DECISION

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

FILE: B-216550 **DATE:** January 29, 1986

MATTER OF: USDA Collection of Excess Advance Deficiency Payments on 1983 Corn and Grain Sorghum Crops

DIGEST:

1. Section 120 of the Omnibus Budget Reconciliation Act of 1982 provided that any debts that might result from advance deficiency payments made to farmers who participated in the 1983 Feed Grain, Rice, Upland Cotton and Wheat Programs were to be repaid to the United States on or before September 30, 1984. However, that provision would not preclude the Department of Agriculture from exercising appropriate discretion to select the best means to collect those debts, including temporary suspension of collection until an administrative offset could be accomplished, pursuant to the Federal Claims Collection Act of 1966, as amended, and the Federal Claims Collection Standards.

2. The decision of the Department of Agriculture to defer the collection of debts arising from excessive advance payments made to farmers who participated in the 1983 Feed Grain, Rice, Upland Cotton and Wheat Programs was not adequately supported by findings and other evidence that complies with the requirements of the Federal Claims Collection Standards.

3. The provisions of section 102.2(e) of the Federal Claims Collection Standards do not excuse agencies that collect debts by administrative offset from the need to send written notices to debtors of amounts owed to the United States, including all the information required by other applicable regulatory provisions.

4. Before it may temporarily suspend the collection of debts pursuant to section 104.2(b)(2) of the Federal Claims Collection Standards, an agency must properly conclude both that the debtor is

presently financially unable to pay the debt, but that his future prospects justify giving him more time, and that future collection can be effected through administrative offset or that the temporary suspension of collection is likely to enhance his ability to pay.

5. Farmers who signed Department of Agriculture form "ASCS-477" in order to participate in the 1983 Feed Grain, Rice, Upland Cotton and Wheat Programs entered into contracts that obligated them to comply with and be bound by agency regulations providing for the assessment of interest (without the need for further notice before interest could accrue) on delinquent debts arising under those programs. Consequently, interest should be assessed and collected (pursuant to the agency's regulations and the Federal Claims Collection Standards) on debts arising under those programs, regardless of the fact that Agriculture has not individually notified each debtor that interest be paid on those debts.

The Inspector General of the United States Department of Agriculture (USDA) has requested our opinion on the propriety of USDA's decision to defer the collection of some debts which were made due on September 30, 1984, by section 120 of the Omnibus Budget Reconciliation Act of 1982 (OBRA), Pub. L. No. 97-253, 96 Stat. 763, 768 (7 U.S.C. § 1445b-2(c) (1982)). The debts arose as a result of what turned out to be overpayments made in advance in 1982 to corn and grain sorghum farmers participating in the 1983 Feed Grain, Rice, Upland Cotton and Wheat Programs. The Inspector General also asks whether the decision to defer the collection of some of the debts was in compliance with the Federal Claims Collection Standards requiring agencies to take timely, aggressive action to collect debts owed to the United States and to assess interest on past due debts. We requested, received and considered the views of USDA on the questions raised.

For the reasons given below, we find that the decision by USDA to defer the collection of the debts from farmers who agreed to participate in the 1984 program did not violate section 120 of ORBA. However, we also find that USDA's method of collecting these deferred debts was inconsistent with the Federal Claims Collection Standards (FCCS). Furthermore these debts were governed by contracts in which USDA's debtors agreed to make payment by a specified date, and to pay interest on any amounts not paid by that date.

BACKGROUND

Under the Agricultural Act of 1949, as amended, 7 U.S.C. §§ 1421 et seq. (1982), USDA (through the Commodity Credit Corporation (CCC) and the Agricultural Stabilization and Conservation Service (ASCS)) administers a variety of programs designed to provide price supports and other assistance to the agricultural sector. Farmers who participate in those programs and comply with the regulations governing them may receive Federal assistance, including loans and direct cash payments. 7 U.S.C. ch. 35A (1982). Among the programs administered by USDA under this authority are the Feed Grain, Rice, Upland Cotton and Wheat Programs for crop years 1982-85. 7 C.F.R. pt. 713 (1984).[1/] Farmers who participate in these programs may be eligible to receive "deficiency payments," which are direct cash awards made when the national average market price for a given agricultural commodity falls below a "target" price established by law. 7 C.F.R. §§ 713.1(a), 713.106, 713.108. Normally, deficiency payments are calculated and paid partway through the marketing year for each particular commodity, i.e., several months after harvest. E.g., S. Rep. No. 504, 97th Cong., 2d Sess. 84 (1982). Deficiency payments to corn and grain sorghum farmers are normally paid "as soon as practicable" after April 1, for the previous year's crop. 7 C.F.R. § 713.108(d)(3).

