



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Agency for International Development--
Authority to Pay Claims under Section 636(b)
of the Foreign Assistance Act of 1961

File: B-246211.2

Date: December 7, 1992

DIGEST

1. Section 636(b) of the Foreign Assistance Act of 1961 which authorizes Agency for International Development (AID) to make payments for administrative and operating purposes without regard to laws and regulations governing the obligation and expenditure of funds, does not authorize AID to make payments for employee's claims for personal property losses in excess of the \$40,000 ceiling on such claims set by the Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. § 3221(b).

2. In order to authorize the use of section 636(b) to provide relief to employees of its contractors and grantees, AID must show that successful implementation of the Foreign Assistance Act would be jeopardized if such relief were not provided. AID is not authorized to provide such relief merely because it wishes to treat these employees in the same manner as its own employees.

DECISION

This responds to a request from the Acting General Counsel, Agency for International Development (AID), to resolve a conflict that has arisen between the AID Inspector General (IG) and AID regarding the extent of AID's authority under section 636(b) of the Foreign Assistance Act of 1961, as amended (FAA), 22 U.S.C. § 2396(b). Specifically, we are asked to determine whether AID has authority under section 636(b) to pay (1) claims of its employees for personal property losses in amounts that exceed the \$40,000 limitation established by the Military Personnel and Civilian Employees Claims Act of 1964, as amended (Claims Act), 31 U.S.C. § 3721(b), and (2) claims of employees of AID contractors and grantees for personal property losses.

We conclude that section 636(b) does not authorize AID to pay its employees any amounts that exceed the \$40,000

limitation set forth in the Claims Act. Secondly, section 636(b) does not authorize AID to pay the claims of these non-government employees merely because AID wishes to treat them in the same manner it treats its own employees. There must be a showing by AID that successful implementation of the FAA would be jeopardized if such relief were not provided.

BACKGROUND

AID employees, employees of AID contractors, and employees of AID grantees suffered losses of and damage to personal property in Liberia and Somalia after they were evacuated during political unrest in June 1990 and January 1992, respectively. As of June 30, 1991, AID had received 25 claims from its employees totaling approximately \$1.6 million, an average of about \$64,000 per claim. According to a November 25, 1991, report issued by the AID IG entitled, "Audit of AID's Procedures for Processing Personal Property Claims Submitted by Evacuees from Liberia and Somalia" (AID Audit Report), AID waived the \$40,000 limitation on employee claims set by the Claims Act for 13 of the 22 claims adjudicated as of that date, citing section 636(b) of the FAA as authority for its action. AID also waived the provisions in its regulations setting maximum allowable amounts on types of items. In addition, although AID was not legally obligated to reimburse employees of its contractors and grantees for their losses, AID agreed to use its authority under section 636(b) to pay their claims on the same basis used to pay claims of its own employees.

Issue

Payment for claims against the United States by government employees for personal property losses or damage resulting from evacuation from a foreign country is authorized by the Claims Act, 31 U.S.C. § 3721(b), and regulations issued thereunder. The Claims Act authorizes executive agencies to settle and pay claims of employees up to \$40,000 for damage to or loss of personal property incident to service.¹

However, AID has special authority under section 636(b) of the FAA that allows it to make certain types of expenditures without regard to the laws and regulations that would otherwise govern the obligation and expenditure of funds. Section 636(b) provides as follows:

¹The IG's report concluded that as a result of AID's decision to waive the \$40,000 statutory limitation and the regulations limiting payments by category, the cost to the government was more than doubled in some cases.

"Funds made available for the purposes of this Act may be used for compensation, allowances and travel of personnel including Foreign Service personnel . . . for printing and binding without regard to the provisions of any other law, and for expenditures outside the United States for the procurement of supplies and services and for other administrative and operating purposes (other than compensation of personnel) without regard to such laws and regulations governing the obligation and expenditure of funds of the United States Government as may be necessary to accomplish the purposes of this Act." (Emphasis added.)

The issue before us is whether section 636(b) authorizes AID to pay claims of its employees for personal property losses in excess of the \$40,000 limit in the Claims Act and to pay claims for personal property losses of employees of its contractors and grantees who are not eligible for any recovery under the Claims Act.

AID and IG Positions

AID maintains that section 636(b) provides the authority to pay these claims without regard to the limitations as to amount and eligibility contained in the Claims Act because the losses and resulting hardships suffered by AID-funded personnel (including AID and non-AID employees) in both Somalia and Liberia were "extraordinary" in two respects. First, according to AID, almost all AID-funded personnel in these countries "lost practically all their possessions." Second, private insurance companies in both cases invoked the war clause exclusion in their policies to deny coverage for the losses.

