

DECISION

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

W. J. Bloom
GSM

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FILE: B-214446

DATE: October 29, 1984

MATTER OF: Propriety of vouchers presented for certification

DIGEST:

1. Payment is generally considered to be made on the date a Government check for payment is dated.
2. Certification of a purchase order voucher and issuance of a check prior to services being performed constitutes an advance payment even though the issued check is held in escrow under the Government's control and is not released to the payee until performance is complete.
3. The advance payments of performers and judges at the Siglo de Oro Drama Festival are authorized under 41 U.S.C. § 255 and since the payments are for the contract price, the checks are held in escrow under Government control until services are issued, and the agency head has apparently determined that the advance payments are in the public interest.

The certifying officer for the Southwest Region, National Park Service, Department of the Interior, has requested a decision on whether 31 U.S.C. § 3324(a) and (b) (1982) (formerly § 529) prohibits the certification of payment vouchers for services not yet performed when the issued checks are sent to the vendors in care of a Government agent who releases them under the terms of the purchase orders only after all contract obligations are complete. The question arose when the certifying officer was asked to certify vouchers in connection with the Siglo de Oro Drama Festival sponsored by the Chamizal National Memorial at El

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Paso, Texas.^{1/} The purchase order vouchers were for the services of performers and judges at the festival and were designated as advance payments since the services were to be performed after the issuance of the payment checks. However, under the terms of the purchase order, the performers and judges were only entitled to payment after all services were successfully completed. Although the officer certified the vouchers in the instant case, he requested an opinion on the legality of such action, since the festival is an annual event.

As explained below, 31 U.S.C. § 3324 prohibits the advance of public money unless authorized "by a specific appropriation or other law." A statutory exception to the advance payment prohibition is provided by 41 U.S.C. § 255 which permits such payments where the Government's interest is adequately protected, the agency head has determined that the payment is in the public's interest, and the payment does not exceed the unpaid contract price. We find that the payment procedures for the Siglo de Oro Drama Festival satisfies the requirements of this exception.

We are advised by the Superintendent of the Memorial that festival participants are paid the day after services are rendered. Normally, there is a 30-day wait to process an invoice for payment. The Superintendent contends that imposing a 30-day wait for payment would create financial hardship for the performers and judges and would virtually eliminate their future participation in the festival.

The current procedure is for the Memorial to request an advance payment for the festival participants' services from the National Park Service's Division of Finance. The Division of Finance receives an invoice copy, along with the receiving report copy and the purchase order. If approved, the Division of Finance instructs the Department of the

^{1/} The Department of the Interior was authorized to establish and develop the Chamizal National Memorial in El Paso, Texas, to commemorate the harmonious settlement of the longstanding boundary dispute between the United States and Mexico concerning the Chamizal, an area of land situated to the north of the Rio Grande in the El Paso-Ciudad Juarez region. Pub. L. No. 89-479, 80 Stat. 232, June 30, 1966. Annually, the Chamizal National Memorial sponsors the Siglo de Oro Drama Festival which this year was held from February 27 through March 11, 1984.

Treasury to issue the checks to the vendors for the invoice amount. In addition, Treasury is instructed to send the checks to a designated agent at the Memorial instead of directly to the payees as is customarily done. Upon receipt of the checks at Chamizal, the agent places them in a safe in his custody and holds them in escrow pending performance. On the day following the performances, the Superintendent authorizes the release of the checks in exchange for each performer's or judge's signature on the invoice indicating payment received.

Under this system, even though the festival participants do not receive their checks until after they perform, the invoice must be certified for payment prior to services being rendered. The certifying officer charged with this responsibility is concerned that by so doing, he is in violation of 31 U.S.C. § 3324, the advance payment prohibition, and that he could be held financially liable for any resulting loss. Under existing law, an official who certifies a voucher is responsible for the correctness of the voucher, including the legality of the payment, and is accountable for the amount of any "illegal, improper, or incorrect" payment certified by him. 31 U.S.C. § 3528.

Section 3324 of Title 31 provides in relevant part:

"(a) Except as provided in this section, a payment under a contract to provide a service or deliver an article for the United States Government may not be more than the value of the service already provided or the article already delivered.