Section 120 of OBRA required USDA to make estimated deficiency payments in advance of the normal payment dates to farmers who participated in the 1983 crop programs. However, if USDA later determined that the advance payments exceeded the amount of the actual deficiency payments that were due, the participating farmers were required to refund the excess amounts to USDA. By statute, those refunds were due at the end of the marketing year for each particular crop. For 1983 corn and grain sorghum crops, the due date was September 30, 1984. 7 C.F.R. §§ 713.3(h)(3), 713.104(d).

In November 1983, USDA determined that the national average market price for the 1983 crops of corn and grain sorghum would probably exceed the established "target"

1/ USDA did not formally prescribe regulations to implement these programs until Jan. 14, 1983. 48 Fed. Reg. 1679 (1983). (Those regulations were not codified in the Code of Federal Regulations (C.F.R.) until the 1984 edition.) USDA began implementing these programs before the regulations had been promulgated.

prices. Consequently, farmers who received advance deficiency payments for those crops would owe USDA refunds for the full amounts of the advances paid. USDA informed its local offices of these facts, and directed them to advise the indebted farmers of their liability and that refunds would be due and payable on October 1, 1984. The local offices were also directed to remind farmers about the assessment of interest on past due debts arising from the failure to comply with applicable regulations. The local offices were not specifically instructed, however, concerning interest assessments on debts arising from the excessive advance payments. USDA/ASCS Notice No. PA-932 (Nov. 8, 1983).

In March 1984, USDA substantially revised its instructions to its local offices concerning the collection of these debts. It instructed county offices not to issue any further demand letters for repayment of overpayments of advance deficiency payments for corn and grain sorghum and to notify farmers who received demand letters that the demand for refund was being deferred and any late payment charge previously determined would not apply. Existing claims were to be canceled. Instructions on how to reestablish them were to be issued later. After October 1, 1984, any unrefunded advance deficiency overpayments were to be set off against other payments earned by farmers. County offices were also instructed to notify farmers that if they chose to participate in the 1984 crop program, collection of the debts would be deferred until the date the final deficiency payment was determined for the 1984 crop program. For corn and grain sorghum, this date was April 1, 1985. USDA/ASCS Notice No. PA-951 (Mar. 9, 1984).

In August 1984, USDA again revised its instructions to its local offices concerning these debts.[2/] As before, local offices were prohibited from demanding payments, assessing interest, or taking any action other than offset (when and if available) to collect the advance deficiency payments owed by those farmers who signed up for the 1984 crop year programs. This revision provided guidance on reestablishing claims and added that local offices were to take all normal, necessary

---

2/ USDA did issue several other revisions which did not substantially alter the provisions relevant to this case. E.g., USDA/ASCS Notice No. PA-957 (Apr. 7, 1984); USDA/ASCS Notice No. PA-980 (Sept. 17, 1984). Since those other revisions made no relevant changes, they will not be described here.

and appropriate actions to recover the advance payments owed by those farmers who chose not to participate in the 1984 programs. The revision specifically directed local offices to send demand notices and assess interest against nonparticipating farmers on October 1, 1984. USDA/ASCS Notice No. PA-978 (Aug. 21, 1984).

In summary, USDA divided the debts which arose from the 1983 crop advance deficiency payments into two classes: debts owed by farmers who did not participate in the 1984 crop programs, and debts owed by farmers who did participate in the 1984 program. Regarding the first class, USDA initiated prompt, aggressive activities designed to collect these debts as soon as possible. On those debts, demand notices were issued on the first day the debts were past due according to section 120 of OBRA, as were interest assessments; offsets were taken whenever available; and local offices were advised to take all normal debt collection steps. Regarding the second class, however, for 7 months after the debts became past due under section 120, USDA restricted its collection activities to offset when, if ever, it might be available. No demand letters were sent and no interest was assessed until April 1985.

DISCUSSION

1. Was USDA authorized to defer collection of debts made due by statute on September 30, 1984?

Section 120 of OBRA only sets the date on which the refunds owed by farmers who received overpayments of deficiency payments by way of advances became due and payable. It does not preclude USDA from exercising its authority and discretion (pursuant to other applicable laws and regulations) to choose the methods and tools which it reasonably determines are best suited to collect those debts after they become due. In this regard, we note that the FCCS, which implement the Federal Claims Collection Act of 1966, as amended, 31 U.S.C. ch. 37, specifically authorize agencies to defer collection of the full amount of a debt by entering into a voluntary installment repayment agreement (4 C.F.R. § 102.11), collecting the debt in installments by administrative setoff (4 C.F.R. §§ 102.3, 102.4), and suspending collection activity (4 C.F.R. § 104.2). In our opinion, section 120 did not repeal by implication or otherwise limit USDA's preexisting authority to exercise sound discretion under 31 U.S.C. ch. 37 and the FCCS to determine what methods and collection schedule are best suited to recover those debts. Cf. 64 Comp. Gen. 142, 145-46 (1984) (implied repeal not favored). Thus

in certain situations, USDA was authorized to defer until a later date the collection of debts that section 120 of OBRA made due on September 30, 1984.

