COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

B-72023

JAN 9 1948

The Honorable,

The Secretary of the Interior.

My dear Mr. Secretary:

I have a letter dated December 17, 1947, from the Assistant Secretary of the Interior, requesting decision as to whether funds made available by a supplemental appropriation act for the fiscal year 1948 for continuation of construction of Bureau of Reclamation projects, if not otherwise restricted, may be applied in payment of earnings for work performed under continuing contracts during the period between the exhaustion of funds appropriated for the fiscal year 1948 and the date funds are made available by the supplemental appropriation act.

Reference is made to section 12 of the act of August 4, 1939, 53 Stat. 1187, 1197, which reads as follows:

"When appropriations have been made for the commencement or continuation of construction or operation and maintenance of any project, the Secretary may, in connection with such construction or operation and maintenance, enter into contracts for miscellaneous services, for materials and supplies, as well as for construction, which may cover such periods of time as the Secretary may consider necessary but in which the liability of the United States shall be contingent upon appropriations being made therefor."

You state that pursuant to the foregoing provisions of law, the Bureau of Reclamation has entered into a number of construction and supply contracts containing a clause substantially as follows:

"Failure of Congress to appropriate funds.- If the operations of this contract extend beyond the current fiscal year, it is understood that the contract is made contingent upon Congress making the necessary appropriations for expenditures thereunder after such current year has expired. In case such appropriation as may be necessary to carry out this contract is not made, the contractor hereby releases the Government from all liability due to the failure of Congress to make such appropriation."

Also, you state that under many of the continuing contracts a considerable amount of work remains to be done; that the funds available for expenditures under the contracts are exhausted; that the contractors have been so advised; and that work performed under the contracts after exhaustion of the funds will be at the contractor's risk. However, it appears that the contractors are willing to continue under the contracts beyond the estimated date of exhaustion of funds provided there is no legal objection to payment for such services out of any supplemental appropriations that may be made by the Congress for the fiscal year 1948 for the continuation of construction of the projects involved. It is pointed out that abandonment of work under the contracts and removals by construction contractors from the site of the work would entail serious economic loss, not only to the contractors but to the Government as well.

The only apparent objection to the proposition outlined in the letter of December 17, 1947, lies in the general prohibitions contained in the Anti-Deficiency Act (31 U.S.C. 665), which provides as follows:

"No executive department or other Government establishment of the United States shall expend in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the

future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. Nor shall any department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. All appropriations made for contingent expenses or other general purposes, except appropriations made in fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made; and all such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment, but this provision shall not apply to the contingent appropriations of the Senate or House of Representatives; and in case said apportionments are waived or modified as herein provided, the same shall be waived or modified in writing by the head of such executive department or other Government establishment having control of the expenditure, and the reasons therefor shall be fully set forth in each particular case and communicated to Congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than $100 or by imprisonment for not less than one month."

However, such provisions apply to the public services in general, and must yield to special provisions relating to a particular department. New York Central and Hudson River Railroad v. United States, 21 C. Cls. 468. Section 12 of the act of August 4, 1939, supra, can only be regarded as excepting the Bureau of Reclamation from the provisions of the Anti-Deficiency Act, to the extent the said act otherwise might be applicable, since once appropriations have been made for the construction of a project, the Secretary of the Interior may enter into contracts for such construction which

may cover periods of time as he may consider necessary but in which the liability of the United States is contingent upon appropriations being made therefor.

In the situation described, appropriations available until expended have been made for the construction of the projects involved, contracts have been entered into by the Secretary of the Interior for such construction, and the construction work itself is in various stages of completion. At such time as the appropriations made for such work become exhausted, there necessarily will result a hiatus, at least in the liability of the United States, with respect to further operations under the contracts, which hiatus will continue for the period during which no appropriations are available. In other words, if services are rendered under the contracts during such period, the United States is liable if, and only if, a supplemental appropriation subsequently is made for the payment of such services. However, upon the enactment of a supplemental appropriation providing funds otherwise available for the work covered by the contract already authorized by law, no reason is perceived why payment could not properly be made, for services performed during the interim period, assuming, of course, that the language of such supplemental appropriation does not prohibit such payment.

Since the receipt of the letter of December 17, 1947, there has been enacted the Third Supplemental Appropriation Act, 1948, which appropriated additional funds, available until expended, for construction of certain projects. I find nothing therein which would preclude

payment for work performed during the period when previously available funds for those projects became exhausted and the time the Supplemental Appropriation Act was approved.

The question presented is answered accordingly.

Respectfully,

(Signed) Lindsay C. Wa...

Comptroller General
of the United State/