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UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-204388

January 5, 1982

The Honorable Kevin D. Rooney
Assistant Attorney General
for Administration
United States Department of Justice

. Dear Mr. Rooney:

This refers to your letter of August 5, 1981, seeking clarification of our decisions concerning ratification of unauthorized commitments.

You point out that FPR § 1-1.405 (1964 ed. amend. 137) provides for ratification of an otherwise proper contract by a contracting officer where it is determined that such a contract or commitment is one that would have been authorized at the time of award. Yet you note that our decisions appear to authorize ratification in a case where Davis-Bacon Act provisions were ignored (B-197129, December 31, 1979), and where an award was made without regard to the requirements for formal advertising (B-196700, January 9, 1980). On the other hand, you also note that in B-195566, March 17, 1980, we denied payment for printing services rendered outside the provisions of 44 U.S.C. § 501.

You state that our decisions have led you to believe that the determination as to what constitutes an otherwise proper award may be discretionary and more flexible than previously believed by your department. Thus, you ask us to address the meaning of "otherwise proper" as that term is used in FPR § 1-1.405. You advise that of the requirements which must be met before a proper award can be executed, availability of pertinent fiscal year funds is perhaps the most critical, followed by the required determination respecting obtainment of maximum practicable competition.

As you state, FPR § 1-1.405 provides that "otherwise proper contract made by individuals without contracting authority, or by contracting officials in excess of the limits of their delegated authority, may be later ratified." The regulation clearly means that a contracting officer may ratify a contractual commitment only if the contract as ratified would not be contrary to statute or regulation. Turning to B-197129 and B-196700, as examples, the contracts involved in those cases could not be ratified under FPR § 1-1.405, because of the absence of Davis-Bacon Act wage rates in one contract and because of the failure to follow formal advertising in awarding the other contract. The contracts would not have been "otherwise proper" even if they had been ratified by a contracting officer. Similarly, a contracting officer could not properly ratify a contract where fiscal year funds are unavailable.

The decisions cited in your letter are not inconsistent with FPR § 1-1.405. Our decision B-195566, supra, is an example of a case where a statute prohibited procurement of the services in question. There, as you say, a statute prohibited the agency from contracting for printing services. We therefore held that payment was not authorized.

On the other hand, in B-197129, where we allowed payment on the basis of quantum meruit, the agency was not prohibited by any statute or regulation from contracting for the work itself. The resulting contract was improper because of the failure to incorporate the Davis-Bacon Act provisions. In this type of situation, the courts recognize that the contractor is entitled to be paid for the reasonable value of the goods or services furnished to the Government despite the absence of a valid contract. See 40 Comp. Gen. 447 (1961), and the cases cited. Such cases are properly referred to our Office for payment, since ratification under FPR § 1-1.405 would not be authorized.

Our authority to allow payment in such cases is based on 31 U.S.C. § 71, which provides that all claims by and against the Government shall be settled

in the General Accounting Office. Our use of the term "impliedly ratified" in B-197129 and B-196700, merely indicated our finding that the work in both cases had been needed by the agency and a benefit had been received by the Government. We would not have authorized payment if the Government had not benefited from the work.

Finally, you ask about the proper form to be used to effect ratifications. FPR § 1-1.405 requires a written document to effect ratification. FPR § 1-1.208 (1964 ed. amend. 9) defines "contract" as a written commitment which obligates the Government to expend funds, and you state that your agency's position is that ratification must be in the form of a bilateral contract document or some other document listed in that section. We agree. In this regard, we call your attention to the provisions of 31 U.S.C. § 200(a) which specifies the type of documentation necessary to record and support an obligation of the United States (binding agreement in writing). In view of this statutory requirement, we certainly agree that every ratification should be properly documented.

Sincerely yours,

Harry R. Van Cleve
Harry R. Van Cleve
Acting General Counsel