2. Was USDA's handling of debts owed by participants in the 1984 crop program consistent with the FCCS?[3]

USDA maintains that under its regulations and the FCCS, it may assess interest only on "delinquent debts," which are defined by those regulations as payments that are "overdue in accordance with the terms of an arrangement for payment as provided for in the contract, agreement or notification of indebtedness * * *." See 7 C.F.R. § 1403.2(d); FCCS, 4 C.F.R. § 101.2(b). Thus USDA argues that these debts were not technically "delinquent" since USDA did not issue demands which specified a date by which payment would be past due, and that it was under no obligation to send demand letters earlier than it did. We disagree.

The FCCS require agencies to take "aggressive action on a timely basis with effective follow-up" to collect debts owed the United States. 4 C.F.R. § 102.1. Section 102.2 of the FCCS prescribes the use of prompt, appropriate, written demands. 4 C.F.R. § 102.2.[4] That section provides, as USDA has noted, that "[t]he availability of funds for offset and the agency's determination to pursue it release the agency from the necessity of further compliance with paragraphs (a), (b) and (c) of [section 102.2]." 4 C.F.R. § 102.2(e). However, section 102.2(e) also provides that "[i]f, either prior to the initiation of, or at any time during, or after completion of the demand cycle, an agency determines to pursue offset, then the procedures specified in § 102.3, § 102.4, or

---

[3] That the FCCS apply to USDA, CCC and ASCS is clear. See e.g., 7 C.F.R. § 1.52 (1984) (the FCCS "are applicable to and controlling on" USDA.); CCC Docket No. CZ 161a, § B(II)(A)(2) (Rev. 4, Jan. 13, 1971) (the FCCS "shall be applicable to all claims by CCC regardless of amount."); ASCS Handbook No. 58-FI, "Managing CCC and ASCS Claims," pt. 1, para. 7, at 2 (Rev. 5, Amend. 1, March 10, 1983) ("Authority for managing ASCS and CCC claims is mandated by [the] Federal Claims Collection Standards. * * *").

[4] The regulations of ASCS, for example, adopt the position that written demands should be made "as soon as it is known that a payment is owed to ASCS or CCC." ASCS Handbook, No. 58-FI, supra, para 77.

5 U.S.C. § 5514, as appropriate, should be followed." Id. As was explained in the Supplementary Information Statement that accompanied the publication of the revised FCCS in the Federal Register,[5]/ this section does not eliminate the need to inform the debtor of the nature and amount of his debt, the date the debt is due, the financial consequences of making late payment, and the agency's intention to collect by means of offset unless the debtor works out other satisfactory arrangements. (The notice would also inform the debtor of his statutory right to contest the existence or amount of the debt.) The provisions of section 102.2(e) were intended not to facilitate delays in collection, but rather to create an equitable yet efficient short-cut in the debt collection process.[6]/ Consequently, the provisions of section 102.2(e) do not permit agencies to avoid the requirement for prompt aggressive action by simply choosing not to send any notice of the debt at all and thereby avoid establishment of a due date.

We must also disagree with USDA's implicit conclusion[7]/ that these debts are not created and governed by contracts which prescribe a payment due date. In order to participate in, and receive the benefits of the 1983 crop year deficiency

---

[5]/ 49 Fed. Reg. 8889, 8890 (1984) ("We emphasize that offset, while obviating the need to comply with the specific demand requirements of § 102.2, still requires written notification. The first step in any offset, administrative or salary, must be a written notification advising the debtor of the agency's intent to use offset. Thus, eliminating the need to comply with § 102.2 does not eliminate the need for written notice.").

[6]/ See 49 Fed. Reg. at 8890 ("[D]eviation from the demand cycle of § 102.2 in offset cases does not violate any rights of the debtor. [At the same time, however,] the collection action in such cases need not be anywhere near as detailed as it would be if offset potential did not exist.").

