

DECISION

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

FILE: B-219474

DATE: August 18, 1986

MATTER OF: Liability for Prompt Payment Interest Penalties
Under Interagency Agreement

DIGEST: Provision in interagency agreement between Federal Emergency Management Agency (FEMA) and General Services Administration (GSA) required FEMA to reimburse GSA for "expenses incurred by GSA in providing the requested assistance." Under this provision, FEMA should reimburse GSA for interest penalties incurred under Prompt Payment Act, since late payment interest is an ordinary business expense and thus within scope of reimbursement provision. 63 Comp. Gen. 338 (1984) distinguished.

In separate submissions, officials of the Federal Emergency Management Agency (FEMA) and the General Services Administration (GSA) have sought our opinion regarding which agency is ultimately liable for late payment interest penalties owed to a private contractor under the Prompt Payment Act. The contract under which these interest penalties were incurred was executed by GSA on behalf of FEMA, pursuant to an interagency agreement between the two agencies. For the reasons given below, we find that FEMA must reimburse GSA for the interest penalties at issue.

BACKGROUND

Under the Disaster Relief Act of 1974, GSA and FEMA entered into an interagency agreement intended to assist FEMA in carrying out its responsibilities in the event of a disaster. In that agreement, GSA agreed to provide various services at FEMA's request. The relevant portion of the interagency agreement states:

"III. PROVISION OF ADMINISTRATIVE SERVICES BY GSA

"GSA, upon the request of [FEMA], shall provide a full range of administrative services and materials in order to support the disaster field operation. These services ordinarily shall include:

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"E. Procurement support. This will be provided in accordance with GSA procurement regulations * * * which provide for appropriate waivers from 'sole source' restrictions in emergency or disaster situations. It is understood that GSA Contracting Officers will perform this function and frequently the services will be required at the disaster field location."

In return for GSA's assistance, Part V of the agreement provides:

"C. Reimbursement. Expenses incurred by GSA in providing the requested assistance * * * shall be reimbursed [by FEMA] and shall be applicable to both emergencies and major disasters."

According to the submissions, pursuant to the interagency agreement, GSA entered into a contract with a private contractor named Wholesale Distribution. Apparently due to administrative error on the part of GSA, the contractor was not paid in a timely fashion and filed a claim for interest penalties under the Prompt Payment Act. GSA billed FEMA for the interest penalties incurred in this case. FEMA, citing 63 Comp. Gen. 338 (1984) as support, has disputed its liability, arguing that the penalties were incurred due to administrative error on the part of GSA, a matter over which it has no control.

When we received these requests, we requested comments from the Office of Management and Budget (OMB). OMB advised us that in its opinion, FEMA must accept responsibility for the payment of interest penalties resulting from contracts executed by GSA under the interagency agreement. Nevertheless, OMB added that GSA should take whatever actions are necessary to "eliminate inefficient and ineffective procedures" that may have caused the late payments and interest penalty charges in this case.

DISCUSSION

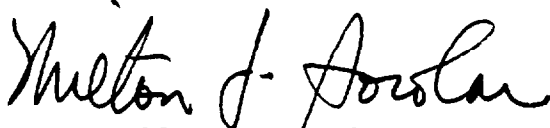
The Prompt Payment Act, 31 U.S.C. ch. 39 (1982), generally requires a Government agency to pay "interest penalties" when it fails to make timely payment for goods or services. Interest penalties are to be paid "out of amounts made available to carry out the program for which the penalty was incurred." 31 U.S.C. § 3902(d). GSA and OMB construe this language to mean that FEMA, as the agency whose programs

were being implemented (with the assistance of GSA), must be liable for the interest penalties incurred in this case. There is, however, as FEMA points out, no "privity" between FEMA and the GSA contractor. In other words, the contractor lacks any basis on which to press a claim against FEMA because it has no contractual relationship with FEMA. Cf. 63 Comp. Gen. at 340. Moreover, as FEMA argues, the agreement did not call upon GSA to deal with contractors in an untimely fashion. Therefore, since late payments occurred through the fault of GSA, FEMA argues GSA must bear the costs.

Nevertheless, we agree with GSA and OMB that FEMA must bear the ultimate liability for the interest penalties incurred in this situation. As quoted above, the agreement provides that FEMA will reimburse GSA for "[e]xpenses incurred by GSA in providing the requested assistance * * *." This language should be construed, according to its plain, ordinary meaning, to contemplate ordinary business expenses that might be incurred in performing the obligations described in the agreement. Interest on a late payment is in the nature of an ordinary business expense. As such, we think it falls within the scope of the reimbursement provision of the agreement.

FEMA's reliance on our decision in 63 Comp. Gen. 338 is misplaced. In that decision we noted that even though the Department of Treasury was "at fault" in failing to issue a check to a contractor within the contractually stipulated discount period, the contracting agency would have to bear the cost of the lost discount because Treasury did not have a contractual relationship with the contractor. The decision noted parenthetically that most of the services there at issue were acquired before passage of the Prompt Payment Act and therefore did not discuss the Act's provisions. In this case, as in 63 Comp. Gen. 338, the contracting agency is obligated to pay additional amounts to the contractor for untimely payments. However, the difference between the two cases is that FEMA agreed to reimburse GSA for its expenses. There was no such agreement in the earlier case and therefore no obligation on the part of Treasury to reimburse the contracting agency.

In view of the foregoing, we conclude that FEMA, under the agreement must reimburse GSA for the interest penalties incurred in this case.

for 
Comptroller General
of the United States