DECISION

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

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FILE: B-184830 DATE: February 27, 1976

MATTER OF: Newport News Shipbuilding and Dry Dock Company 98550

DIGEST: 1. Allocation of Navy appropriation for DLGN nuclear powered guided missile frigate program between DLGN 41 and DLGN 42, which was based on Navy's budget request and contained in committee reports to 1975 Defense Department Appropriation Act, is not legally binding on Navy since it was not specified in Appropriation Act itself.

2. "Full funding" of military procurement programs is not a statutory requirement, and deviation from full funding does not necessarily or automatically indicate violation of 31 U.S.C. § 665 or 41 U.S.C. § 11.

3. Where exercise of contract option required Navy to furnish various items of Government-furnished property (GFP), but contract clause authorized Navy to unilaterally delete items of GFP and make necessary equitable adjustment, full value of unobligated and undelivered GFP should not be considered an "obligation" as of time of option exercise for purposes of assessing violation of 31 U.S.C. § 665 or 41 U.S.C. § 11. Exercise of DLGN 41 contract option did not violate these statutes since recorded obligations and other binding commitments did not exceed available appropriations.

4. Proviso in Appropriation Act requires DLGN 41 to be "follow ship" of DLGN 38 class. Proviso is not violated since DLGN 41 has same basic characteristics as prior ships of that class, notwithstanding nonincorporation of series of modifications and absent showing that unincorporated modifications would significantly alter those characteristics.

INTRODUCTION

This decision concerns the validity of the exercise of a contract option. For clarity of presentation, we have divided the text into four sections. The first section summarizes pertinent facts and sets forth the relevant chronology. Second is a brief summary of the issues presented. Since the interpretation of the 1975 Defense Department Appropriation Act is of major importance to our decision, the statutory

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provisions and pertinent legislative history have been synthesized in the third section. The fourth section is the body of our decision, containing our analysis of the facts, discussion of authorities, and our conclusions.

I. BACKGROUND AND CHRONOLOGY

On June 25, 1970, the Navy awarded contract number N00024-70-C-0252 to Newport News Shipbuilding and Dry Dock Company of Newport News, Virginia (hereinafter referred to as "Contractor"). The contract provided for preconstruction work on the DLGN 38 nuclear powered guided missile frigate. (*) On December 21, 1971, the contract was modified by Modification P0007 to provide for construction of the first three ships of the class, DLGN 38, 39 and 40. Modification P0007 also contained option provisions for two additional ships, DLGN 41 and 42. Subsequent modification, P00018, revised the option clause (Article 28) and provided for exercise of the DLGN 41 option by written notice given on or before February 1, 1975. The revised Article 28 provides in part:

> "The Contracting Officer may increase the quantity of vessels under this contract by the timely exercise of Option 1 for DLGN 41 and, if Option 1 is exercised, by the timely exercise of Option 2 for DLGN 42 at cost and profit not to exceed a profit-cost envelope defined by the target cost, target profit, target price, share line and ceiling price set forth below.
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> * * * * *
>
> "The Parties agree to negotiate in good faith to reach an agreement as rapidly as possible on the provisions of this contract which require modification in order to express the agreement of the parties as to new option provisions for DLGN 41 and DLGN 42. * * *"

The contract is a fixed-price incentive contract (see Armed Services Procurement Regulation [ASPR] § 3-404.4 [1975]), with provisions for adjustment based on the excess of actual cost over target cost and on

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(*) As of July 1, 1975, the DLGN was redesignated as Guided Missile Cruiser (CGN).

contract escalation (labor and material). Article 28, as revised by Modification P00018, established the profit-cost envelope for the DLGN 41 as follows:

Target Cost	Target Profit	Target Price	Ceiling Price
$76,050,000	$9,691,000	$85,741,000	$100,951,000

The contract also provides for delivery by the Government of property described in the contract as "Government-Furnished Property" (GFP), to be supported by certain Government-furnished information and engineering services. Extracts from pertinent GFP provisions are set forth in Attachment 1.

On February 22, 1974 (Modification P00022), Navy authorized Contractor to expend $35 million for long lead time items relating to the DLGN 41 ("material procurement, shop fabrication and other preliminary work"). The bulk of this authorization was required by Article 28 as a prerequisite to exercising the option. In August 1974, Contractor advised Navy that it considered the DLGN 41 option invalid. Considerable correspondence between Contractor and Navy ensued, with Contractor asserting as many as 11 reasons for the invalidity of the option and Navy consistently maintaining its validity. On January 31, 1975, Navy notified Contractor that it was exercising the DLGN 41 option (Modification P00024).

The parties, on February 3, 1975, entered into a Memorandum of Understanding whereby they agreed to negotiate in good faith to resolve their differences, not to institute any action in any administrative or judicial tribunal, and Contractor agreed to continue performance. The Memorandum specified that it could be terminated by either party after 30 days upon 48 hours written notice. Discussions and the flow of correspondence continued, with both parties maintaining their respective positions. On August 25, 1975, Contractor notified Navy of its intent to terminate the Memorandum and to suspend performance. On August 27, 1975, Contractor requested an opinion from the Comptroller General on the validity of the option exercise.