AID contends that for more than 30 years the executive branch has taken the position that mitigating hardships of personnel administering foreign assistance overseas in circumstances such as these is "necessary to accomplish the purposes of" the FAA within the meaning of section 636(b). AID states that this position had its genesis in Executive Order 10893, November 8, 1960,² which expressly permitted the antecedent of section 636(b), section 411(d) of the Mutual Security Act of 1954, as amended, 22 U.S.C. § 1931(d) (1958), to be used "to obviate or mitigate hardship occurring with respect to personnel administering functions under the Act."

²Executive Order 10893 was superseded in 1961 upon the passage of the Foreign Assistance Act of 1961, which contained section 636.

The IG's Office argues that AID has no legal basis to use section 636(b) to settle its employees claims, for several reasons. First, it maintains that payments for losses of personal property constitute "compensation of personnel" within the meaning of that phrase in the parenthetical exclusion of section 636(b) and thus are not authorized under a literal reading of the statutory language. Second, even if this interpretation is not adopted, the IG states that section 636(b) should not have been used here because, contrary to the statutory requirement "there was no showing that the use of section 636(b) was necessary for accomplishing the purposes of the Foreign Assistance Act." AID Audit Report, at 7.

ANALYSIS

While our Office agrees with the IG's conclusions that section 636(b) does not authorize AID to avoid the limitations imposed by the Claims Act, our position is based on a somewhat different rationale. We believe that the Claims Act was intended to govern the maximum amounts payable to all federal employees, including AID employees, who suffer losses of personal property incident to service. An examination of the legislative history of the Claims Act and its various amendments supports our view.

In 1964, Congress provided all executive agencies with statutory authority to address the type of extraordinary losses that in AID's view necessitates resort to the special authority in section 636(b). The Claims Act extended settlement authority, which already existed for military personnel and civilian employees of the military departments, to include claims for personal property losses by all federal civilian employees. Pub. L. No. 88-558, 78 Stat. 767, 768 (1964). The legislative history shows that the purpose of the Claims Act was to compensate individuals who have suffered "heavy personal losses." H.R. Rep. No. 382, 89th Cong., 1st Sess. 6 (1965).

The Claims Act initially allowed agencies to pay up to \$6,500 for personal property losses suffered incident to government service. Amendments to the Claims Act increased the ceiling for payment of claims to \$10,000 in 1965, \$15,000 in 1974, and \$25,000 in 1983. Additionally, in 1980, Congress amended the Claims Act to authorize payment of up to \$40,000 for federal civilian employees and military personnel if their losses in a foreign country resulted from an evacuation due to political unrest. Pub. L. No. 96-519, 94 Stat. 3031-3032 (1980). The basis for this "dichotomy in benefits" was the political concern for our evacuees from Iran and the victims of the attacks upon U.S. embassies in Iran and Pakistan. See H.R. Rep. No. 1037, 100th Cong., 2d Sess. 6 (1988). In 1988, the Claims Act was revised

again to treat all incident-to-service personal property losses the same by setting the maximum amount payable for all claims by military personnel and federal employees at \$40,000, Pub. L. No. 100-565, § 1, 102 Stat. 2833 (1988). This legislation was proposed by the Department of Defense to insure that all military personnel and federal civilian employees were treated equally under the Claims Act for personal property losses incident to service. H.R. Rep. No. 1037 at 6.

The Claims Act was originally enacted to provide a clear, definite and workable statutory authorization for the payment of claims. H.R. Rep. No. 858, 96th Cong., 2d Sess. 5 (1980). We find no indication that Congress contemplated that AID employees would be specially exempted from the Claims Act and the limitations set forth therein. To the contrary, the legislative history of the 1980 amendments to the Claims Act indicates that Congress intended that claims submitted by employees of the three largest foreign affairs agencies, including AID, would be treated uniformly under the legislation. This is demonstrated by the following excerpt from the report of the House Judiciary Committee on the 1980 legislation:

" . . . when the authority to reimburse employees for personal property losses was granted to civilian agencies just over fifteen years ago, it was agreed among the three largest foreign affairs agencies--State, AID and ICA (then USIA)--that the claims program should be administered in such a manner that the employees of those agencies would be treated equally. Accordingly, there are joint regulations which govern the adjudication of claims by all employees of State, AID and ICA. . . . The committee was informed that the joint regulations have provided the means for assuring equitable and uniform claims processing for the large segment of overseas civilian personnel who are employed by these agencies." (Emphasis added.) *Id.* at 6.

