



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Defense Logistics Agency Multiyear Contract for
Storage and Rotation of Sulfadiazine Silver Cream

File: B-224081

Date: January 15, 1988

DIGEST

Proposed multiyear contract for the supply, storage, and rotation of sulfadiazine silver cream by the Philadelphia Defense Personnel Support Center of the Defense Logistics Agency (DLA) is not permissible. The Antideficiency Act, 31 U.S.C. § 1341(a)(1)(B) (1982), prohibits multiyear procurement, i.e., a procurement which obligates the United States for future fiscal years, without either multiyear or no-year funding or specific statutory authority. The storage and rotation portion of the proposed contract satisfies neither of those conditions. Nothing in 10 U.S.C. § 2306(a) (1982), cited by DLA, constitutes authority for multiyear procurement. A "subject to availability clause" does not permit a multiyear procurement using annual funds.

DECISION

In a recent report of our National Security and International Affairs Division, "Medical Readiness: DOD Can Improve Management of Dated Drug Items Held as War Reserves," GAO/NSIAD-87-38, January 9, 1987, we discussed the procurement of sulfadiazine silver cream by the Philadelphia Defense Personnel Support Center of the Defense Logistics Agency (DLA). The acquisition plan reportedly called for a supply and services contract for a 5-year period with an option for an additional 5-year period. We indicated in our report that while we regarded the services portion of the contract as a worthwhile cost-savings device, we had serious doubts about whether the proposed multiyear contract was legal. In this decision we conclude that DLA does in fact lack authority to enter into a multiyear contract in these circumstances.

BACKGROUND

Under the contract, which was awarded in July 1987, the contractor is required to supply sufficient stocks of the cream to meet DOD's medical needs in case of a sudden emergency. It is also required to store the supplies in its own facilities and to rotate them as necessary in order to

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assure that DOD will always have fresh supplies available. The supply portion of the contract apparently will not extend beyond the first year of the contract. The storage and rotation portion of the contract, however, is to extend for the 5-year life of the contract, with an option for an additional 5 years. The supply and rotation costs are to be funded with annually appropriated Operation and Maintenance funds, which are available for obligation only during the year for which they were appropriated.

ANALYSIS

This Office has no objection to the concept of a multiyear stock rotation contract for medical supplies. We agree with the DLA Competition Advocate's observation that the contract would be innovative, cost-saving, and otherwise beneficial to the government in many respects. Nonetheless, as set forth below, we conclude that DLA lacks the necessary statutory authority to engage in a multiyear procurement of storage and rotation services in these circumstances, notwithstanding the potential benefits to the government.

The authority of all government contracting officers is circumscribed by statutory restrictions on the obligation and expenditure of appropriated funds. All contracting authority, no matter how broadly worded, is limited by these statutory restrictions, in the absence of language indicating a clear intent to make an exception. One of these statutory restrictions is the Antideficiency Act, which provides that no officer of the government may involve the government "in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a) (1)(B) (1982). See FAR, § 32-702. Both the courts and the Comptroller General have held that the Antideficiency Act prohibits multiyear procurement; including a procurement which obligates the United States to pay for severable services to be performed in future fiscal years, without either multiyear or no-year funding or specific statutory authority. See generally, 48 Comp. Gen. 497 (1969). In Leiter v. United States, 271 U.S. 204 (1925), the Supreme Court held that a purported multiyear lease of office space by the Veterans Bureau was binding on the government only for the first year of the lease. The Court held that,

"to make it [the lease] binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease,

making a new lease under the authority of such appropriation for the subsequent year."

Id. at 207.

The Comptroller General has relied on the Leiter case in several subsequent decisions involving "continuing" service contracts. In 42 Comp. Gen 272 (1972), the Comptroller General reviewed an Air Force contract for maintenance services on Wake Island. The contract was for 3 years, but was to be funded with annual funds as they became available. The Air Force contended that the contract was a permissible "requirements" contract because the funds were not obligated in the Air Force's accounts until orders were placed with the contractor. The Comptroller General rejected that contention, pointing out that the services were "automatic incidents of the use of the air field" and no affirmative administrative decision or act was required to obligate the Government for the second and third years of the contract. Id. at 277. See also 33 Comp. Gen. 90 (1953) (Atomic Energy Commission trucking contract for 3 years impermissible); 29 Comp. Gen. 91 (1949) (Food and Drug Administration 3-year lease of publicity film with annual funds impermissible); 28 Comp. Gen. 553 (1949) (Post Office contract for truck servicing and storage with "automatic renewal" provision invalid).

Multiyear procurement, accordingly, is permissible only in two limited circumstances: when multiyear or no-year appropriations are available, at the time the contract is executed, covering the entire period of the government's commitment, or when permitted by specific statutory authority. FAR, § 17.102-1(a). The storage and rotation portion of the Defense Personnel Support Center's sulfadiazine silver cream procurement falls within neither of those categories.