Two days later, Navy brought suit in the United States District Court for the Eastern District of Virginia, to restrain Contractor from ceasing performance. After oral argument on Plaintiff's motion for temporary restraining order, the parties stipulated to resume performance and payment, and to join in requesting the Comptroller General's opinion, the stipulation to remain in effect for 1 year, unless sooner cancelled or modified by mutual agreement or by order

of the Court. The stipulation was entered as the Order of the Court and the case left open on the docket pending further advice. United States v. Newport News Shipbuilding and Dry Dock Company, and Tenneco, Inc., Civil No. 75-88-NN (E.D. Va., August 29, 1975).

Navy then submitted its report to us, dated October 1, 1975, on the allegations contained in Contractor's August 27 submission. Contractor was given the opportunity to comment on Navy's report, and did so by letter dated November 7, 1975. By letter of November 24, 1975, Navy submitted its rebuttal of Contractor's comments. Contractor advised us that it did not wish to submit any further material and the record was then closed.

II. SUMMARY OF ISSUES

The issues presented for consideration may be grouped under the following headings:

(1) Violation of the Antideficiency Act.

(2) Violation of the Appropriation Act.

(3) Violation of ASPR provisions.

The pertinent portion of the Antideficiency Act, 31 U.S.C. § 665 (1970), provides:

> "(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."

Also relevant is 41 U.S.C. § 11(a) (1970), which provides that:

> "No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Departments of the Army, Navy, and

Air Force, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

Contractor argues, citing authorities, that it has a duty to inquire into the status of the DLGN appropriation. It then points out that, in October 1973, for purposes of the fiscal year 1975 budget estimate, Navy estimated the cost of the DLGN 41 at $268,000,000. In October 1974, for purposes of the fiscal year 1976 budget estimate, Navy estimated the cost of the DLGN 41 at $337,400,000. The difference, $69,400,000, consists of the following:

$15,000,000	--	target price to ceiling price deficit
13,000,000	--	inflation deficit on GFP
41,400,000	--	contract escalation deficit
$69,400,000		

Appropriations for the DLGN 41 prior to FY 1975 totalled $115.7 million. In its FY 1975 budget submission, Navy requested $152.3 million for construction of the DLGN 41 and $92 million for advance procurement funding of the DLGN 42, for a total of $244.3 million. Congress approved the total of the request but without specifying the breakdown in the law itself. Instead the Navy's breakdown was included in committee reports. (See Section III, infra.)

Contractor thus argues that the total appropriation available for the DLGN 41 was $115.7 million plus $152.3 million, or $268 million, which is less than the Navy's FY 1975 cost estimate by $69.4 million. Contractor further points out that Navy has authorized the expenditure of $30.4 million for long lead time activity on the DLGN 42 (Modification P00023), and thus argues in the alternative that, even if the total appropriation available is deemed to be $360 million ($115.7 million plus $244.3 million), the amount available for the DLGN 41 would be at most $329.6 million, which is still less than the Navy's FY 1975 estimate.

Navy, citing its own authorities, asserts that Contractor is under no "duty" to question the adequacy of the appropriation. In any event, Navy points out that its budget estimates relate to the overall DLGN 41 program, not merely to the contract with Contractor, and argues that it had adequate appropriations to cover its contractual obligations. The major elements of this argument are (1) the total appropriation available for the DLGN 41 is $360 million rather than $268 million; and (2) the cost of GFP is not to be included in determining Navy's contract obligations since Navy has specific authority under the contract to delete or decrease items of GFP or to provide items from inventory.

Contractor then states that Navy had estimated the cost of GFP at approximately $166.1 million, and contends that, if substantial deletions are made from this amount, it will be impossible to satisfy the congressional mandate in the 1975 Appropriation Act that the DLGN 41 be constructed as a "follow ship" of the DLGN 38 class (see Section III, infra).

Finally, Contractor argues that the exercise of the DLGN 41 option violated ASPR §§ 1-1505(b) and (c)(1), set forth below:

> "(b) When the contract provides for price escalation and the contractor requests revision of price pursuant to such provision, or the provision applies only to the option quantity, the effect of escalation on prices under the option must be ascertained before the option is exercised.
>
> "(c) Options should be exercised only if it is determined that:
>
> "(i) funds are available; * * *"

The argument apparently is that proper compliance with § 1-1505 would have dictated either non-exercise of the option or price revision.

III. APPROPRIATION LEGISLATION AND LEGISLATIVE HISTORY

It is not disputed that $115.7 million had been appropriated for the DLGN 41 for fiscal years prior to FY 1975. See Hearings on Department of Defense Appropriations for Fiscal Year 1975 Before A Subcomm. of the House Comm. on Appropriations, 93d Cong., 2d Sess., pt. 7, at 705 (1974).

The Navy's budget submission for FY 1975 included $152.3 million for construction of the DLGN 41 and $92 million for long lead time activity for the DLGN 42. Hearings on Department of Defense Appropriations for Fiscal Year 1975 Before a Subcomm. of the Senate Comm. on Appropriations, 93d Cong., 2d Sess., pt. 3, at 34 (1974).

Title I of the Department of Defense Appropriation Authorization Act, 1975, Pub. L. No. 93-365 (August 5, 1974), 88 Stat. 399, 400, provides in pertinent part that "$244,300,000 shall be used only for the DLGN nuclear powered guided missile frigate program." It is beyond question that this amount reflects the budget request. Thus, the House Committee on Armed Services reported as follows:

> "The bill provides $256.0 [sic] million for the guided missile nuclear powered frigate (DLGN) program. Of this sum, $152.3 million is for the completion of DLGN 41, for which the Congress provided long lead time funds last year, and $92.0 million in additional long lead time items for DLGN 42, for which the Congress also provided long lead time funds last year. The Department of Defense will require full funding of the balance of the moneys needed for the construction of DLGN 42 next year."