[7]/ In arguing from the applicable regulations that interest may only be assessed on payments that are past due under the terms of a demand letter, USDA overlooks that portion of these regulations which provides that debts are also "delinquent" if payment is past due under the terms of a contract or agreement. 7 C.F.R. § 1403.2(d); 4 C.F.R. § 101.2(b).

programs, farmers were required to sign a form ASCS-477.[8] 7 C.F.R. § 713.50(b)(2)(i). That form obligated those farmers to comply with applicable regulations (7 C.F.R. pt. 713) which specify that refunds of excess advance payments are due by the end of the marketing year--in this case, September 30, 1984 (7 C.F.R. §§ 713.104(d)(1), 713.3(h)(3))--and that payments not timely made would be subject to "late payment charges" specified in the regulations. Consequently, it is our opinion that, even though demand notices were not sent, farmers who participated in the 1983 corn and grain sorghum crops program did enter into contracts that specified the date on which payment was due, and that refunds not paid on or before September 30, 1984, constituted delinquent debts under those contracts, the FCCS, and the regulations of USDA, CCC, and ASCS. See FCCS, 4 C.F.R. § 101.2(b); 7 C.F.R. § 1402(d).

The fact that the governing statute, regulations, and contracts specified September 30, 1984, as the date on which these debts were due and payable is not dispositive, however. The regulations provide two bases on which an agency might delay collection of the full amount of a debt. The first basis involves the use of installment repayment agreements. 4 C.F.R. § 102.11. Under the FCCS, debts are normally to be collected in "one lump sum." 4 C.F.R. § 102.11(a). However, "if the debtor is financially unable to pay the indebtedness in one lump sum, payment may be accepted in regular installments." Id. Agencies which enter into such arrangements are required to obtain financial statements and enforceable written agreements, as well as assess interest on the debt. Id. Since USDA did not take these steps and does not cite this authority, it does not appear that USDA's activities either were intended to (or actually do) fall within the scope of this authority.

The second basis involves suspension of the collection of debts based upon one or more of three different grounds. 4 C.F.R. § 104.2. Two of those grounds, the inability to locate the debtor, and the pendency of a request for waiver or administrative review (4 C.F.R. §§ 104.2(a), 104.2(c)), do not

---

[8] The form ASCS-477, entitled "Notice of Intention to Participate and Application for Payment," provides that, in return for the benefits to be received under the program, the farmer agrees to "comply with the regulations governing the applicable program and payment limitations [and that] overpayments not repaid by the required date will be subject to late payment charges according to regulations (7 C.F.R. 1403)."

seem to be applicable here. The third ground involves the financial condition of the debtor and is addressed in 4 C.F.R. § 104.2(b), which provides:

> "(b) Financial condition of debtor. Collection action may also be suspended temporarily on a claim when the debtor owns no substantial equity in realty or personal property and is unable to make payments on the Government's claim or effect a compromise at the time but the debtor's future prospects justify retention of the claim for periodic review and action, and;
>
> "(1) The applicable statute of limitations has been tolled or started running anew; or
>
> "(2) Future collection can be effected by offset, notwithstanding the statute of limitations, with due regard to the 10-year limitation prescribed by 31 U.S.C. 3716(c)(1); or
>
> "(3) The debtor agrees to pay interest on the amount of the debt on which collection action will be temporarily suspended, and such temporary suspension is likely to enhance the debtor's ability to fully pay the principal amount of the debt with interest at a later date." (Emphasis added.)

USDA maintains that its decision to seek possible future opportunities to collect these debts through administrative offset enabled it to defer other collection activities against its debtors. However, the "catchline" of section 104.2(b) and its use of the conjunction "and" clearly shows that although the availability of future offset activity is relevant to suspension of collection under section 104.2(b), it must be tied to an appropriate evaluation of the financial condition of the debtor (or appropriate class of debtors). It is not clear to us that USDA attempted to apply these criteria in its handling of these debts, nor does USDA cite them in support of its policies in this case.

Instead, USDA states that its decision to collect this class of debts exclusively through the use of administrative offset (and thereby defer for 7 months the use of other appropriate collection activities) "served several policy

purposes" including: (1) increasing the level of participation in the 1984 crop programs; (2) providing farmers with funds to repay their debts; and (3) taking advantage of legislative changes which resulted in 1985 crop program advance payments in October 1985--thus facilitating collection of some of the amounts owed through offset.9/

It is not clear to us how the reasons offered by USDA to justify its collection policies reflect application of the criteria governing suspension of collection under the FCCS.

