



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dr. Edward Margulies
File: B-224687
Date: March 9, 1987

DIGEST

A physician who contracted with Indonesia to perform health-related services, and who was paid by funds granted to Indonesia by the United States Agency for International Development, arranged with a freight forwarder to move his personal effects from the United States to Indonesia. The physician's contract provided that he would not be reimbursed for using foreign air carriers if U.S. air carriers were available, but the forwarder did not use available U.S. air carriers. Since the contract provision was based on the requirements of the Fly America Act, which precludes payment of U.S. funds for international air transportation on foreign air carriers where U.S. air carriers are available, the physician may not be reimbursed for the use of the foreign air carrier. Further, there is no authority to permit waiver of the act in this case.

DECISION

The question in this case is whether the Fly America Act may be waived so that the United States Agency for International Development (AID) may reimburse an AID-financed contractor who paid for the use of a foreign air carrier in the international air transportation of his personal effects.^{1/} Since the Fly America Act precludes expenditures of U.S. Government funds for the use of a foreign air carrier in international air transportation where there is no justification to demonstrate the necessity for it, and no justification has been shown in this case, AID may not reimburse the contractor.

BACKGROUND

Dr. Edward Margulies contracted with the Ministry of Health of Indonesia to provide his services in furtherance of a

^{1/} This responds to a request for a decision from Richard McClure, the Controller for AID in Jakarta, Indonesia.

health improvement project financed by funds granted by AID to Indonesia. The contract between the Indonesian agency and Dr. Margulies, the contractor, reflects certain conditions that AID imposed in connection with the granted funds. The contract provided that Dr. Margulies would be reimbursed for moving his personal effects from the United States to Indonesia, but that he had to use U.S. air carriers if they were available. The contract provided a definition of availability and also included a formula for determining the amount Dr. Margulies would not be reimbursed if he impermissibly used foreign air carriers.

AID informed us that contractors in grant projects of this nature make their own transportation arrangements for moving their household effects from the United States to the country involved without assistance or instructions from AID in dealing with the movers. Therefore, the mover selected by the contractor would not necessarily be informed of any transportation requirements involving the sole use of U.S. air carriers that would apply, even though the mover's bills are presented directly to AID for payment. The responsibility thus rests with the contractor to inform the mover of those requirements.

In this case Dr. Margulies indicates that he instructed the mover, a freight forwarder, to use only American carriers in the transportation of his personal effects, but the forwarder used a foreign air carrier to take the effects from Honolulu through Hong Kong, Singapore, and then to Jakarta. AID's office in Jakarta paid only \$163.28 out of the forwarder's total bill of \$616.59 because AID determined that a U.S. air carrier had been available from Honolulu through Tokyo to Hong Kong, with a change to a foreign air carrier only being necessary for the last part of the trip from Hong Kong to Jakarta. The \$453.31 difference was determined under the liability formula in the contract. The forwarder's agent in Jakarta still had possession of Dr. Margulies' personal effects when AID refused payment of the total bill, and the agent would not release the effects until he paid the \$453.31 difference. He did pay that amount and now requests reimbursement from AID, suggesting that in the circumstances there should be a waiver of the provisions contained in his contract relating to the requirement that he use U.S. air carriers.

ANALYSIS AND CONCLUSION

When an agency in furtherance of an agreement, such as the health improvement project in this case, obtains international air transportation and pays from funds " * * * appropriated, owned, controlled, granted, or conditionally

granted * * *," the Fly America Act, 49 U.S.C. App. § 1517, prohibits the use of any of those funds for a foreign air carrier unless U.S. air carriers are unavailable. The act applied to the transportation of Dr. Margulies' personal effects paid for by the funds AID granted in this case. The provision in the contract between the Ministry of Health of Indonesia and Dr. Margulies requiring him to use U.S. air carriers was not negotiable but was instead simply the means AID used to inform him of the mandatory requirements of the act. Although he indicates that he did make an attempt to fulfill the requirement by instructing the forwarder to use U.S. air carriers, because there were no U.S. air carriers offering direct cargo service from Honolulu to Jakarta the forwarder instead apparently followed the usual commercial practice of picking the most expeditious service offering the fewest plane changes. Dr. Margulies has not furnished a copy of the instructions he gave to, or the agreement he had with, the forwarder, and it is not clear from the record before us what mutual understanding may have existed between them in the matter.

It is our view that AID in any event had no choice but to apply the Fly America Act when the forwarder's bill was presented and when Dr. Margulies later applied for reimbursement. The act requires the disallowance of any expenditure for international air transportation by a foreign air carrier in the absence of satisfactory proof of necessity therefor. AID's determination of U.S. air carrier availability, without any other extenuating circumstances, precludes such a finding of necessity. Furthermore, there is no provision in the act for waiver of its requirements.^{2/} Therefore, Dr. Margulies may not be reimbursed by AID.



for Comptroller General
of the United States

^{2/} See Jasinder S. Jaspal and Claude A. Goode, 60 Comp. Gen. 718 (1981); and Arnold J. Jacobius, B-186007, November 15, 1976. In addition, the liability imposed under the formula contemplated by and prescribed through regulation under the act cannot be waived. See, generally, Arthur R. Thompson, 56 Comp. Gen. 209 (1977).