H.R. Rep. No. 93-1035, 93d Cong., 2d Sess. 22 (1974). See also S. Rep. No. 93-884, 93d Cong., 2d Sess. 74 (1974). The Conference Report points out that the Conference adopted the more specific language of the House (the amounts involved, however, were not in disagreement):

> "Authorization by item for ship construction
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> "The House language sets forth the amounts of money which are authorized specifically and only for each program. The Senate amendment did not include such language.
>
> "The House conferees pointed out the desirability of having better congressional control over shipbuilding funds since in the past many programs have been terminated and the funds transferred to other programs without prior approval of the committees.
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> "The Senate recedes."

S. Conf. Rep. No. 93-1038, 93d Cong., 2d Sess. 22 (1974).

The Appropriations Committees approved the full amount authorized by Pub. L. No. 93-365 for the DLGN program. The House Committee on Appropriations, in its report on the appropriation bill (H.R. 16243), stated:

> "The program recommended will provide . . . $244,300,000 for construction of DLGN 41 and for advance procurement funding for DLGN 42. These ships are to be constructed as follow ships of the Virginia (DLGN 38) Class, * * *"

H.R. Rep. No. 93-1255, 93d Cong., 2d Sess. 120 (1974). The Senate report provides more detail:

"DLGN nuclear powered guided missile frigate.— $152.3 million is recommended for the procurement of one DLGN nuclear powered guided missile frigate. The sum recommended and $115.7 million in advance procurement funds will procure DLGN— 41, the fourth of the DLGN— 38 class. The mission of this class of ships is to operate offensively, in the presence of air, surface or subsurface threats, independently or with nuclear or conventional strike forces and other Naval forces or convoys. The ship is of 11,000 tons displacement with nuclear propulsion and equipped with the Tartar D guided missile system, automatic 5" guns and long range radar. An additional $92.0 million is recommended for the procurement of long-lead-time items for DLGN— 42.

"The funds are recommended on the basis of constructing these two nuclear frigates as sister ships of three DLGN 38— Class frigates now under construction using existing contract options. The authorizing committees have included in the authorizing Act language to limit these funds for this purpose.

"The Navy testified the AEGIS anti-air warfare weapon system, which is currently under development, is being considered for installation on a future class of escort ships intended to escort aircraft carriers. However, the development schedule for AEGIS shows it will be many years before production units suitable for shipboard installation will be available.

"The Committee reaffirms its previous position that construction of nuclear powered submarines and ships should be supported by Congress whenever feasible and in the best interest of the Navy. The Committee considers construction of DLGN 41 and DLGN 42 should proceed now as follow ships of the DLGN 38 Class and not be deferred for years in anticipation of successful development of a hopefully better weapon system.

"The Committee supports the action of the authorizing legislation with regard to construction of DLGN 41 and DLGN 42. Consequently, language has been provided in the bill setting the funds aside for this purpose only."

S. Rep. No. 93-1104, 93d Cong., 2d Sess. 143 (1974).

Against this background, title IV of the Department of Defense Appropriation Act, 1975, Pub. L. No. 93-437 (October 8, 1974), 88 Stat. 1212, 1220, appropriated --

> "for the DLGN nuclear powered guided missile frigate program, $244,300,000, which shall be available only for construction of DLGN 41 and for advance procurement funding for DLGN 42, both ships to be constructed as follow ships of the DLGN 38 class; * * *"

The clause requiring the DLGN 41 and 42 to be "follow ships" of the DLGN 38 class had been proposed by the Senate and was adopted in conference. H.R. Conf. Rep. No. 93-1363, 93d Cong., 2d Sess. 21 (1974).

IV. DISCUSSION AND CONCLUSIONS

At the outset, we see no need to resolve the question of Contractor's duty or lack of duty to inquire into the status or adequacy of the appropriation. At least with respect to our involvement in the matter, Contractor did in fact question the appropriation, the parties stipulated to join in seeking our opinion, and this stipulation was adopted as the Order of the United States District Court.

The main question to address is the amount of appropriations legally available under Pub. L. No. 93-437 for the DLGN 41, that is, whether the full $244,300,000 contained in the Act is available, or whether the subdivision in the committee reports is controlling. In this respect, Contractor presents a logically appealing argument. Since the $244,300,000 was intended to cover two items -- construction of DLGN 41 and advance procurement for DLGN 42 -- and since the Act does not specify how that amount is to be applied between the two items, resort must be had to the legislative history to determine the application. Under this theory, the total amount available for DLGN 41 is $268 million -- the $152.3 million approved for the DLGN 41 for FY 1975 plus the $115.7 million appropriated in prior years.

We have frequently expressed the view that subdivisions of an appropriation contained in the agency's budget request or in committee reports are not legally binding upon the department or agency concerned unless they are specified in the appropriation act itself. 17 Comp. Gen. 147 (1937); B-163058, March 17, 1975; B-164031(3), April 16, 1975; LTV Aerospace Corporation, 55 Comp. Gen. 307 (B-183851, October 1, 1975), 75-2 CPD 203. Cf. B-149163, June 27, 1962. See also our Reports LCD-75-310 and LCD-75-315, January 20, 1975, entitled "Legality of the

Navy's Expenditures For Project Sanguine During Fiscal Year 1974." This is not to say that legislative history is immaterial. It merely recognizes that a degree of flexibility is desirable in the financial operations of Federal departments and agencies, and that Congress may at any time readily restrict that flexibility with respect to a particular item by inserting the desired limitation in the appropriation act. The agency is by no means free to simply disregard an expression in pertinent committee reports. The realities of the annual appropriations process, as well as nonstatutory arrangements such as reprogramming, provide safeguards against abuse.