First, multiyear or no-year funds are not available for the storage and rotation portion of the sulfadiazine silver cream contract. As DLA indicates in a June 2, 1987 letter to this Office, that portion of the contract is to be funded with annually appropriated Operation and Maintenance funds, which are 1-year funds. See, e.g., Department of Defense Appropriations Act, 1987, Pub. L. No. 99-591, §§ 101(c), 9006, 100 Stat. 3341, 3341-86, 3341-101 (1986).

Second, there is no statutory authority permitting the use of a multiyear contract in these circumstances. The Congress has provided specific statutory authority for multiyear contracting with annual funds in certain limited circumstances. Two examples of this authority are 10 U.S.C. § 2306(g) (1982) and 10 U.S.C. § 2306(h) (1982). These statutes permit the Department of Defense to enter into

multiyear contracts using annual funds to procure services and supplies in limited circumstances. Subsection (g), which is applicable to certain contracts for services, was enacted specifically in response to the Comptroller General's decision in 42 Comp. Gen. 272 (1962) (Wake Island), discussed above. See S. Rep. No. 1313, 90th Cong., 2d Sess. 1 (1968). Subsection (h), added in 1981, provides authority for the multiyear procurement of weapon systems and related items and services by the Department of Defense in certain prescribed circumstances. In its June 2, 1987 letter to this Office, DLA concedes that neither subsection (g) nor subsection (h) is applicable in the instant case.

DLA advises, however, that since "no other statutory limitations have been located," it concludes "that the broad authority contained in 10 U.S.C. § 2306(a) authorizes this procurement." As discussed earlier, we think that such a statutory limitation is imposed by the Antideficiency Act which, in the absence of express statutory authority to the contrary, precludes multiyear procurement. We conclude that there is nothing in 10 U.S.C. § 2306(a) (1982) which overcomes that prohibition and constitutes authority for multiyear procurement.

Subsection 2306(a) title 10 reads as follows:

"The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to this limitation and subject to subsections (b)-(f), the head of an agency may, in negotiating contracts under section 2304 of this title, make any kind of contract that he considers will promote the best interests of the United States."

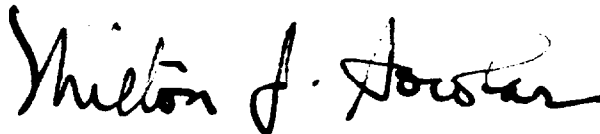
The second sentence of subsection 2306(a) is, in part, a codification of subsection 4(a) of the Armed Services Procurement Act of 1947, Act of February 19, 1948, ch. 65, 62 Stat. 21, 23. The first sentence of subsection 4(a) reads, "Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 2(c) may be of any type which in the opinion of the agency head will promote the best interests of the Government." It is apparent from the context of subsection 4(a) that the phrase "any type of contract" refers to the varying ways in which performance and cost may be structured in government contracts. See generally FAR Part 16, "Types of Contracts." The legislative history of the 1947 Act supports this interpretation. See S. Rep. No. 571, 80th Cong., 1st Sess. 16-18 (1947); H.R. Rep. No. 109, 80th Cong., 1st Sess. 19-20 (1947). An interpretation of 10 U.S.C. § 2306(a) as broad as asserted by DLA would effectively nullify the Antideficiency Act and several other fiscal law limitations.

We cannot find that the Congress intended such a sweeping result.

Contracting officials at DLA sought and obtained from the Director of DLA "deviations" from the requirements of FAR, § 17.103-1(b)(2), which prohibits multiyear contracts when requirements "exceed a 5-year planned program," and FAR, § 17.204(e), which provides that the "total of the basic and the option periods" in the case of service contracts "shall not exceed 5 years." Neither of these FAR sections, however, addresses or implements statutory restrictions on the obligation of appropriations in advance of availability. No deviations were obtained to FAR sections which do implement those statutory restrictions. See, e.g., FAR, § 17.102-1(a); FAR, § 17.103(1)(b)(1), nor could DLA contracting officials have obtained such deviations, because no officer of the government has authority to waive these statutory requirements.

Finally, the inclusion in the contract of FAR clause 52.232-19, "Availability of Funds for the Next Fiscal Year," does not permit multiyear contracting. Inclusion of that clause may permit contracting for a single fiscal year in advance of the enactment of a pending appropriations act in certain circumstances. See, e.g., 39 Comp. Gen. 340 (1959). Such a clause, however, does not permit a multiyear procurement using annual funds. 48 Comp. Gen. 497, 501 (1969). We note that in both the Leiter case and 42 Comp. Gen. 272 (Wake Island), the contracts found to be impermissible included a "subject to availability" clause. The Antideficiency Act covers not only appropriation obligations recordable in the accounts of an agency, but any other obligation or liability which may arise under a contract and "ultimately require the expenditure of funds." Id. at 277.

Accordingly, we recommend that DLA seek specific statutory authority from the Congress to continue this contract beyond the close of the current fiscal year.

for 
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