

DECISION



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

FILE: B-211229

DATE: April 24, 1984

MATTER OF: Bureau of Land Management - Reimbursement of
Contract Disputes Act Payments

- DIGEST:** 1. Bureau of Land Management must charge current appropriations, rather than expired appropriation "M" account for reimbursement to permanent judgment appropriation for awards and judgments paid pursuant to Contract Disputes Act. For purposes of reimbursement requirement of 41 U.S.C. § 612(c), a court judgment or monetary award by a board of contract appeals is viewed as giving rise to a new liability.
2. Antideficiency Act violation does not occur when agency has insufficient current appropriations to satisfy award or judgment rendered against it pursuant to Contract Disputes Act. Judicial or quasi-judicial judgments or awards do not involve a deficiency created by an administrative officer and are not viewed as violations of the Antideficiency Act.

This is in response to a request for a decision from Mr. Edward P. Greenberg, an authorizing certifying officer of the Bureau of Land Management (BLM) of the Department of the Interior. Mr. Greenberg requests our advice regarding the availability of appropriated funds to reimburse the permanent judgment appropriation established by 31 U.S.C. § 1304 (formerly § 724a) for contract claims charged against the permanent judgment appropriation in accordance with the Contract Disputes Act of 1978. The claims in question arise from construction contracts negotiated prior to fiscal year 1981. BLM proposes to charge payments to an expired appropriation "M" account, but does not make clear whether it intends to restore any expired surplus obligation authority to the "M" account in order to record the obligation. As discussed below, we conclude that only appropriations current as of the date of the award are available for reimbursement of the permanent judgment appropriation by BLM.

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The Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq. (Supp. IV 1980), established a mechanism for the resolution and payment of claims and disputes arising from contracts of the executive branch. Payment of judgments and awards under the Act is covered by 41 U.S.C. § 612 (Supp. IV 1980) which reads, in part:

"§ 612. Payment of claims

(a) Judgments

Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 724a of title 31.

(b) Monetary awards

Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.

(c) Reimbursement

Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 724a of title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes." (Emphasis added).

Judgments against the United States by the Court of Claims and monetary awards to a contractor by a board of contract appeals are authorized to be paid and charged to the permanent judgment appropriation established by 31 U.S.C. § 1304 (formerly § 724a). The agency must then reimburse the permanent judgment appropriation "out of available funds" or by obtaining an additional appropriation.^{1/}

^{1/} Since the judgment fund is a permanent indefinite appropriation this "reimbursement" does not represent a restoration of, or an increase in, the level of the fund's obligation authority. Instead, it serves to adjust the level of appropriation authority available to the agency for otherwise authorized purposes.

The disputed claims in question arise from BLM building, recreation, and transportation contracts entered into prior to fiscal year 1981. The claims have been presented pursuant to the Contract Disputes Act of 1978, and are expected to total approximately \$1 million. According to BLM, all available appropriated funds for construction are "committed" to projects currently approved and underway, and are not available for the payment of contractor claims. However, BLM proposes to charge the reimbursement to the permanent judgment fund to its expired appropriation "M" account, discussed below, in the event the claims result in judgments or awards in favor of the contractors. An "M" account is a consolidated successor account to which obligated but unliquidated balances of appropriations are transferred on September 30 of the second full fiscal year after the expiration of their availability. 31 U.S.C. § 1552 (formerly § 701). The "M" account is available to liquidate any obligation attributable to any of the appropriations from which it is derived. 31 U.S.C. § 1553 (formerly § 702). See B-114874, September 16, 1975.

Prior to the Contract Disputes Act, monetary awards by agency boards of contract appeals were paid directly by the contracting agency, in the same manner as settlements by a contracting officer still are. A judgment of a court, however, was paid from the permanent judgment appropriation with no requirement for reimbursement. Under this system, the concern developed that agencies might prolong litigation until ultimate resolution by a court, thereby shifting the financial burden from the agency's own appropriations to the General Fund of the Treasury. The Commission on Government Procurement created in 1969 recognized this problem, and recommended in its final report to the Congress in 1972 that court judgments on contract claims be made payable from agency appropriations.

The payment provisions of the Contract Disputes Act (41 U.S.C. § 612, quoted above) are based largely on this recommendation. The use of the permanent judgment appropriation assures a source of funds for prompt payment of final judgments and awards. Promptness in payment is desirable for the Government as well as the contractor, since interest under 41 U.S.C. § 611 runs until the award is paid. The reimbursement requirement fosters agency accountability, and removes any incentive to prolong litigation since it applies to court judgments as well as board awards. Thus, the Contract Disputes Act marked a significant change in the way monetary awards by boards of contract appeals are paid.

In a number of situations involving the administrative settlement of claims against the United States, we have held that payment is chargeable to appropriations current at the time of final action on the award. See, e.g., B-174762, January 24, 1972; 27 Comp. Gen. 237 (1947). This rule is grounded on the theory that the court or administrative award "creates a new right" in the successful claimant, giving rise to new Government liability. See 1 Comp. Gen. 200 (1921). Accordingly, "there is no obligation on the part of the United States for payment of any amount on a claim until a final determination of the Government's liability is made" by the designated authority. 27 Comp. Gen. at 238. We have applied this rule with respect to claims under the Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. § 3721, under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 (1976), and under provisions of the Foreign Service Act of 1946, 22 U.S.C. § 1156(a), 1157(a) (1976), now repealed. See B-174762, January 27, 1972; B-80060, September 30, 1948; 27 Comp. Gen. 237 (1947).