Our position was stated in B-164031(3), supra, as follows:

> "Our Office has traditionally taken the position that, in a strict legal sense, the total amount of a line item appropriation may be applied to any of the programs or activities for which it is available in any amount absent further restrictions provided by the appropriation act or another statute."

In LTV Aerospace Corporation, supra, our most recent and most exhaustive statement in the area, we considered a restriction in a conference report which stated that $20 million was being provided for a Navy Combat Fighter but that "Adaptation of the selected Air Force Air Combat Fighter to be capable of carrier operations is the prerequisite for use of the funds provided." The appropriation in question was a lump-sum appropriation for "expenses necessary for basic and applied scientific research, development, test, and evaluation." After a detailed discussion of pertinent authorities, including those cited above, we held that the restriction in the conference report was not legally binding since it was not specified in the appropriation act itself. The following excerpts from our LTV decision reflect the rationale for our holding:

> "In this regard, Congress has recognized that in most instances it is desirable to maintain executive flexibility to shift around funds within a particular lump-sum appropriation account so that agencies can make necessary adjustments for 'unforeseen developments, changing requirements, incorrect price estimates, wage-rate adjustments, changes in the international situation, and legislation enacted subsequent to appropriations.' Fisher, 'Reprogramming of Funds by the Defense Department', 36 The Journal of Politics 77, 78 (1974). This is not to say that Congress does not expect that funds will be spent in accordance with budget

estimates or in accordance with restrictions detailed in Committee reports. However, in order to preserve spending flexibility, it may choose not to impose these particular restrictions as a matter of law, but rather to leave it to the agencies to 'keep faith' with the Congress. See Fisher, supra, at 82. As the Navy points out, there are practical reasons why agencies can be expected to comply with these Congressional expectations. If an agency finds it desirable or necessary to take advantage of that flexibility by deviating from what Congress had in mind in appropriating particular funds, the agency can be expected to so inform Congress through recognized and accepted practices.

* * * * *

"Accordingly, it is our view that when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies.

* * * * *

"An accommodation has developed between the Congress and the executive branch resulting in the appropriation process flexibility discussed above. Funds are most often appropriated in lump sums on the basis of mutual legislative and executive understandings as to their use and derive from agency budget estimates and testimony and expressions of intent in committee reports. The understandings reached generally are not engrafted upon the appropriation provisions enacted. To establish as a matter of law specific restrictions covering the detailed and complete basis upon which appropriated funds are understood to be provided would, as a practical matter, severely limit the capability of agencies to accommodate changing conditions.

"As observed above, this does not mean agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore

> such expressions of intent at the peril of strained relations with the Congress. The executive branch -- as the Navy has recognized--has a practical duty to abide by such expressions. This duty, however, must be understood to fall short of a statutory requirement giving rise to a legal infraction where there is a failure to carry out that duty."

As further noted in LTV, it is significant that Congress has explicitly recognized this view. In commenting on reprogramming in its report on the Department of Defense Appropriation Bill for FY 1974, the House Committee on Appropriations stated:

> "In a strictly legal sense, the Department of Defense could utilize the funds appropriated for whatever programs were included under the individual appropriation accounts, but the relationship with the Congress demands that the detailed justifications which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose confidence in the requests made and probably result in reduced appropriations or line item appropriation bills."

H.R. Rep. No. 93-662, 93d Cong., 1st Sess. 16 (1973). This congressional recognition is also implicit in the excerpt from the Conference Report on Pub. L. No. 93-365 quoted in Section III, supra.

Contractor urges that LTV is inapplicable here since LTV involved a lump-sum appropriation whereas the DLGN appropriation is a more specific "line item" appropriation. While we recognize the factual distinction drawn by Contractor, we nevertheless believe that the principles set forth in LTV are equally applicable and controlling here. To be sure, any appropriation which is intended to be available for more than one item and which contains no further subdivision may be said to contain an element of "ambiguity" since it is impossible to tell from the face of the statute how the appropriation is to be allocated among the items for which it is available. However, implicit in our holding in LTV and in the other authorities cited is the view that dollar amounts in appropriation acts are to be interpreted differently from statutory words in general. This view, in our opinion, pertains whether the dollar amount is a lump-sum appropriation available for a large number of items, as in LTV, or, as here, a more specific appropriation available for only two items.

For the reasons discussed above and in the cited authorities, we conclude that the entire $244.3 million was legally available for the DLGN 41 and that the total appropriation available for the DLGN 41 was, therefore, $360 million.

Next, it is important to distinguish between the "full funding" concept and the requirements of the Antideficiency Act. Under the full funding policy applicable to military procurement programs, funding for those programs is requested and provided at their initial stage, on the basis of the entire estimated cost of the procurement regardless of the anticipated fiscal year timing and rate of obligations. See DOD Directive No. 7200.4 (October 30, 1969). Full funding was described by Deputy Comptroller of the Navy RADM E.W. Cooke in recent hearings as follows:

> "By full funding we mean at the time we budget for an item, a ship, we look at the full cost of the ship when it is delivered to the Navy. We look for escalation in the contract during the building years, plus everything it is going to cost until it is delivered, excluding outfitting and post delivery costs, is full funding, and we budget for it that way at the time we submit the request to the Congress."

