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DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-220210 **DATE:** September 8, 1986

MATTER OF: Army Corps of Engineers--Disposition of Funds Collected in Settlement of Faulty Design Dispute

DIGEST: Faulty design by an architect-engineer (A-E) caused the Air Force to incur additional corrective expenses in the ensuing construction contract. The corrective expenses--added costs paid to construction contractor plus added amounts paid to Army Corps of Engineers for supervision and administration (S&A)--were charged to Air Force's 1982 5-year Military Construction appropriation. In 1985, Government recovered the amount of the additional costs from the A-E. Since the appropriation charged was still available for obligation at the time of the recovery, it may be reimbursed from the recovery to the extent of the additional costs actually incurred. However, portion of recovery representing S&A expenses in excess of amount actually charged Air Force must be deposited as miscellaneous receipts.

The disbursing officer for the United States Army Corps of Engineers, Norfolk District, has collected $46,324 from an architect-engineer (A-E) who provided a faulty design for construction work. The disbursing officer requested our decision on whether the collected funds may be used to reimburse the appropriation used to pay the construction contractor for the extra expenses it incurred to correct the A-E's faulty design, and the revolving fund available for the Corps' supervision and administration (S&A) expenses, or whether the funds must be deposited into the Treasury as miscellaneous receipts pursuant to 31 U.S.C. § 3302. As explained below, since the agency has already paid the additional construction expenses plus a 5-1/2 percent flat rate representing additional S&A expenses, these sums collected from the A-E may be credited to the agency's appropriation. The balance of the S&A collection must be deposited into the general fund of the Treasury as a miscellaneous receipt.

FACTS

The Air Force awarded an architect-engineering contract to O'Dell Associates to design a Consolidated Support Center and Softball Complex at Langley Air Base, Virginia. When the design was completed, O'Dell was paid from the Air Force's

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1981 Military Construction appropriation. The Air Force used O'Dell's design to solicit bids and procure a contract for the construction of the Complex and Center.

The Air Force awarded the contract to the Kenbridge Construction Company. The Army Corps of Engineers supervised and administered the project. The construction contract was funded by the Air Force's 1982 Military Construction appropriation. After beginning work, Kenbridge experienced construction problems caused by O'Dell's faulty design. Consequently, Kenbridge was issued a contract modification to cover additional construction expenses incurred to make corrections for the faulty design. The contract modification was also funded from the 1982 appropriation.

Subsequently, O'Dell agreed that it was liable for the faulty design in the amount of $46,324 and it forwarded a check in that amount to the disbursing officer. $40,324 represents the amount paid to the construction contractor to cover the additional expenses it incurred in making the adjustments necessary to compensate for the architect's faulty design. The remaining $6,000 represents compensation for the extra costs of S&A incurred by the Corps. Originally, the S&A expenses were charged to the revolving fund established by the Civil Functions Appropriations Act, 1954, Pub. L. No. 83-153 (July 27, 1953), 67 Stat. 197, 199. The Corps charges S&A expenses against the fund and the fund is later reimbursed from appropriations of the "client" agency. The Corps charges a procuring agency a flat 5-1/2 percent of the contract price for S&A. The 5-1/2 percent rate is calculated so that in the long run the Corps will "break even" in providing supervision and administration of agency projects. Thus, in this case, the Corps charged $2,218 of the additional S&A expenses incurred in supervising and administering the contractor's adjustments to the Air Force's project account. The remaining $3,782 was absorbed by the revolving fund. The disbursing officer deposited the settlement monies into a suspense account pending this decision. The Corps suggests that retention of the recovery here would be consistent with our decision in 62 Comp. Gen. 678 (1983).

DISCUSSION

Early decisions of the Comptroller of the Treasury held that "excess reprocurement costs" recovered from a defaulting contractor need not be deposited in the Treasury as miscellaneous receipts, but could be retained by the agency to fund a replacement contract. 21 Comp. Dec. 107 (1914); 16 Comp. Dec. 384 (1909). The theory was that the money should be used

"to make good the appropriation which will be damaged" by having to incur costs in excess of the original contract price to receive the goods or services that would have been received under the original contract but for the default. 21 Comp. Dec. at 109.

Some years later, without ever explicitly overruling or modifying the earlier cases, decisions began to hold that the recoveries had to be deposited as miscellaneous receipts, and this new rule was then followed consistently for decades.1/ At the same time, the decisions drew a distinction between default situations and situations in which faulty work was discovered after completion of the contract. In the latter situation, the agency could retain the recovery to fund necessary replacement or corrective work, on the theory that payment to the original contractor in excess of the value of satisfactory performance constituted an erroneous payment, and the recovery of erroneous payments has always been treated as a refund to the appropriation originally charged.2/

In 62 Comp. Gen. 678 (1983), we recognized that the distinction between default and defective workmanship should not control the disposition of funds recovered from the original contractor. Modifying several earlier decisions, we held that "excess reprocurement costs" recovered from a contractor, whether occasioned by a default or by defective workmanship, could be retained by the contracting agency to the extent necessary to fund a replacement contract coextensive in scope with the original contract. If the agency could not retain the funds for the purpose and to the extent indicated, it could find itself effectively paying twice for the same thing, or possibly, if it lacked sufficient unobligated money for the reprocurement, having to defer or forego a needed procurement, with the result in many cases that much if not all of the original expenditure would be wasted.

