



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Demolition of the Existing LaGuardia Air Traffic Control Tower

File: B-286457

Date: January 29, 2001

DIGEST

The Federal Aviation Administration, which is constructing a new Air Traffic Control Tower at LaGuardia Airport, may use the Facilities and Equipment appropriation within the Transportation Appropriations Act for fiscal year 2001 to demolish the existing LaGuardia Air Traffic Control Tower, owned by the Port Authority of New York and New Jersey.

DECISION

The Federal Aviation Administration (FAA) requests an advance decision on whether it may use appropriated funds to demolish the existing LaGuardia Air Traffic Control Tower (ATCT) to the ground. The FAA has agreed to demolish the current LaGuardia ATCT to the point where the line of sight from a new ATCT will not be obstructed. We conclude that the FAA may use the Facilities and Equipment appropriation within the Transportation Appropriations Act for fiscal year 2001 to demolish the existing ATCT to the ground.

BACKGROUND

The FAA is constructing a new ATCT at LaGuardia Airport, located in Flushing, New York. The Port Authority of New York and New Jersey owns the existing ATCT. The FAA agreed with the Port Authority to demolish the old ATCT to the point where the existing tower would no longer obstruct the new tower's view of air traffic.¹ The Port Authority, however, objected to the FAA leaving a partially demolished tower in place, indicating that this would present an eye sore. The Port Authority will not agree to pay to demolish the remainder of the tower using its own funding and has

¹ The new tower will be constructed approximately 800 feet from the existing tower.

requested that the FAA demolish the entire ATCT.² In addition to the Port Authority's concern about the visual aspects of a partially demolished tower, the FAA has stated that the hub of the electrical wiring for the existing LaGuardia tower is located underground at the base of the tower, and it may be difficult to access and modify the wiring if the tower is not demolished.

The Department of Transportation and Related Agencies Appropriations Act for fiscal year 2001 appropriates \$2.7 billion for Facilities and Equipment for "necessary expenses for acquisition, establishment, and improvement ... of air navigation and experimental facilities and equipment...". Pub. L. No. 106-346, 114 Stat. 1356 (2000). In the conference agreement accompanying the fiscal year 2001 Department of Transportation and Related Agencies Appropriations Act, the conferees, in discussing the use of Facilities and Equipment funds, identified \$145 million for "replacement of air traffic control towers and other terminal facilities" at approximately 50 airports. The conferees specifically agreed that LaGuardia Airport would receive \$23 million of these funds. H.R. Conf. Rep. No. 106-940, at 6 (2000) (conference report accompanying Pub. L. No. 106-346). The FAA plans to use fiscal year 2001 Facilities and Equipment money to construct the new ATCT as well as to demolish the existing ATCT.

DISCUSSION

Pursuant to 31 U.S.C. § 1301(a) (1994), appropriated funds may be used only for authorized purposes. Even if a particular expenditure is not specifically provided for in the appropriation act, the expenditure "is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of the function, and if it is not otherwise prohibited by law." 66 Comp. Gen. 356 (1987). This concept is known as the "necessary expense doctrine." The necessary expense doctrine does not require that a given expenditure be "necessary" in the strict sense that the expenditure would be the only way to accomplish a given goal, rather that the expenditure will contribute to accomplishing the purposes of the appropriation to be charged. 50 Comp. Gen. 534 (1971).

We have held that whether or not a particular expense is necessary in fulfilling an authorized purpose is, in the first instance, a matter of agency discretion. B-223608, Dec. 19, 1988. When we review an expense to determine if it is necessary to fulfill an authorized purpose, we determine whether the expense falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose is so attenuated as to take it beyond the range. *Id.*; 70 Comp. Gen. 720 (1991).

² The FAA has not determined if it will retain ownership of the new ATCT once it is complete. According to the FAA, if it can negotiate an agreement with the Port Authority whereby the Port Authority will agree to pay for demolition of the new tower at the end of its useful life, the FAA may transfer ownership to the Port Authority.