Hearings on Reprograming Before a Subcomm. of the House Comm. on Appropriations, 94th Cong., 1st Sess. 316 (1975). Full funding is not required for all multi-year contractual activities. Thus, research and development programs are funded "incrementally," that is, appropriations are requested and provided in fiscal year installments limited in amount to the anticipated obligations necessary during particular fiscal years.

On January 9, 1975, the Deputy Secretary of Defense wrote to the Chairman, House Committee on Appropriations, requesting approval to deviate from full funding for the Navy shipbuilding program. The Deputy Secretary noted that strict adherence to full funding would cause the DLGN 41/42 contract options to be missed. The Chairman, on January 13, requested our views on the legality of Navy's request. In our reply to the Chairman, B-133170, January 29, 1975, we stated:

> "As suggested in your letter, implementation of the DOD proposal would, as a practical matter, limit congressional options. Nevertheless, we do not believe that this proposed departure from full funding is legally objectionable as such. The determinative factor here, in our view, is that the full funding policy does not constitute a statutory requirement. It is, instead, a policy developed between DOD and congressional committees and formalized by a DOD Directive. The full funding policy is in this regard similar to formalized but nonstatutory policies which govern reprogramming actions within appropriations for the military departments. * * *

"As noted previously, we assume that under the DOD proposal a number of procurement actions would be initiated in fiscal year 1975 pursuant to the various line item shipbuilding programs. Procurements for certain program elements might still be capable of completion within the limits of appropriations now available, although the total cost of the entire program is not fully funded under current estimates. While initiation of such procurement actions would depart from the full funding policy, this result is not, in our view, legally objectionable for the reasons stated above. However, we believe that serious legal issues would arise to the extent that the DOD proposal might include initiation of procurement actions during fiscal year 1975 which of themselves involve predicted funding deficits. This would be the case with respect to any procurement action which, under current estimates for escalation and inflation, would cause the Government to incur obligations exceeding the amount of appropriations now available for such procurement. * * *"

Considering the procurement actions in light of 31 U.S.C. § 665 and 41 U.S.C. § 11, we noted:

"* * * We perceive of no reason why current agency cost estimates would not constitute an appropriate standard for determining the applicability of 41 U.S.C. § 11.

"For the reasons stated, we believe that the instant DOD proposal is technically subject to legal objection if, and to the extent that, procurement actions initiated during fiscal year 1975 involve, by current estimates, costs exceeding amounts presently available therefor."

It is important to note from the foregoing that (1) full funding is not a statutory requirement, and (2) departure from full funding does not necessarily or automatically indicate a violation of 31 U.S.C. § 665 or 41 U.S.C. § 11.

In 42 Comp. Gen. 272, 275 (1962), we summarized 31 U.S.C. § 665 and 41 U.S.C. § 11 as follows:

"These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the

> Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose; * * *"

The first factor to consider in assessing potential violations of the statutes in question is the recording of obligations pursuant to section 1311 of the Supplemental Appropriation Act, 1955, as amended, 31 U.S.C. § 200, which provides in part:

> "(a) * * * no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of--
>
> "(1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed * * *."

Obligations under contracts of the type here in question are recorded on the basis of target price. We approved this method of recording obligations in 34 Comp. Gen. 418, 420-21 (1955). Thus, the exercising of the DLGN 41 option resulted in the recording of an obligation for purposes of 31 U.S.C. § 200, with respect to Contractor, of $85,741,000.

However, the recording of obligations under 31 U.S.C. § 200 is not the sole consideration in determining violations of 31 U.S.C. § 665 and 41 U.S.C. § 11. B-133170, supra; B-163058, supra. We believe that the words "any contract or other obligation" as used in 31 U.S.C. § 665 encompass not merely recorded obligations but other actions which give rise to Government liability and will ultimately require the expenditure of appropriated funds. In B-163058, supra, we suggested as one example of such action conduct by a Government agency which would result in Government liability under a clear line of judicial precedent, such as through claims proceedings.

Considering the facts of the present case against this background and in the light most favorable to Contractor, we believe the following elements should be counted against the available appropriation:

(1) The target price of the DLGN 41 option, $85,741,000, which was recorded as an obligation under 31 U.S.C. § 200.

(2) Contract escalation (labor and material) and target to ceiling escalation. These are included because exercise of the option by the Navy committed the Government to pay these items even though they may not have initially been recorded as obligations. Since the final amounts cannot be definitively calculated, current estimates must be used, i.e., estimates as of the time of the option exercise. B-133170, supra. Estimates in the record most favorable to Contractor are $70.4 million for contract escalation and $15.2 million for target to ceiling price increase, for a total of $85.6 million.

(3) Navy indicates that, at the time the DLGN 41 option was exercised, $58.55 million of DLGN 41 funds had been obligated (i.e., recorded under 31 U.S.C. § 200) for program work to be performed by parties other than Contractor.

(4) Modification P00023 authorized Contractor to expend $30.4 million for advance procurement for the DLGN 42.

Totaling these items, we have:

$ 85,741,000	--	DLGN target price
85,600,000	--	escalation
58,550,000	--	other contractors
30,400,000	--	DLGN 42 advance procurement
$260,291,000		

Subtracting this from the total appropriation available, $360 million, leaves approximately $100 million.