9/ The second and third reasons offered by USDA are not particularly useful in supporting its position. First, as the FCCS point out, offset generally should not be taken against "advance" payments. Frequently, taking offset against advance payments tends to substantially interfere with or defeat the purposes of the program payments against which offset would be taken. 4 C.F.R. § 102.3(a).

Second, it is difficult to see how the legislation to which USDA here refers actually served as a basis for the decision (made in March 1984) to restrict USDA's collection activities to offset. That statute conditioned the making of advance payments for the 1985 programs upon a determination by USDA that the quantity of surplus corn on hand on September 30, 1985, would probably exceed a designated amount. Pub. L. No. 98-258, 98 Stat. 130, 132-33, § 202 (1984), to be codified in 7 U.S.C. § 1444d(e).

The USDA's Preliminary Regulatory Impact Analysis concerning the 1985 programs (which was issued on May 11, 1984) did not even speculate concerning the determination required by Pub. L. No. 98-258. It wasn't until September 14, 1984 (when the Final Regulatory Impact Analysis for the 1985 program was issued) that USDA made the findings necessary under that act to authorize advance payments for the 1985 programs. Compare USDA Preliminary Regulatory Impact Analysis (1985 Feed Grain Program) (May 11, 1984) with USDA Final Regulatory Impact Anaysis (1985 Feed Grain Program) (Sept. 14, 1984) (incorp. by ref. in 50 Fed. Reg. 1892 (Sept. 14, 1984)). Thus, it seems unlikely that USDA's March 1984 decision to rely solely upon offset was significantly motivated by anticipation of advance payments pursuant to the provisions of Pub. L. No. 98-258.

Certainly, to the extent that USDA could and did legitimately anticipate that offset would be available shortly after, or at any time during the delinquency of these debts, USDA could and should have used administrative offset to collect those debts, to the extent feasible. However, once the specific opportunity for taking offset was gone, USDA should have employed the various other means available to it under the FCCS to promptly and aggressively collect the remaining balances. 4 C.F.R. § 102.1

Finally, we agree with the Inspector General that the interest assessment policies followed here by USDA and its constituent agencies, CCC and ASCS, are not entirely consistent with the FCCS. Compare 7 C.F.R. §§ 713.103(e), 713.104(d)(2), 1403.1 to 1403.6 with 4 C.F.R. § 102.13. We assume that at least some of the inconsistencies may be attributed to the fact that USDA's regulations generally predate enactment of 31 U.S.C. § 3717 and the most recent revision of the FCCS.[10/] However, we need not evaluate the propriety of these inconsistencies in order to resolve the Inspector General's questions because, as was pointed out above, these debts are governed by contracts which explicitly fix the interest policies applicable to them.

The governing contracts, as quoted above, specifically provide that in return for the payments and other benefits available under these programs, the farmers agree to repay past due overpayments with interest and to be bound by and comply with the applicable USDA regulations. Since all of the necessary terms are specified in or ascertainable from these contracts and incorporated regulations, we conclude that USDA was legally entitled to interest on those advance payments or portions thereof that remained unpaid as of October 1, 1984. USDA's failure to issue demand letters to its debtors pursuant to 31 U.S.C. § 3717 and the FCCS does not alter this conclusion, since the requirements of section 3717 and section 102.13 of the FCCS are not applicable to the extent that the governing contract explicitly fixes the applicable interest terms. 31 U.S.C. § 3717(g)(1); 4 C.F.R. § 102.13(i)(1)(iii).

10/ E.g., 7 C.F.R. pt. 1403 (1984) (source: 47 Fed. Reg. 37075 (Aug. 25, 1982)). Note: section 3717 was originally enacted on October 25, 1982 (Pub. L. No. 97-365, § 11, 96 Stat. 1749, 1755-56), and the FCCS were most recently revised on March 9, 1984 (49 Fed. Reg. 8889 (1984)).

We are not aware of anything in the FCCS that would have authorized USDA or its agencies to waive those interest charges under these circumstances. See 4 C.F.R. § 102.13(g). Cf. 49 Fed. Reg. at 8893.

CONCLUSIONS

For the reasons given above, we find that USDA's policies concerning the collection of the debts arising from the advance deficiency payments made for 1983 corn and grain sorghum crops did not violate section 120 of OBRA. However, those policies were not consistent with the provisions of the FCCS, in that USDA failed to take timely, aggressive, and effective action to collect those debts owed to the United States by farmers who participated in the 1984 Feed Grain Programs. We also find that, despite its failure to send appropriate notices which advised those debtors of their liability for interest charges, USDA is legally entitled to, and should take, appropriate steps to recover interest assessments on those debts pursuant to the governing contracts.

Milton J. Socolar

Acting Comptroller General
of the United States