"(b) An advance of public money may be made only if it is authorized by--

"(1) a specific appropriation or other law; * * *

In order for us to determine if section 3324 is violated, we must first decide whether the certification of the vouchers and issuing of the checks prior to the rendering of services constitute advance payments since the payees do not receive payment until after all contract obligations are met. If we find that it does, we must then determine if there is a "specific appropriation or other law" that would overcome the advance payment prohibition.

Early Federal cases held that the date of issuance of a Government check was the date of payment. See Lloyd-Smith v. United States, 71 Ct. Cl. 74, 80 (1930); American Potash Co. v. United States, 80 Ct. Cl. 160, 165 (1934); Morgenthau v. Fidelity & Deposit Co. of Maryland, 94 F.2d 632, 635 (D.C. Cir. 1937). That was the position of this Office as well. 31 Comp. Gen. 260, 261 (1952); 18 Comp. Gen. 155, 157 (1938). In 1954 the Court of Claims changed this rule, at least in the context of prompt payment discount. The Foster Co., Inc. v. United States, 128 Ct. Cl. 291 (1954). In Foster, the Court held that the date the vendor received payment was the date of payment for prompt payment discount purposes. This Office extended the Foster rule to cover not only discount provisions but late payment charges, and held that absent a Federal statute or contractual expression the Foster rule would apply. In 61 Comp. Gen. 166 (1981), we emphasized that the question of when payment occurs is best remedied by express contractual provisions. Subsequent to that decision, Congress passed the Prompt Payment Act (Pub. L. No. 97-177, May 21, 1982) to specifically deal with late payment charges and discount provisions. 31 U.S.C. § 3901. Under this Act "a payment is deemed to be made on the date a check for payment is dated." Id. Thus, the general rule is that the payment date is normally considered to be the date on the check.

The Superintendent in his letter indicated that a voucher providing for payment only after performance was in effect a contractual agreement that the check's date would not constitute the date of payment. However, since normally payment is not made until after performance and the voucher was clearly labelled "AN ADVANCED PAYMENT," we do not consider the check as outside the advance payment restriction.

Consequently, in order for the certifying officer to legally approve these invoices, they must fall within an exception to the advance payment prohibition. 31 U.S.C. § 3324.

The appropriation act for the National Park Service contains no provisions that would authorize advance payments. See, e.g., Interior Department and related agencies, appropriations for fiscal year 1984, Pub. L. No. 98-146, 97 Stat. 919, 923-926 (1983). However, a relevant exception to the advance payment prohibition is contained in 41 U.S.C. § 255. It provides:

"(a) Any executive agency may--

"(1) make advance, partial, progress or other payments under contracts for property or services made by the agency; and

* * * * *

"(b) Payments made under subsection (a) of this section may not exceed the unpaid contract price.

"(c) Advance payments under subsection (a) of this section may be made only upon adequate security and a determination by the agency head that to do so would be in the public interest. Such security may be in the form of a lien in favor of the Government on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien shall be paramount to all other liens." (Emphasis added.) See, also, Federal Acquisition Regulations, subpart 32.4 (1984).


Thus, in order to satisfy 41 U.S.C. § 255, the advance payments may not exceed the contract price, adequate security must be provided, and the agency head must determine that the payment is in the public interest. Here all three elements are met.

First, the payments are for the amount stated in the purchase order. Second, adequate security is provided in that the checks are held in escrow under the Government's control until festival participants satisfy their contract obligations. Cf. 56 Comp. Gen. 567 (1977) (proposed escrow account to be maintained outside of Government control does not appear to satisfy the security requirement). In addition, it appears that appropriate safeguards are in place at Chamizal. We note that there is a separation of duties at the Memorial with respect to the payment procedures. See, GAO Standards for Internal Controls in the Fed. Gov. 1983 p. 10. The designated agent is responsible for safeguarding the check; while release of the check is dependent on authorization from the Superintendent.

Finally, the agency head has apparently determined that the advance payments are in the public interest since they

facilitate the hiring of highly qualified participants for the festival.

Accordingly, we find that the certification of the payment vouchers is legally permissible and would not subject the certifying officer to pecuniary liability if all other aspects of the vouchers are correct. However, we would like to make clear that it is the unique circumstances surrounding the Siglo de Oro Drama Festival that allows us to sanction the certification of the payment voucher here. The payment procedures employed by the National Park Service for the festival would be inappropriate for routine payments for goods and services obtained under contract where no legitimate basis for advance payments exists.

for 
Comptroller General
of the United States