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

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SEP 3 - 1969

Dear Mr. Chairman:

Further reference is made to your letter of May 14, 1968, questioning the propriety of the Grand Hotel construction and renovation projects by the United States Army in Nha Trang, Vietnam.

We previously advised you that we had requested a report on the facts of the matter from the Secretary of the Army and that your letter would be given further consideration when such report was received. While an interim report was received here in January of 1969, the final report from the Assistant Secretary for Financial Management was made by letter dated August 4, 1969.

The projects in question were initiated in late 1965 and were carried out for the United States Army by Pacific Architects and Engineers, Inc. At that time it was estimated that to renovate the hotel and annex, construct a 600-man cantonment, install a power plant and electrical distribution system, and to install a security fence would cost a total of $208,423.

Since military construction funds were not available, it is understood that several of the above items were scaled down so that no individual item exceeded $25,000. The costs were to be financed with funds appropriated for "Operation and Maintenance, Army." Arrangements then were made with Pacific Architects and Engineers, Inc., which firm had a cost-plus a-fixed-fee contract to provide repair and utility functions for United States Army facilities in Vietnam, to proceed with the above work. The cost for this work substantially exceeded the above estimates and after $175,000 had been expended, costs for the work apparently including the above $175,000 were charged against "Assistance-in-Kind" funds (local currencies).

The final total recorded cost for the projects was approximately $996,226, including Government-furnished supplies and equipment valued at $294,252.

In our letter to the Secretary of the Army requesting a report in the matter we indicated that we were particularly interested in answers to nine specific questions set forth therein. Those questions and the Department's answers thereto are set out in the Assistant Secretary's letter of January 14, 1969. Pertinent parts of that letter together with our comments thereon, where appropriate, are set forth below.

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"The first question raised by your letter is whether or not any appropriated funds were used. The cost of the work was initially charged to appropriated funds, partially Military Construction, Army, and partially Operation and Maintenance, Army. When it was discovered, late in 1965, that the projects charged to Operation and Maintenance, Army, were in excess of the statutory amount of $25,000, immediate action was taken to cancel work not started and to obtain 'Assistance-in-Kind' funds to cover costs not properly chargeable to Operation and Maintenance, including amounts previously charged. Equipment rental costs of $7,000 remained as a charge to Operation and Maintenance, Army.

"The second question pertained to the source of financing of the Government-furnished materials. These materials were financed in part by Military Construction, Army, in part by Operation and Maintenance, Army, and in part by Assistance-in-Kind funds. As noted above, charges to Operation and Maintenance, Army, were reversed in late 1965 and placed against 'Assistance-in-Kind' funds. More specific information is being requested from Vietnam as to the eventual source of financing of the Government-furnished materials."

The Assistant Secretary in his letter of August 4, 1969, advised us as follows:

"A review has been made of records available in Vietnam and elsewhere concerning the source of funding of the Government-furnished materials. This review disclosed that equipment procured with Military Construction, Army, funds, and utilized in the project, consisted of the following:

3 each 350 KW Generator @ $41,400	$124,200
1 each Air Conditioner	3,475
	$127,675

"There were no records or additional data available to determine the funding of the difference between the MCA procured equipment of $127,675 and the total Government-furnished material of $294,252. As was previously stated, certain of the material was initially charged to Operation and Maintenance, Army, funds, but that charge was reversed in late 1965 and placed

against 'Assistance-in-Kind' funds. Unfortunately, no records or data could be found to indicate whether or not the entire balance of $166,577 was charged to 'Assistance-in Kind' funds."

GAO Comments

See in this connection our comments regarding question 8.

"The next question was whether any U.S. owned foreign currencies were used, and if so, was their use exempted from the provisions of section 1415 of the Supplemental Appropriation Act, 1953. As noted above, certain of the costs of the Grand Hotel work were charged to Assistance-in-Kind funds. These are not U.S. owned currencies, but rather are used by the Government of Vietnam to pay for certain goods and services furnished to the U.S. forces in Vietnam under the Mutual Defense Assistance Agreement of December 23, 1950. In carrying out that agreement, U.S. forces are authorized to procure authorized goods and services directly, with subsequent payment of bills by a disbursing office of the Government of Vietnam. The acceptance of such goods and services in accordance with mutual defense agreements, without specific appropriation, was authorized by section 619 of the Department of Defense Appropriation Act, 1966. Identical sections have appeared in Department of Defense appropriation acts for fiscal years 1967, 1968 and 1969."

