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DECISION

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

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FILE: B-133316 DATE: October 31, 1978

MATTER OF: Currency Exchange Rate Fluctuations

DIGEST:

Agency is prohibited by Anti-Deficiency Act from making payments in excess of funding limitations. Fact that limitations must be exceeded to make contract payments because of fluctuation in currency exchange rates and not through fault of agency does not justify exceptions to Act. In such situation, agency must ask Congress for deficiency appropriation.

The Department of the Army has requested our opinion as to whether a violation of 31 U.S.C. 665 (1970), the so-called Anti-Deficiency Act, occurs when, in connection with contract payments to be made in foreign currency, a statutory or regulatory funding limitation is exceeded due to fluctuations in the exchange rates for the foreign currency.

The statute provides that:

> "(a) No officer or employee of the United States shall make or authorize any expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.
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> "(h) No officer or employee of the United States shall authorize or create any obligation or make any [illegible] (1) [illegible] excess

> of an apportionment or reapportionment, or (B) in excess of the amount permitted by regulations prescribed pursuant to subsection (g) of this section."

The Army reports that:

> "The problem arises from the minor construction, repair and maintenance of real property facilities where there are statutory or regulatory limitations or both on the obligation and expenditure of funds for such purposes* * *[A]t the time of entering into the contract, the amount of the contract is within both the statutory and any applicable limitations associated with the work in question. The contract requires payment in local [foreign] currency. Local currency is purchased at the time such currency is required to make payment to the contractor. At some point either during performance of the contract or before final payment to the contractor, due solely to a change in the exchange rate for local currency, payment of the full contract price to the contractor will result in exceeding either the regulatory or the statutory limitation or both."

The Army believes that the statute is not violated in the above situation as it "speaks in terms of an officer or employee of the United States making or authorizing an obligation under an appropriation or fund in excess of the amount available therein" and "certainly no one in the Army could be charged with having authorized or created an obligation or made payment of any sum in excess of the limitation or limitations" as the situation is the result of the workings of the international currency market which the contracting officer could not influence. The Army concludes that:

> "[I]t is our position that even though ceilings subject to [31 U.S.C. 665] may be exceeded, as long as the fund limitation at the appropriation level is observed and the increase in price is caused solely by devaluation of the dollar, payments may be made under the contract and no reports of violation of [31 U.S.C. 665] need be processed. In such situations, it is difficult to believe the Congress intended to have individuals assume responsibility for exceeding limitations where those individuals are not in a position to influence the real cause of the limitations being exceeded."

We cannot agree with the Army's position. The statute prohibits an officer or employee of the United States from making "an expenditure * * * in excess of the amount available" under an appropriation. The Army now proposes to make payments in excess of the appropriation available because ceilings imposed by statute or regulation issued pursuant to 31 U.S.C. 665(g) have been exceeded through no fault of its contracting officers. However, 31 U.S.C. 665 says nothing about why sufficient funds are no longer available; nor is it significant that the contracting officers are not at fault. The statute flatly prohibits such payments from being made.

As the Army suggests, when a contracting officer finds that the dollars required to continue or make final payment on a contract will exceed a statutory limitation he may terminate the contract, provided the termination costs will not exceed the statutory limitations. Alternatively, the contracting officer may issue a stop work order and the agency may ask Congress for a deficiency appropriation citing the currency fluctuation as the reason for its request. In this regard, we note that the general problem of exchange rate fluctuation was the subject of a recent report by this Office entitled "Better Program Management Through Eliminating Exchange Rate Gains and Losses from DOD Budget Process", ID-78-33, April 7, 1978. In the report, we recognized that contracts written in foreign currency had a significant effect on the budget process and stated "that the present method of seeking supplemental appropriations and reprogramming authority is not timely in dealing with the problems caused by fluctuations in the currency rates and it affects the orderly implementation of approved programs." We concluded that "[i]t would be desirable to provide for an alternative funding method to eliminate from the budgetary process exchange rate losses that are not predictable and have adversely affected Defense programs. This would also insure that the Department of Defense does not supplement its appropriations through gains derived from floating currency exchange rates." We recommended that:

> " * * * the Secretary of Defense seek legislative authority to initiate an alternative funding method to eliminate exchange rate gains and losses from the Department of Defense's budgetary process. Such legislation should require that the Secretary of Defense provide the Congress with an annual accounting of exchange rate transactions by country. The Department of Defense would continue to be responsible to its oversight committees for justifying program expenditures covered by the foreign currency transactions."

We note that Title III of the Department of Defense Appropriation Act, 1979, Public Law 95-457, approved October 13, 1978 provides $500,000,000 for transfer by the Secretary of Defense to or from certain appropriations available to the Department of Defense for fiscal year 1979 and thereafter "in order to maintain the budgeted level of operations * * * and thereby eliminate substantial gains and losses to such appropriations caused by fluctuations in foreign currency exchange rates * * *." Thus, it appears that the problems referred to in our report and which have been of concern to the Army should not arise in the future.

R. F. Keller

Deputy Comptroller General
of the United States