Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Securities and Exchange Commission—Reduction of Obligation of Appropriated Funds Due to a Sublease

File: B-265727

Date: July 19, 1996

DIGEST

The United States Securities and Exchange Commission (SEC) may not reduce its obligation of appropriated funds resulting from a lease, and correspondingly increase its available appropriations, by subleasing space and arranging for the sublessee to make its payments directly to the landlord. The SEC should deposit the amount paid by its sublessee, whether paid to the SEC or the landlord, into the Treasury as miscellaneous receipts.

DECISION

The United States Securities and Exchange Commission (SEC) requests our opinion on whether it may reduce its obligation of appropriated funds for a lease to reflect the reduced rent the SEC pays as a result of a sublease. Consistent with SEC's lease with the landlord, the landlord accepts payments from the SEC's Recreation and Welfare Association (RWA) under its sublease with the SEC, and the SEC reduces its rental payments to the landlord by the amount the RWA pays. The SEC has been reducing its obligation of appropriated funds by the amount its sublessee pays the landlord to in effect reflect the SEC's net rental payment instead of the rental payment required by the lease. As discussed below, we conclude that under the terms of the current lease, the SEC's treatment of its sublessee's payments improperly augments its appropriation and the SEC should deposit the reduction in its rental payments into the Treasury as miscellaneous receipts.

Background

A lease between the SEC and the Judiciary Plaza Limited Partnership (landlord) included the entire parking garage beneath its headquarters office building. The SEC did not intend to use the entire garage but wanted for security reasons to limit access to the garage and hence the building to SEC employees. The lease became effective October 1, 1993, and currently expires December 31, 1997.

Prior to the SEC leasing the entire parking garage, the RWA, a nonprofit corporation made up exclusively of SEC employees, had an agreement for a certain number of discounted rate parking spaces with the company operating the parking garage. The RWA then made these spaces available to SEC employees on a first-come, first-served basis. Of the amount it charged the employees, the RWA retained an administrative fee and paid the balance to the parking garage operator.

After the SEC leased the entire parking garage, the SEC provided free parking to employees with severe disabilities, executives and employees eligible based on job-related requirements, and SEC carpools and contractors. The SEC also agreed to accommodate the 45 employees who had been paying $100 per month to park through the RWA. From October 1993 through March 1994, the RWA held in a separate account the $100 per month it continued to collect from each employee parking in the garage through the RWA. After deducting a 15 percent administrative fee for running the parking program and paying certain taxes, the RWA subsequently paid the remaining funds to the SEC, which were forwarded to the United States Treasury.

A new arrangement began in April 1994. The SEC's lease allows the SEC to sublease and provides that at the SEC's request, the landlord will accept directly from a sublessee the payments a sublessee is required to make. The landlord credits the sublessee's payments to the rental the SEC is otherwise required to pay and the SEC's future rental payments to the landlord are reduced by the amounts so credited. The RWA entered into a month-to-month sublease with the SEC for up to 70 parking spaces for $85 per month. The RWA would continue to charge SEC employees $100 a month and retain $15 per month. However, under the sublease, the RWA would pay the remaining $85 directly to the landlord. The sublease was amended on April 11, 1995, to reduce RWA's payment to the landlord to $80 per space per month. The amended sublease explicitly provides that the SEC is responsible for authorizing and issuing the applicable parking permits to RWA, and for monitoring the proper use of the permits. The term of the sublease is month-to-month and the sublease can be terminated by either the SEC or the RWA. After the RWA began making payments directly to the landlord, the SEC began obligating appropriated funds on the basis of the rental payments it actually made to the landlord after being credited for its sublessee's payments instead of the amount of the rent called for in the lease.

Discussion

Unless otherwise authorized, agencies must deposit all funds received for the use of the United States in the general fund of the Treasury as miscellaneous receipts. 31 U.S.C. § 3302 (1994). Failure to do so constitutes an improper augmentation of the agency's appropriation.

Under the SEC's lease with the landlord and sublease with RWA, the landlord continues to make the entire garage available to the SEC, the SEC retains control over the parking spaces, the SEC determines the amount RWA will pay for such spaces, and, notwithstanding the sublease, the SEC remains liable to the landlord for the rent of the entire parking garage should RWA not make its payment under the sublease. In the final analysis, the SEC's legal rights and obligations vis-a-vis the landlord are in substance unaffected by the sublease. Yet, instead of the SEC's appropriation bearing the entire rent the landlord charges the SEC for leasing the garage, the SEC obligates its appropriation in the amount of the rent as reduced by any amounts paid by RWA. The SEC previously treated payments it received directly from RWA for parking spaces as money received for the use of the United States to be properly deposited into the Treasury as miscellaneous receipts under 31 U.S.C. § 3302. Under the current arrangement, the SEC's appropriation is benefiting from the sublease in the same amount as it would if the SEC was authorized to credit its appropriation with any payments the SEC collected directly from the RWA. In this regard, the SEC clearly is augmenting its appropriation by reducing the obligation charged to the appropriation by the amount the SEC's sublessee pays the SEC's landlord. The next question is whether the augmentation is improper.