GAO Comments

31 U.S.C. 700a

Section 619 of the Department of Defense Appropriation Act, 1966, 79 Stat. 377, referred to by the Assistant Secretary provides, in part, as follows

"* * * agencies of the Department of Defense may accept real property, services, and commodities from foreign countries for the use of the United States in accordance with mutual defense agreements or occupational arrangements and such agencies may use the same for the support of the United States forces in such areas, without specific appropriations therefor: Provided, That within thirty days after the end of each quarter the Secretary of Defense shall render to the Committees on Appropriations of the Senate and the House of Representatives and to the Bureau of the Budget a full report of such property, supplies, and commodities received during such quarter."

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"The fourth question asked our views as to whether the provisions of section 322 of the Economy Act of 1932 were violated, and noted that while that section is inapplicable to leases for the 'foreign services' of the United States, the legislative history shows that the intent was to exclude the 'Foreign Service.' By an opinion dated September 12, 1946, copy of which is attached, The Judge Advocate General of the Army stated the view that the exception as to 'foreign services' in section 322 comprises the officers and employees of various branches of the Government with duty stations abroad. That opinion cited as its basis the decision of January 11, 1933 of the Comptroller General of the United States, which appears at page 486 of Volume 12 of the published decisions. Since we know of no later decision overruling or modifying that decision of the Comptroller General, the Department of the Army has considered it as applicable."

GAO Comments

Section 322 of the Economy Act of 1932, 40 U.S.C. 278a provides as follows--

"After June 30, 1932, no appropriation shall be obligated or expended for the rent of any building or part of a building to be occupied for Government purposes at a rental in excess of the per annum rate of 15 per centum of the fair market value of the rented premises at date of the lease under which the premises are to be occupied by the Government nor for alterations, improvements, and repairs of the rented premises in excess of 25 per centum of the amount of the rent for the first year of the rental term, or for the rental term if less than one year: Provided, That the provisions of this section shall not apply to leases made prior to June 30, 1932, except when renewals thereof are made after such date, nor to leases of premises in foreign countries for the foreign services of the United States: * * *."

While the decision appearing in 12 Comp. Gen. 486 did not directly involve a lease in a foreign country, we agree that what was said therein indicates that leases in foreign countries were exempted from the provisions of 40 U.S.C. 278a.

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"The next question asked for the Army's views as to the propriety of making permanent improvements of foreign leased property when the improvements have a normal useful life far beyond the terms of the lease, and also asked whether the costs in any event should not be restricted to the limited authorization for minor construction contained in 10 U.S.C. 2674. The Department of the Army believes that the propriety of making permanent improvements depends upon the circumstances of individual cases, and that no hard and fast rule applicable to all conditions and circumstances can be stated. Although it might be feasible to utilize the minor construction limitations in 10 U.S.C. 2674 as a rule of thumb, they should not be considered as binding in all events. Circumstances will arise in which military requirements can be met only through the use of leased property, and where, because of time factors or non-availability of proper sites, it is not possible to rely upon new construction. In such cases, the undesirability of making permanent improvements to privately owned property must yield to the necessity for meeting the military requirement.

"The sixth question asked whether or not the establishment of separate projects of less than $25,000 each was a violation of DOD Directive 7040.2, since the lease was for the sole purpose of providing a Field Forces I headquarters. It is not believed that the purpose of the lease is determinative of the question of compliance with DOD Directive 7040.2 in carrying out minor construction projects. The cited directive sets forth certain criteria as to what constitutes a single project within the purview of 10 U.S.C. 2674. For example, it defines a project as a single undertaking involving construction applicable to one or more real property facilities, including all work necessary to accomplish a specific purpose and produce a complete and usable real property facility. Real property facility is defined as a separate and individual building or structure, assigned a 3-digit category code. It is interesting to note that in the Grand Hotel case, there were separate projects under category codes 610, 723, 811, 841, and 872.

GAO Comments

The category codes enumerated above are defined in DOD Instruction 4165.3 as covering the following types of facilities--

610 Administrative Buildings

723 Troop Housing--Detached Facilities

811 Electricity Source (including generating plant)

841 Water-Supply, Treatment and Storage

872 Grounds Fencing, Gates and Guard Towers

While it can be contended that the establishment of separate projects of less than $25,000 each did not violate the literal terms of DOD Directive 7040.2, such action is not consistent with the spirit and purpose of the Directive. These separate projects in and of themselves would have served little purpose, if any. Their primary use was only as a part of the overall purpose of establishing a Field Forces I headquarters.