The decisive factor thus appears to be the extent to which GFP must be included for purposes of 31 U.S.C. § 665 and 41 U.S.C. § 11. Contractor asserts the cost of GFP at $166.1 million (presumably derived by subtracting from the October 1974 estimate of $337,400,000, the sum of target price [$85.741 million], target to ceiling price increase [$15.2 million], and contract escalation [$70.4 million]). Navy does not dispute this figure. Presumably, the $58.55 million obligated to other contractors represents items in the GFP (or related Government-furnished information or engineering services) category, thus leaving $107.55 million. If this entire amount must be added to our previous total of $260.291 million, then the appropriation is exceeded by approximately $7.5 million and the statutes violated.

In order to determine the proper treatment of GFP for the present purposes, it is necessary to examine the nature of Navy's obligation with respect to GFP under the contract. Under General Provision 11(b), Navy may unilaterally decrease GFP to be provided, or may substitute items of GFP, making whatever equitable adjustments to the contract as may thereby become necessary. Navy, in arguing that its GFP obligation cannot violate the Antideficiency Act, makes the following points:

> "(1) There remain three years until scheduled delivery of DLGN-41, during which the Congress may appropriate additional funds for timely new procurement of residual GFP items for DLGN-41 by the Navy. Absence of such funds in hand at present constitutes no antideficiency act violation because no new obligation (contract) has yet been created to procure such GFP items.
>
> "(2) Residual GFP items need not be purchased from extant or future appropriations. Such items can legitimately be furnished by the Navy to Newport News from existing Government inventories (e.g., by removal of ordnance items from ships to be stricken from the register of U.S. Navy Ships).
>
> "(3) Navy duty to furnish enumerated GFP items is not unconditional. It is conditioned upon our right to delete GFP items (granting to or obtaining from Newport News a correlative equitable adjustment). The Navy does not dispute that deletion of such items as the nuclear reactors would not permit Newport News to deliver an operational warship of the DLGN-38 class. No such drastic deletions might be necessary, however; deletion of minor residual items not affecting the essential military characteristics of operational warships of the DLGN-38 class might well be accomplished, thereby preserving available appropriated funds for other commitments or obligations, while faithfully discharging the Navy's GFP duties to Newport News."

Since Navy was not absolutely obligated to furnish all GFP, we do not believe that the full value of all GFP under the contract may be used to assess a violation of 31 U.S.C. § 665 or 41 U.S.C. § 11. Cf. 42 Comp. Gen. 272, supra, wherein we noted:

> "One [item] appears to create a complete and outright obligation for provisioning and maintenance of a large stock

> of specified supplies and for keeping operational a substantial quantity of operating equipment, and although provision is made for apportioning the monthly payment for these services in the event less than the full month's services are required, we see no provision in the contract for eliminating the requirement except by termination of that part of the contract for the convenience of the Government." (Emphasis added.)

Id., at 277. Viewing the situation as of the time of the exercise of the option, it is impossible to determine the exact amount of recorded obligations or other liability to be incurred by Navy under the GFP provisions. Based on the preceding figures, however, it appears that the deletion of approximately $7.5 million of GFP, or approximately 4.5 percent of the estimated total of $166.1 million, would keep Navy within the available appropriation. While it remains possible that future actions by the Navy with respect to GFP might result in sufficient obligations or other Government liability so as to be objectionable under 31 U.S.C. § 665 or 41 U.S.C. § 11, we cannot conclude that such obligations or other liability existed at the time of the exercise of the option.

In view of the foregoing, it is our opinion that the exercise of the DLGN 41 option by Navy on January 31, 1975, did not violate either 31 U.S.C. § 665(a) or 41 U.S.C. § 11(a). To hold otherwise would be to view these statutes as requiring "full funding," which we do not believe to be the case. It would appear to follow that the exercise of the option also did not violate ASPR § 1-1505(c)(i).

There are two main thrusts to Contractor's allegation that the exercise of the DLGN 41 option violated the proviso in Pub. L. No. 93-437 that the DLGN 41 be constructed as a "follow ship" of the DLGN 38 class:

(1) If GFP is substantially decreased from the amount specified in the contract, the resulting ship will not be a "follow ship" of the DLGN 38 class.

(2) Over 300 modifications have been issued in the designs and specifications of the DLGN 38, 39 and 40, which have not been incorporated into the DLGN 41. If these modifications are not for the most part incorporated, the DLGN 41 cannot be a "follow ship."

Contractor thus argues that the appropriation is available only for a follow ship of the DLGN 38 class; that the DLGN 41 as ordered on January 31, 1975, is not such a follow ship; and that therefore the appropriation is not available for the DLGN 41 as ordered under the option.

The parties have urged widely divergent definitions of the "follow ship" concept. Navy contends that the concept requires merely that the ship "have the same basic characteristics as the other ships of the class." Referring to the comments in S. Rep. No. 93-1104, quoted in Section III, supra, Navy submits that the concept requires only that the DLGN 41 be of 11,000 tons displacement, nuclear propelled, and equipped with the Tartar D guided missile system, automatic 5" guns, and long range radar. Navy further submits that modifications on prior ships which have not yet been incorporated into the DLGN 41 are minor in nature and do not alter the basic characteristics which define the DLGN 38 class.