The FAA is planning to replace the existing LaGuardia ATCT using funds appropriated for this purpose. As noted earlier, the conferees to the fiscal year 2001 Transportation Appropriation Act specifically identified replacement of air traffic control facilities at LaGuardia Airport in their discussion of the use of Facilities and Equipment funds. The term “replacement” generally may encompass both removing an existing facility and constructing a new facility in its place. Given the reasonable connotation of the term “replacement,” there may be any number of different scenarios where the demolition of the existing tower at LaGuardia is a necessary incident to the construction of the new tower. Accordingly, while the complete demolition of the existing ATCT may not be necessary in the strict sense of essential to the utility of a new ATCT, that is not the test. Rather the necessary expense test is less demanding, asking in the context of this case whether the complete demolition of the old tower will contribute to the accomplishment of the purpose of the appropriation to be charged. With the inquiry so focused, we think FAA may reasonably exercise its discretion to conclude that the complete demolition of the existing ATCT is necessary to accomplish the replacement of the existing tower with a new tower.

In addition to determining whether the expenditure is necessary to accomplish the purpose of the appropriation, we also must determine if it is not otherwise prohibited by law. Generally, agencies may not use appropriated funds to make permanent improvements to property not owned by the government. See 65 Comp. Gen. 722, 723-724 (1986). FAA’s demolition of the existing tower could be viewed as such an improvement. The reasoning behind this prohibition is that to permit such improvements would constitute a gratuity to the owner which government officials are not authorized to make in the absence of statutory authority. Id. In many situations, however, there is a benefit or return to the government as a result of making permanent improvements to property it does not own. This prohibition, therefore, is recognized as one of public policy, not statutory prohibition, Id. at 724, and we have recognized exceptions to the general prohibition based on the facts and circumstances of particular cases. See, e.g., 71 Comp. Gen. 4 (1991); 38 Comp. Gen. 143 (1958).

Our decisions have identified the following factors that should be present before appropriated funds may be expended for permanent alterations to property not owned by the government: (1) the improvements are incidental to and essential for the accomplishment of the purpose of the appropriation, (2) the cost of the improvement is in reasonable proportion to the overall cost of the contract price, (3) the improvements are used for the principal benefit of the government, and (4) the interests of the government in the improvements are protected. See, e.g., 71 Comp. Gen. 4 (1991); 69 Comp. Gen. 673 (1990); 53 Comp. Gen. 351, 352 (1973).

We need not decide whether the above factors will be satisfied in the present case because FAA’s statutory authority to “replace” the ATCT, not the policy, applies in this situation. In 69 Comp. Gen. 673 (1990), the FAA asked whether it could award a contract for waste water pretreatment improvements at the Mike Monroney Aeronautical Center (the Center), which is located on leased property. We found that all of the necessary factors appeared to be satisfied, but held that even if they

were not, our policy rule was not applicable because the Congress had provided funding for the proposed improvements in the fiscal year 1989 Department of Transportation and Related Agencies Appropriations Act. Pub. L. No. 100-457, 102 Stat. 2125 (1988). The act contained an appropriation for “Facilities and Equipment,” which according to the accompanying House and Conference reports, included funds for environment cleanup at the Center. Both the House and Conference reports specifically included funds for “Mike Monroney Aeronautical Center environmental cleanup.” 69 Comp. Gen. at 675.

In this case, the conference agreement accompanying the fiscal year 2001 Department of Transportation and Related Agencies Appropriations Act identified replacement of air traffic control towers at approximately 50 specific airports, including LaGuardia, as an appropriate use of FAA’s Facilities and Equipment appropriation. H.R. Conf. Rep. No. 106-940, at 6 (2000). The federal government owns very few air traffic control towers, therefore, to accomplish the replacement of air traffic control towers at each of the enumerated airports, appropriated funds will, in some instances, need to be used to remove existing facilities not owned by the government in order to construct new facilities in their place.

Because the Congress has appropriated funds for replacement of the ATCT at LaGuardia Airport, and because we believe that FAA may reasonably conclude that demolition of the existing ATCT is necessary to the construction of the new ATCT, we would not object to the expenditure of appropriated funds for the complete demolition of the existing ATCT at LaGuardia Airport.

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