An exception to the general rule against augmenting an agency's appropriation includes receipts that qualify as refunds to an appropriation. Refunds may be retained to the credit of the appropriation and are not required to be deposited into the general fund of the Treasury. 65 Comp. Gen. 600 (1986).

The SEC argues that the situation here is akin to a refund because if it paid its entire rent to the landlord, the landlord would then pay the SEC a refund in the amount the landlord received from the sublessee. The SEC analogizes the landlord's agreement to permit the SEC to sublease and receive a credit in the amount the sublessee pays the landlord to a contract adjustment or price renegotiation that either results in a refund or otherwise reduces the government's obligation. Because refunds and reductions in contract obligations result in increasing available appropriations, the SEC proposes a similar treatment here.

The SEC's Office of Inspector General (OIG) reached a contrary view in its report, Parking Garage Space Allocation and Usage, OIG-154, April 14, 1995. The OIG disagreed with the SEC's arguments and concluded that the SEC was improperly augmenting its appropriation just as if the SEC was directly receiving and retaining the sublessee's rental payments. We agree with the OIG.

In situations where we treated a contract adjustment or price renegotiation as a refund that could be credited to an appropriation like those cited by the SEC,[1] the "refund" reflected a change in the amount the government owed its contractor based on the contractor's performance or a change in the government's requirements. In contrast, the SEC has not changed its determination that it has a need to limit access to its headquarters (and garage) for security reasons and, to meet that need, its control over and responsibility for the entire garage under the lease has not changed. The space the landlord provides the SEC, and the rent the SEC is required to pay for that space, has not changed by virtue of the RWA receiving and paying for some of the parking spaces acquired from the landlord by the SEC.

The SEC also argues that its sublease to a third party of an interest it acquired from another contractor at essentially the same price is analogous to the contract arrangement in 7 Comp. Gen. 391 (1927), in which we approved crediting an appropriation for reductions in the government's liability. We believe the SEC misapprehends the import of our 1927 decision as it applies to the SEC's situation.

That decision involved an agreement between Yosemite National Park and its road contractors in which the Park would supply the contractors with electricity from the Park's power plant. Contracts between the Park and its road contractors were charged to the roads-and-trails appropriation and the contractors deducted from their monthly vouchers the cost of electricity provided to them. The cost of generating the electricity provided to the contractors was charged to the regular park appropriation available for the operation and maintenance of the Park. However, the Park plant was not always able to supply the necessary amount of electricity to the road contractors. To fulfill its obligation to the contractors, the Park purchased electricity from a private company and charged the cost to the regular park appropriation.

The Comptroller General concluded that the deductions made from the contractors' vouchers may not be used by the roads-and-trails appropriation to reimburse the appropriation for the cost of electricity generated by the Park's power plant, but instead should be deposited into the Treasury. The sale of electricity produced by

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[1]The SEC cites a line of Comptroller General decisions to support its argument that the contract adjustment is a refund. See 34 Comp. Gen. 145 (1954) (refund under a guarantee-warranty clause); 33 Comp. Gen. 176 (1953) (contractor's refund under a price redetermination clause); and 27 Comp. Gen. 384 (1948) (credit allowance received for defective part). In these cases, the amounts received were not improper augmentations of agency appropriations because they were adjustments in previous payments made by the agencies for which they bargained for under the original contracts.

the Park's power plant was a revenue of the Park and a statute explicitly required the deposit of revenues of the national parks into the Treasury as miscellaneous receipts. 7 Comp. Gen. at 393. However, the Comptroller General approved crediting the park appropriation with amounts deducted from the contractors' vouchers for furnished electricity when the Park purchased the electricity from private companies rather than generating it from the Park power plant "and the regular park appropriation had originally been charged with the cost" of the purchase. 7 Comp. Gen. at 393-394.

The SEC argues that since "GAO determined that Treasury was not entitled to receive any money" in this decision, Treasury is not entitled to receive any money in the present situation. However, as discussed above, Treasury did receive the contractor deductions when they reflected the cost of Park-generated electricity. The reason some reimbursement of the park appropriation was allowed is that in those instances when the Park appropriation had been charged for purchasing electricity, the failure to reimburse would result in the park appropriation subsidizing a contract properly funded by the roads-and-trails appropriation. Where reimbursement was allowed, the net result was that the road-and-trails appropriation bore the entire cost of what was contemplated by the contract—an amount paid to the contractors and an amount paid for electricity to be furnished to the contractors.

The SEC's situation does not present such an issue. The SEC's proposal is not designed to address which appropriation bears the entire cost of the government's obligation. Conversely, the SEC's proposal is designed to result in obligating its appropriation in an amount less than the cost of its lease for the entire garage even though the SEC through its lease controls the entire garage.

Accordingly, we conclude that absent statutory authority to retain such amounts, the SEC's use of amounts paid by its sublessee under the current lease arrangement to reduce the obligation created by the SEC's lease with the landlord constitutes an improper augmentation of its appropriation. The SEC must deposit the amounts paid by the SEC's sublessee, whether paid to the landlord or the SEC, as miscellaneous receipts into the Treasury.

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