The rule discussed in the preceding paragraph has not been applied to contract claims in the past. Rather, the question in contract claims has been whether the liability stems from a right arising out of the original contract. While we do not disturb this concept as it relates to agency settlements at the contracting officer level, our review of the Contract Disputes Act -- the enhanced status of boards of contract appeals and the apparent congressional intent behind the change in the payment process -- leads us to conclude that reimbursements under 41 U.S.C. § 612(c) should be treated as new obligations.

The legislative history of the Contract Disputes Act supports our conclusion that current funds should be used to reimburse the permanent judgment appropriation pursuant to the Act. The report on the Senate bill included the following explanation for the reimbursement provision:

"In order to promote settlements and to assure the total economic cost of procurement is charged to those programs, all judgments awarded on contract claims are to be paid from the defendant agency's appropriations. If the agency does not have the funds to make the payment the agency is to request additional appropriations from Congress.

"One of the Commission's primary objectives was to induce more resolution of disputes by negotiation and settlement. Requiring the agencies to shoulder the responsibility for interest and payment of judgments brings to bear on them the only real incentives available to induce more management involvement in contract administration and dispute resolution. Either the agencies must use some part of their program funds to pay the interest and the judgment, or they must seek additional funds from Congress for this purpose. The former course can have an impact on current programs; the latter would necessitate an explanation to a congressional committee. While these are negative incentives, they offer some counterpart to the economic considerations a contractor must evaluate in deciding whether to settle a claim or to litigate."

S. Rep. No. 95-1118, 95th Cong., 2nd Sess. 33 (1978).

The report's reference to "an impact on current programs" implies an understanding on the part of Congress that reimbursement of the permanent judgment appropriation was to be made from funds otherwise available for ongoing programs, i.e., current funds.

In commenting on the proposed contract disputes legislation to the House Committee on the Judiciary, we supported the provision that became 41 U.S.C. § 612:

"We favor this approach since it ultimately obligates the agency to account for all awards against it out of its own appropriations. This eliminates the existing incentive for agencies to avoid settlements and prolong litigation in order to have the final judgment occur in court and thus not payable out of its own appropriations. This will also provide availability to Congress as to the true economic cost of procurement programs."

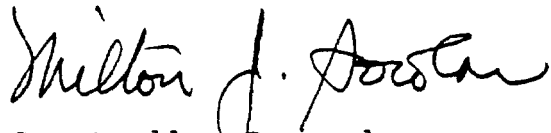
B-107871, August 17, 1977, reprinted in H.R. Rep. No. 95-1556 at 86 (1978). In our opinion, the desired visibility to which we alluded in this comment is best achieved by the use of current funds.

Further, one of the primary objectives of the reimbursement provision "was to induce more resolution of disputes by negotiation and settlement." *Id.* at 33. This objective would be substantially defeated if contracting agencies were allowed to use funds from expired appropriation accounts to reimburse the permanent judgment appropriation. Payment from an expired account could often amount to a mere bookkeeping transaction for an agency. However, charging this payment to current appropriations would typically be of much more consequence to an agency because it could affect the operation of ongoing programs. If an agency knew that an award or judgment would be payable from expired appropriations, it would have little incentive to negotiate and settle claims prior to final adjudication. This is exactly the result Congress sought to avoid with the reimbursement provision.

Accordingly, we conclude that BLM may not charge reimbursements to the permanent judgment appropriation made pursuant to the Contract Disputes Act against an expired appropriation "M" account. Rather, BLM must charge the appropriation account current as of the date of the award or judgment.

Mr. Greenberg has also asked whether a violation of the Antideficiency Act, 31 U.S.C. § 1341, occurs when "an agency is required to seek an appropriation from Congress to reimburse the permanent judgment account and does not receive the appropriation" resulting in a situation in which "current funds are insufficient to cover the Court or contract board's judgment." We conclude that no Antideficiency Act violation would occur in those circumstances. It has been the position of this Office that a judicial or quasi-judicial judgment or award "does not involve a deficiency created by an administrative officer." 1 Comp. Gen. 540, 541 (1922). Accordingly, such an award would not be viewed as violating the Antideficiency Act. 62 Comp. Gen. _____, B-208637, September 29, 1983.

Further, we note that the circumstances in which Congress fails to make additional appropriations out of which a judgment or award could be satisfied would be relatively rare. In our view, the phrase "additional appropriations for such purposes" in 41 U.S.C. § 612(c) refers to any subsequent appropriation available to the agency to pay the claim in question, not necessarily to a specific "line item" appropriation made to satisfy a particular judgment. Accordingly, unless funding for a particular agency function were discontinued by the Congress, it is unlikely that further appropriations to pay a given judgment or award would not ultimately be available.



Acting Comptroller General
of the United States