"The next question asked whether the procurement of materials and supplies in Singapore was a violation of MACV directive 35-1, and whether the Government of Vietnam concurred in such procurement either in advance or subsequently. The procurement in question was actually initially financed by the contractor with U.S. dollars. Later, as indicated above, costs initially covered under the Operation and Maintenance, Army, contract were reversed and charges were made to the Assistance-in-Kind contract. Thus, Assistance-in-Kind funds were not directly used for purchase of materials outside of Vietnam. Although this practice was not specifically recognized under the directive then in effect, it was later recognized by the inclusion in the current version of MACV directive 35-1 of a provision reading 'This does not preclude contractors working under AIK contracts from using their own working capital to finance the purchase of supplies and equipment outside RVN for use in the performance of their AIK funded contract.' Accordingly, it appears that no violation of the directive took place. There is no indication of specific approval by the Government of Vietnam of the purchases in question."

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GAO Comments

Our reason for questioning this transaction is that MAC Directive 35-1 provides that AIK funds are authorized for goods and services available only in Vietnam and may not be used for goods and services provided from sources outside the country. While the language of the Directive in effect at the time of the procurement appears to have been technically violated, there is no corrective action which can be taken.

"The eighth question in your letter asked whether or not any of the provisions of 10 U.S.C. 2674 were violated. Investigation of that aspect of the matter is continuing, and all of the facts necessary to a final determination are not yet available. It is possible that failure to observe the limitations of 10 U.S.C. 2674 could result in a concurrent violation of section 3679, Revised Statutes, which, as you know, is a criminal statute carrying severe penalties. For this reason, we feel that no position can be stated until all facts are at hand and have been reviewed and a final adjudication made. If it is found that section 3679 was violated, a full report will be forwarded to the Office of the Secretary of Defense as required by DOD Directive 7200.1."

GAO Comments

The provisions of 10 U.S.C. 2674 permit the military departments to initiate, without prior congressional approval, the construction of urgently needed projects, including the construction of new facilities and the extension or conversion of existing facilities, costing not in excess of $200,000. Those provisions authorize the expenditure of military construction funds for such projects; however, where the cost of the project does not exceed $25,000 funds appropriated for operation and maintenance may be used. 10 U.S.C. 2674 further provides that projects costing more than $25,000 must be approved in advance by the Secretary of the department concerned and those projects costing more than $50,000 must be approved in advance by the Secretary of Defense.

Since it is reported that the three generators and one air conditioner costing a total of $127,675 were purchased with military construction funds and it is understood that approval by neither the Secretary of the Army nor the Secretary of Defense was obtained for such generating plant (Code 211) it seems evident that such expenditure was made in violation of 10 U.S.C. 2674.

Furthermore, since without such approval, the funds were not available for the purchase of those items for use on this project, it is our view that if the person responsible for making or authorizing the expenditure knew that the items were being procured for this project, he violated section 3679, Revised Statutes, 31 U.S.C. 665, which provides in part that

> "(a) No officer or employee of the United States shall make or authorize an 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."

In the absence of records to establish how much of the amount of $166,577 charged to the appropriation Operation and Maintenance, Army, was subsequently charged to AIK funds we cannot determine whether other projects likewise were in violation of the above provisions of law.

> The last question asked our views as to whether the Government may recover any of the funds involved. There is no evidence, to our knowledge, of any fraud or personal enrichment by any of the persons involved. The final charge to appropriations was adjusted so as to be in accord with all applicable laws. Since the expenditures, both from appropriated funds and Assistance-in-Kind funds, were for the purpose of providing badly needed facilities for the troop strength build-up which occurred in early 1965, and since the Government received the full benefit of such expenditures and the use of the facilities, there appears to be no valid basis for recovery of any funds."

GAO Comments

We agree that, from the facts furnished, there exists no legal basis to recover any of the funds involved from the contractor. The contractor would be justified in assuming that the requisite approvals by the Secretary of the Army or the Secretary of Defense had been obtained.

Sincerely yours,

R.F.KELLER

For the Comptroller General of the United States

The Honorable John L. McClellan, Chairman
Permanent Subcommittee on Investigations
Committee on Government Operations
United States Senate