Contractor argues that the "follow ship" concept requires, not only that the DLGN 41 have the same basic characteristics as the preceding ships, but that it incorporate the evolutionary changes made in those preceding ships. Contractor contends that the "follow ship" concept "embraces notions of technological change and economic efficiency," and that if the evolutionary changes are not made, an immense engineering effort will be required on the part of Contractor to modify the plans for the DLGN 40 to conform to specifications for the DLGN 41 as they existed on January 31, 1975.

The record reveals considerable controversy over the unincorporated modifications. Navy points out that, in the August 29 stipulation, it agreed to negotiate in good faith to incorporate all applicable modifications. Contractor notes, however, that Navy had refused to incorporate these modifications prior to the stipulation. Navy states its reason for its refusal as follows:

> "* * * Navy has taken the position * * * that, prior to exercising the option for the DLGN 41 it had no contract right to make changes unilaterally to the specifications of the DLGN 41 (other than for long lead time work). To have done so would have allowed the contractor to argue that in making such changes, the Government had prejudiced its right unilaterally to exercise the DLGN 41 option. * * *
>
> "Navy counsel was concerned that if its [sic] Navy attempted to incorporate the changes unilaterally prior to option exercise Newport News could contend that this invalidated the option since it was not exercised in accordance with its terms."

Contractor counters that it would have been "hard pressed" to assert such an argument since it had requested the incorporation. Each party accuses the other of refusal to negotiate at various stages of the controversy.

The "follow ship" controversy embraces a variety of intricate issues involving the obligations of the parties under the contract, such as whether Navy would have prejudiced its right to exercise the option by incorporating the modifications. We do not consider these issues as before us under the August 29 court stipulation, and believe they are more appropriate for resolution under the "Disputes" clause of the contract. We emphasize that we are addressing only the narrow question of whether the exercise of the option violated the "follow ship" proviso of Pub. L. No. 93-437.

It seems clear that deletions of certain items of GFP would preclude the resulting ship from being a follow ship of the DLGN 38 class. Indeed, certain deletions would make delivery of an operational vessel impossible. Navy recognizes this, for example, in the case of the nuclear reactors. A deletion of this magnitude could very well be deemed a violation of the mandate of Pub. L. No. 93-437. We do not, however, believe that every deletion of GFP would automatically violate the follow ship requirement. Since it is not known at present which GFP items may or may not be deleted -- or indeed if any deletions will be necessary -- any conclusion on our part in this regard would be purely speculative. It is sufficient for purposes of the present decision to note that there have thus far been no deletions of GFP that might amount to a violation of the statutory requirement. In this connection, and in light of our previous conclusion that the entire $244.3 million appropriated for the DLGN program in FY 1975 was legally available for the DLGN 41, it is significant to reiterate that the deletion of only 4.5 percent of the total GFP (or, deducting the $58.55 million obligated, approximately 7 percent of the GFP yet to be obligated) would keep Navy within the available appropriation.

Regarding the incorporation of modifications, Navy argues that its more general definition of "follow ship" is, as noted above, supported by the legislative history of Pub. L. No. 93-437. While not in itself conclusive, the cited excerpt from S. Rep. No. 93-1104 is the only relevant discussion we have found in the legislative history. It thus may be argued that the cited characteristics -- 11,000 tons displacement, nuclear propelled, and equipped with the Tartar D guided missile system, automatic 5" guns and long range radar -- were viewed as defining the DLGN 38 "class." Correspondingly, there is no indication in the legislative history that Congress intended a more restrictive concept.

In hearings on Defense Department appropriations for FY 1976, the following exchange took place between Representative McFall and Admiral Price:

"Mr. McFALL. Your statement says that the need to get the AEGIS system to sea in a firstline ship is critical. Why is it that the AEGIS antiair warfare system cannot be installed in DLGN-42?

"Admiral PRICE. It could be installed on the DLGN-42, sir. However, we have several factors that we would have to consider.

"The first is that there would be an extensive redesign effort required on that ship to put the Aegis in. Therefore, it would not be a DLGN-38 class any more. Since it would not be a DLGN 38 class, the current option which we have would not be valid and the contract would have to be renegotiated.

"In other words, it would be a new contract, with the increased costs and everything that would be involved in that.

"Also, the Aegis development schedule would not provide us with a system to install on a ship until 1980. This would mean that the earliest we would get the DLGN-42 if we installed Aegis on it would be in late 1982 or early 1983; thus we would lose at least 2 to 3 years of the use of this valuable ship.

"The design studies that we have made show that it is cheaper to take the DLGN-42 as it now is and to later backfit the ship with Aegis--if the Navy determines this would be necessary or desirable--than to delay the DLGN-42 to put Aegis on it originally.

"For all those reasons, we do not consider that it would be advantageous at all to delay the ship waiting for Aegis.

"Mr. McFALL. You can put Aegis on there, backfit it?

"Admiral PRICE. Yes; we can backfit it."

Hearings on Department of Defense Appropriations for 1976 Before a Subcomm. of the House Comm. on Appropriations, 94th Cong., 1st Sess., pt. 5, at 954 (1975). While this is of minimal value in illuminating provisions in the 1975 Act, it does, we believe, illustrate the type of problem Congress has been concerned with, i.e., the compatibility of the ship with present and proposed weapon systems and the desirability of immediate construction versus postponement in relation to these systems.