Thus, with respect to defective workmanship cases, the thrust of our 1983 decision was essentially to affirm the holding of decisions such as 34 Comp. Gen. 557, with the additional feature of applying the same result where the recovery, by virtue of factors such as inflation or underbidding,

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1/ E.g., 26 Comp. Dec. 877 (1920); 10 Comp. Gen. 510 (1931); 40 Comp. Gen. 590 (1961).

2/ 8 Comp. Gen. 103 (1928); 34 Comp. Gen. 577 (1955); 44 Comp. Gen. 623 (1965).

exceeded the amount paid to the original contractor. With respect to default cases, we, in effect, returned to both the rule and the rationale of the early Comptroller of the Treasury decisions.

In 64 Comp. Gen. 625 (1985), we gave 62 Comp. Gen. 678 its logical application and held that an agency could use the proceeds of a performance bond forfeited by a defaulting contractor to fund a replacement contract to complete the work of the original contract.

The instant case clearly presents a situation of "defective workmanship" rather than "default." As explained below, we think agency retention of the recovery in this case would have been permissible even prior to 62 Comp. Gen. 678.

Prior decisions permitting agency retention of recoveries from breaching or defaulting contractors have involved either no-year appropriations[3]/ or, where annual appropriations were involved, situations in which the replacement or corrective costs had not yet been paid.[4]/ In either situation, agency retention of the recovery enables the agency to avoid depletion of appropriations that are still available for obligation at the time of the recovery.

For example, 44 Comp. Gen. 623 (1965) involved a "defective workmanship" recovery where the appropriation originally charged was an expired annual appropriation. We said that the recovery "may be credited to the appropriation or its successor ["M"] account." Id. at 626. In that case, however, since the corrective work had not yet been undertaken, crediting the recovery to the successor account would still serve the purpose of avoiding depletion of a current appropriation in view of the established rule that expired appropriations remain available beyond the expiration date to fund a proper

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[3]/ 62 Comp. Gen. 678 (1983) (involved a no-year appropriation, although the decision failed to so state); 34 Comp. Gen. 577 (1955); 16 Comp. Dec. 384 (1909).

[4]/ 64 Comp. Gen. 625 (1985); 44 Comp. Gen. 623 (1965); 8 Comp. Gen. 103 (1928); 21 Comp. Dec. 107 (1914).

replacement contract. This is the same result the Comptroller of the Treasury had reached in 21 Comp. Dec. 107 (1914).5/

The appropriation sought to be reimbursed in this case is the Air Force's 1982 Military Construction appropriation. By its terms, that appropriation is a 5-year appropriation, remaining available until September 30, 1986.6/ While our prior decisions have not dealt specifically with a multiple-year appropriation, we think the result follows logically and directly from those decisions. As noted, where the replacement or corrective costs have not been incurred at the time of the recovery, the decisions have permitted retention by the agency, to the extent necessary to fund the replacement work, regardless of the type of appropriation (annual, multiple-year, or no-year). Where the replacement costs have already been paid and the appropriation from which they were paid is still available for obligational purposes at the time of recovery, the type of appropriation would again make no difference.

Accordingly, we think it follows from decisions such as 34 Comp. Gen. 577 that the $40,324 recovered from O'Dell for additional contractor expenses and $2,218 representing 5-1/2 percent of that additional contract amount which the Corps actually charged the Air Force for S&A expenses need not be deposited in the Treasury as miscellaneous receipts, but may be credited to the Air Force's 1982 Military Construction account.

On the other hand, the $3,782 which represents monies collected for S&A expenses over and above the Corps' actual 5-1/2 percent charge must be deposited into the Treasury as miscellaneous receipts. To allow that portion of the collection to be deposited in the revolving fund would result in an augmentation to that fund. As indicated earlier, the Corps calculates that charging a flat rate of 5-1/2 percent of contract price for S&A expenses will, on the average, cover its actual expenses in providing services. Allowing the Corps to retain collections above its calculated 5-1/2 percent rate would result ultimately in collecting more than actual costs,

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5/ We have not held, nor do we suggest here, that the result would necessarily be the same if the corrective costs had already been paid from an appropriation which, at the time of the recovery, was no longer available for obligation.

6/ Military Construction Appropriation Act, 1982, Pub. L. No. 97-106 (Dec. 23, 1981), 95 Stat. 1503, 1504.

causing an augmentation of the revolving fund. Accordingly, so as to preclude a violation of 31 U.S.C. § 3302, the Corps should deposit the $3,782 into the Treasury as miscellaneous receipts.

for Milton J. Socolar
Comptroller General
of the United States