to reserve any amount for the purpose of refunding the contractors' cost shares. The Committee stated:

'The Committee directs the Federal Aviation Administration to apply the entire \$54,213,000 the total amount which would be set aside in the "pay-back reserve" by the end of fiscal year 1968, to the fiscal year 1968 program. This is in accord with action taken recently by the Committee on the Department of Defense Appropriation Bill.

'The Committee recognizes the obligations of the government to the contractors, but feels that since the government is always obligated to pay termination costs on contracts, and since the government would not and could not fail to pay amounts due contractors upon termination for the convenience of the government, these funds should be utilized for the program rather than set aside. The Committee is very desirous of maintaining close scrutiny over the costs of the SST program. The elimination of the "pay-back reserve," in addition to being a better utilization of financial resources during fiscal year 1968, gives the Congress a closer and tighter control over program costs of the SST. Further, the Committee does not believe that it is likely that the government will be required to terminate the program and believes that the accumulation of large amounts (which could total \$156,000,000 at the end of the development phase of the program) for this purpose is unnecessary. (Report No. 484, pp. 18-19.)'

"Assuming no contrary intent is indicated by the Senate, we would consider the quoted language of the House Report as a clear recognition of the Government's obligation to refund the contractors' cost shares in the event of a termination for convenience or failure to fund a cost overrun. We would also view this language as a Congressional authorization--in fact a mandate--for the FAA to fund the SST contracts without maintaining any reserve for this purpose."

It is stated in your letter that in the event the Senate's action is consistent with the approach taken by the House, the FAA proposes to follow the directive of the House Appropriations Committee and not reserve amounts for possible refund of the contractors' cost shares. The contracts, it is stated, will be amended to help accomplish this result, drafts of which were enclosed with your letter. Our advice is requested (1) whether the proposed course of action would violate the statutes cited above, or any other law, and (2) would a termination for convenience or failure to fund a cost overrun, subsequent to amending the contracts but prior to the appropriation of adequate funds for refund of the contractors' cost shares, be considered a violation of the aforementioned statutes or any other law?

An appropriation chargeable with payments under the original contract in any particular case is chargeable, also, with payments under a termination agreement providing for termination of the contract and for payment to the contractor of the amount agreed upon in settlement of the contractor's rights arising out of the original contract. 23 Comp. Gen. 862. Termination costs do not necessarily become a factor in estimating fund requirements or providing appropriations for carrying out a program, since generally the amount obligated for work performed would be sufficient to meet termination costs. There are exceptions however, and in such event termination costs become a factor in funding to preclude a possible violation of the "Anti-Deficiency Act," 31 U.S.C. 665. Such is the case here involved and the contracting parties have so recognized this in the contracts which state that the amounts currently funded include "a reasonable estimate for termination liability."

Resolution of the questions presented by you involves the proposition of whether the direction of the Committee on Appropriations as set forth in House Report No. 484, coupled with the passage of the appropriation act with reductions as recommended and explained in the committee report, may be viewed as constituting the proposed action as one "authorized by law" within the meaning of that term as used in the

"Anti-Deficiency Act." We believe that such legislative action affords ample support for an affirmative conclusion to the proposition. The course of action to be taken by the Federal Aviation Administration is clearly spelled out, the obligation of the Government to the contractors is recognized, and it is contemplated by the Committee that such action will result in better utilization of financial resources coupled with closer and tighter control by Congress over program costs. In addition to the statement in House Report No. 484, Mr. Boland, Chairman of the Subcommittee on Department of Transportation Appropriations gave the following explanation on July 18, 1967, before the House of Representatives sitting as the Committee of the Whole House on the State of the Union for the consideration of the bill (H.R. 11456), (Cong. Rec. p. H8815):

"These planes will cost some \$40 million each. The Federal Government's share of the program up to this point is \$511 million. That is what we have appropriated up to the request for fiscal year 1968.

"The request this year was for \$198 million. We recommended a reduction of \$55 million, but the reduction will not hurt the program at all. Actually almost all of the reduction of \$55 million will come in what is known as the payback reserve fund.

"The managers of the civil supersonic transport program have put into a payback reserve fund moneys to pay the contractors if the Government should suddenly decide to cancel the program. There was some \$35 million in the program for that purpose up to this fiscal year, and I believe they requested almost \$19 million in the program for this year, or a total of about \$54 million.

"We said that the Government is an insurer anyhow, and if we end the program there is a liability the Government will have to pay, so there is no sense in putting \$54 million in escrow somewhere for the purpose of paying liability claims which might arise in the future, if the Government does not go forward with the program."

The bill passed the House of Representatives in the reduced amount as recommended by the Committee on Appropriations. In the event similar action is taken by the Senate indicating a clear legislative pattern of approval of the course of action outlined in House Report 484, it is the opinion of our Office that it would be unreasonable to conclude

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that there was a violation of the cited statutes or other law upon the adoption of the proposed procedure, or a violation in the event of termination of the contracts in the circumstances outlined. The course of action would be taken as directed by Congress. Since neither section 3690, Revised Statutes, the act of June 30, 1906, 31 U.S.C. 627, concerning the construction of appropriation acts, nor other statutes pertinent to the question here concerned, are to be viewed as limitations on Congress (see 23 Comp. Dec. 167, 171), your questions are answered in the negative.

The drafts of the proposed amendments to the contracts have been examined and we see no objection thereto. We understand, of course, that these are subject to change.

Sincerely yours,

FRANK H. WEITZEL

Assistant Comptroller General
of the United States

The Honorable
The Secretary of Transportation

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