Further, regarding AID's assertion that section 636(b) of the FAA authorizes payments for claims that are not covered by the Claims Act in situations such as these because of the magnitude of the losses suffered and the absence of insurance coverage for losses caused by foreign civil disturbances, the 1980 amendments to the Claims Act were made specifically to cover losses that occurred in just such circumstances. The report of the House Judiciary Committee clearly demonstrates this to be the case:

"At the hearing held . . . on February 6, 1980, it was pointed out that the circumstances which

prompted evacuations, and cases where damage resulting from mob violence, terrorist attacks and hostile acts involved instances in which personnel cannot protect their possessions by obtaining insurance. Where employees and military personnel have obtained insurance to protect their belongings in foreign countries, the policies have exclusions for damage resulting from such acts. As a practical matter, for such losses in overseas areas, insurance against the increased risks of loss occasioned by political unrest, civil disorders, and forced abandonment of personal property is simply unavailable. The committee has been advised that, in fact, many Iranian evacuees who thought they had insurance against such risks were shocked and dismayed when they later were informed by their insurance carriers to the contrary.

"The committee has concluded that claims arising from overseas evacuation claims need special legislative treatment because of events such as those which occurred in Iran this past year where numerous United States personnel suffered substantial or total losses of their household goods and personal effects." Id. at 6. (Emphasis added.)

Accordingly, it is apparent that the Claims Act, as amended, contemplates what AID views as the extraordinary circumstances that occurred here. Furthermore, it is clear that Congress intended the Claims Act to apply to losses by AID employees in the same manner and to the same extent it covers losses by all other federal civilian and military personnel. Thus, we see no basis for AID's determination that section 636(b) authorizes it to allow its employees to receive greater benefits than other federal civilian employees or military personnel who suffered personal property losses during the Somalia and Liberia evacuations can receive under the Claims Act.

We recognize that Executive Order 10893, November 8, 1960, provided that AID could use its authority under the antecedent of section 636 (section 411 of the Mutual Security Act of 1954) "to obviate or mitigate hardship" of AID personnel. However, Executive Order 10893, which was superseded in 1961, was issued at a time when executive agencies had no authority to settle claims for personal property losses of civilian personnel. Thus, AID's reliance on this Executive Order as supporting its position that

section 636(b) authorizes AID to override statutory limitations on the right of federal civilian employees to recover for personal property losses, a right which did not exist when the Executive Order was in effect, is misplaced in our view.

While it is arguable that AID could have relied legitimately on section 636(b) to authorize payments to its employees if they had suffered losses of this type at a time when no statutory remedy otherwise existed that would allow for such payments, that argument lost most of its power and force upon the enactment of, and subsequent amendments to, the Claims Act which expressly provides for recovery in such circumstances. We do not believe that section 636(b) provides AID with unique authority to disregard the provisions of the Claims Act which otherwise limit the amounts that may be paid to all federal civilian employees. In this respect, our Office has previously held that section 636(b) authority "was intended to be judiciously applied" and should not be construed as a waiver of or an exception to all laws and regulations relating to the obligation of expenditure of government funds. See B-188968, Oct. 17, 1978. In particular, we do not believe that this authority may properly be used to circumvent laws and regulations to resolve administrative problems that are not peculiar to AID.

The second issue is whether AID is authorized to use its section 636(b) authority to pay the claims of employees of its contractors and grantees for their personal property losses under the circumstances described. The section authorizes AID to make expenditures for administrative or operating purposes without regard to laws and regulations governing the obligation and expenditure of funds if such expenditures are necessary to accomplish the purposes of the FAA. However, AID has not identified any administrative or operating purpose that could not be accomplished without providing financial assistance to these non-AID employees.

Essentially, the only rationale AID offers for paying these claims is that it wishes to treat its contractor and grantee employees in the same manner as its own employees. Although we appreciate AID's desire to provide relief to these employees, it is not authorized to do so merely because it wishes to treat contractor and grantee employees in the same manner as its own employees. There must be a showing that successful implementation of the FAA program would be jeopardized if such relief were not provided. No such showing has been made here. In particular, there is no suggestion of how payments to employees of AID contractors, clearly beyond any obligation of the government under those contracts, contributes in any way to the FAA program.

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If AID believes that employees of contractors and grantees who work on AID projects overseas must be assured of protection against personal property losses, just as federal employees are protected under the Claims Act, the logical way to provide the necessary protection is to include a provision in AID's contractual and grant documents to this effect. Unlike a contract provision, section 636(b) does not provide the employee with any assurance that his or her personal property losses will be reimbursed.

Accordingly, based on the present record, we conclude that AID is not authorized to use section 636(b) to pay the claims of employees of its contractors and grantees in this case.

Milton J. Boston
for Comptroller General
of the United States