See also Hearings on Department of Defense Appropriations for 1975 Before a Subcomm. of the House Comm. on Appropriations, 93d Cong., 2d Sess., pt 2, at 113 (1974). Rather than evidencing a concern over detailed modifications, it is, in our opinion, more likely that the "follow ship" mandate reflected the congressional decision to proceed with construction of the DLGN 41 on the basis of existing weapon systems, as opposed to postponing construction for several years in anticipation of more advanced systems which could in any event be installed in the future if desired. In addition, we believe the cited excerpt from S. Rep. No. 93-1104 (Section III, supra) supports this interpretation.

While we recognize that the question is not free from doubt, our review of Pub. L. No. 93-437 and its legislative history has not revealed a sufficient basis to dispute the more general concept of "follow ship" advanced by Navy. The record indicates that the ship ordered under the option will meet the general criteria specified in S. Rep. No. 93-1104. Further, Contractor has not shown that any of the unincorporated modifications significantly alter these basic characteristics. Accordingly, we do not find sufficient legal basis to warrant a conclusion that the Appropriation Act was violated.

Finally, with respect to ASPR § 1-1505(b), Navy asserts that it did consider the effect of escalation on option prices. In light of our previous conclusion as to the availability of the $244.3 million appropriated for FY 1975, we perceive no basis to conclude that Navy acted improperly in this regard.

Comptroller General
of the United States

ATTACHMENT 1

EXCERPTS FROM CONTRACT GFP PROVISIONS

ARTICLE 11. GOVERNMENT FURNISHED PROPERTY

(a) The Government shall furnish for use under this contract in accordance with Clause 11 of the General Provisions entitled "Government Property (Fixed Price)" only the property listed in Schedule A Modification No. 7 dated 18 October 1972.

(b) The property furnished under this clause is for the installation or stowage aboard the vessel(s) being constructed under this contract. None of this property shall be used by the Contractor or a subcontractor for any purpose other than that for which such property has been furnished, unless specifically authorized in writing by the Contracting Officer. Specifically, test equipment intended to be provided to the ship, furnished to the Contractor for stowage aboard the ship, shall not be used by the Contractor for any purpose except for those tests required by Section 9670-0 of the specifications.

(c) When the Contractor is authorized to make repairs to Government Furnished Property under the Government Property Clause, Clause 11 of the General Provisions, and the Government considers any item of work to be the responsibility of a third party by reason of a warranty in favor of the Government or otherwise, the Government shall so inform the contractor. In each such case the Contractor agrees to obtain compensation for the performance of such work from such third party and agrees that such compensation shall be in lieu of an equitable adjustment in the price of the contract as provided in the Government Property (Fixed Price), Clause 11 of the General Provisions. If the Contractor is unable to obtain compensation for any such item from such third party, he shall so inform the Government together with the reasons therefor, so that the Government may protect its interest directly against such third party and the Contractor may present a claim for equitable adjustment against the Government in accordance with the said Clause 11 of the General Provisions.

GENERAL PROVISION 11

11. GOVERNMENT PROPERTY (FIXED PRICE).-(a) Government-Furnished Property. The Government shall deliver to the Contractor, for use in

connection with and under the terms of this contract, the property described as Government-furnished property in the Schedule or specifications, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (hereinafter referred to as "Government-furnished property"). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-furnished property suitable for use (except for such property furnished "as is") will be delivered to the Contractor at the times stated in the Schedule or, if not so stated, in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-furnished property is not delivered to the Contractor by such time or times, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay, if any, occasioned the Contractor thereby, and shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by any such delay, in accordance with the procedures provided for in the clause of this contract entitled "Changes." Except Government-furnished property furnished "as is," in the event the Government-furnished property is received by the Contractor in a condition not suitable for the intended use the Contractor shall, upon receipt thereof, notify the Contracting Officer of such fact and, as directed by the Contracting Officer, either, (i) return such property at the Government's expense or otherwise dispose of the property, or (ii) effect repairs or modifications. Upon the completion of (i) or (ii) above, the Contracting Officer upon written request of the Contractor shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by the rejection or disposition, or the repair or modification, in accordance with the procedures provided for in the clause of this contract entitled "Changes." The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government-furnished property or delivery of such property in a condition not suitable for its intended use.

(b) Changes in Government-furnished Property.

(1) By notice in writing, the Contracting Officer may (i) decrease the property provided or to be provided by the Government under this contract, or (ii) substitute other Government-owned property for property to be provided by the Government, or to be acquired by the Contractor for the Government, under this contract. The Contractor shall promptly take such action as the Contracting Officer may direct with respect to the removal and shipping of property covered by such notice.

(2) In the event of any decrease in or substitution of property pursuant to subparagraph (1) above, or any withdrawal of authority to use property provided under any other contract or lease, which property the Government had agreed in the Schedule to make available for the performance of this contract, the Contracting Officer, upon the written request of the Contractor (or, if the substitution of property causes a decrease in the cost of performance, on his own initiative), shall equitably adjust such contractual provisions as may be affected by the decrease, substitution, or withdrawal, in accordance with the procedures provided for in the "Changes" clause of this contract.

(c) Title. Title to all property furnished by the Government shall remain in the Government. In order to define the obligations of the parties under this clause, title to each item of facilities, special test equipment, and special tooling (other than that subject to a "Special Tooling" clause) acquired by the Contractor for the Government pursuant to this contract shall pass to and vest in the Government when its use in the performance of this contract commences, or upon payment therefor by the Government, whichever is earlier, whether or not title previously vested. All Government-furnished property, together with all property acquired by the Contractor, title to which vests in the Government under this paragraph, is subject to the provisions of this clause and is hereinafter collectively referred to as "Government property." Title to Government property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty.