**Comptroller General**
**of the United States**

**Washington, D.C. 20548**

B-250941.2

February 19, 1993

The Honorable Olympia J. Snowe
Ranking Minority Member
Subcommittee on International
Operations
Committee on Foreign Affairs
House of Representatives

Dear Ms. Snowe:

We refer to your letter of September 30, 1992, concerning construction costs incurred by the Department of the Navy under a contract with Entrecanales Y Tavora, S.A., to build the United States pavilion for the Seville Expo. The Navy procured and administered the contract for the United States Information Agency pursuant to an interagency agreement.

During discussions with our evaluators, House Committee on Foreign Affairs staff members asked us to determine (1) who was responsible for approximately $2 million in construction costs that exceeded the amount USIA had budgeted and authorized the Navy to spend under the agreement, and (2) whether the Navy or USIA should pay for those excess construction costs. USIA has suggested that the Navy improperly allowed the contractor to spend more money than USIA had authorized, and that the Navy therefore should pay that excess.

In our view, both agencies, in attempting to insure timely completion of the Pavilion under difficult circumstances, contributed to the additional costs. For the reasons discussed below, we believe that the contract costs should be paid out of USIA funds, subject to review by the Defense Contract Audit Agency.

## Background

In mid-June 1990, USIA approached the Navy about accepting construction management responsibility for the Pavilion. The Navy, however, was reluctant to do so because of the short construction time-frame; the lack of detailed plans, specifications and, at that point, exhibitors; and uncertainty about the project's costs. Nevertheless, after further consideration the Navy informally agreed to undertake the construction management role, and USIA then formally asked the Defense Department to task the Naval

Facilities Engineering Command with the project. In the request, USIA explained that it had not been involved in any similar expositions where building construction was required for the past 20 years, and suggested that the Command's vast construction experience, especially in Spain, would "assure an excellent U.S. presence at Seville."

The Navy had to cancel its first attempt to compete the project after determining, based on offers received, that the Pavilion would cost approximately $24 million, well above USIA's original estimate of $8 million and the available funding. The May 1991 award to Entrecanales followed a second competition, after the Navy secured a Spanish architect/engineer to redesign the project on a lower-cost scale. The timing of the award left just 11 months before the planned opening of the exposition, April 20, 1992.

The Navy issued 17 contract modifications between award and completion of the project. Thirteen were bilateral modifications, which the Navy and the contractor priced in advance. However, the other four (Nos. 12-15) were unilateral change orders issued by the Navy contracting officer in late February and early March 1992,[1] less than 2 months before the Pavilion was due to open.

In general, the four unilateral modifications were for signage, new foundations in the plaza for several items, electrical work, and additional structural work on various walls. No price was agreed upon for the modifications, but each contained a "not-to-exceed" price. The Navy placed a total ceiling on these four modifications of $217,000, which would leave $162,000 remaining of the funds authorized by USIA.

There is nothing in the record showing how the Navy determined the "not-to-exceed" amounts for the four unilateral modifications; they appear to be nominal amounts that are not supported by documentation. In fact, the contractor quickly notified the Navy, by letters of March 11 and 12, that it would far exceed the ceilings in each case.

Shortly after the modifications were issued, Navy and USIA officials met and discussed the fact that the four unilateral modifications might represent $300,000 to $500,000 in added construction costs alone (i.e., not including the Navy's administrative fee, foreign currency fluctuations, or costs for related changes to architect/engineer contracts). Moreover, the record shows

[1]One on February 26, two on March 4, and one on March 5.

that the unilateral modifications themselves were modified to increase the scope of the work in some instances.

After completing the work, Entrecanales submitted a bill in the amount of $2,946,463 for (primarily) the extra work required by the unilateral change orders. The contractor and the Navy then entered negotiations to address the issue. Ultimately, Entrecanales accepted the Navy's final offer of $1.9 million, which the Navy negotiating team had determined was fair and reasonable based on government estimates, direct observation of the work, contractor information, and the Navy's evaluation of the strength of the government's position if Entrecanales chose to pursue the matter through the claims process. Adding the not-to-exceed total already included in the four modifications, the settlement brought the total agreement on all outstanding claims to $2,117,000, roughly $2 million more than the total amount USIA had authorized the Navy to spend ($12,712,246).

The memorandum of agreement (MOA) under which the Navy performed the work for USIA contained a construction authorization amount and stated that the Navy should notify USIA if the cost estimates were going to exceed the funding ceiling. The MOA also specified that any increases in funding limitations were to be made by letters issued from the USIA Comptroller to the Navy's Comptroller. USIA and the Navy used this procedure to increase the funding ceiling on seven different occasions between August 1990, and March 1992. However, the Navy did not use the procedure to obtain additional funding when Entrecanales advised that its work under the modifications would exceed the specified not-to-exceed amounts and, consequently, the USIA funding authorization.

As stated above, USIA maintains that the Navy was responsible for contract costs in excess of the amount authorized. To support its position that the Navy therefore should pay those costs, USIA cites a provision in our Office's Policy and Procedures Manual for Guidance of Federal Agencies, and a letter from our Office to the Comptroller of the Department of Defense in a similar matter, B-234427, Aug. 10, 1989. The Manual provides that if it becomes evident that the provision of goods or services under an interagency agreement will exceed funds available, the performing agency should immediately notify the requesting agency and curtail or stop work; otherwise, the performing agency may itself violate the Antideficiency Act. The letter suggests that in such case the requesting agency would not be liable for the excess costs.

We disagree with USIA's view of the reasons for the additional construction costs. Our review shows that USIA, in attempting to fulfill its own responsibility for U.S.

participation in Seville Expo, also contributed to incurring those costs. We also disagree that the Navy should be held responsible for their payment.

Reasons for Costs in Excess of Authorized Funding

From the outset, the Navy was placed in a difficult position. The Navy's first competition failed essentially because USIA's original design and specifications, as well as its original estimate of total cost, were inadequate, leading to proposals roughly 3 times more than USIA's cost estimate. That left less than 1 year to redesign the Pavilion, solicit and evaluate proposals, and have construction completed.

The contract costs in issue primarily represent design and construction changes and costs necessitated by the rush to complete the project. The record shows that USIA had not determined who the exhibitors that would use the Pavilion would be. This meant that the Navy, its architect/engineer contractor, and Entrecanales had to try to design and build a structure without knowing beforehand the exact requirements, because the specifications would have to be modified to accommodate the actual needs of exhibitors. The record is replete with memoranda, correspondence, and contract modifications showing that changes had to be made to the design and construction of the Pavilion throughout the life of the contract. This situation apparently caused the need to pay premium rates to Entrecanales to accelerate its work so that the Pavilion would be ready by the opening date. Also, last minute design changes required Entrecanales to delay performing or change the order of the many tasks it had to do, and in some instances required Entrecanales to redo work already completed to obsolete specifications.

As the Pavilion neared completion, the circumstances in which the construction was performed added greatly to the cost. According to the record, Entrecanales had to work around the exhibitors' materials and equipment, and remove its own materials and equipment to accommodate a "press day" held by the Commissioner General of the United States Pavilion. Furthermore, the short time between the modifications and opening day caused Entrecanales to have to work during several national and local holidays at premium rates. Competition for labor and supplies among the many contractors working to complete pavilions on time also led to increased labor rates and material costs. Most importantly, from the very beginning, USIA urged the Navy to make every effort to ensure that the Pavilion would be completed on time and, although the Navy may not have used the formal MOA procedure to ensure additional USIA funding, USIA officials were on site who should have been aware, to

some degree, of the extraordinary Navy/Entrecanales efforts to be ready by April 20.

In sum, we do not think it would be fair to conclude that either party to the MOA was solely responsible for the unexpected costs of the Pavilion.

Responsibility for Payment

We believe that payment for all construction costs should be made out of USIA's funds.

Initially, we point out that the Policy and Procedures Manual essentially only sets out guidance for how requesting and performing agencies should interact when the agreement between them begins to appear inadequate in terms of funding. The Manual, while noting the Antideficiency Act problem where the performing agency spends more than the requester has available, is not intended to establish that one or the other must pay if the guidance is not precisely followed.

In our 1989 letter to the DOD Comptroller, we expressed our concern that the Army, performing under an interagency agreement with the Agency for International Development (AID), may have violated the Antideficiency Act and 31 U.S.C. § 1301(a), when it spent more of its own money than AID, which was to reimburse the Army for the expenditures, had in its appropriation for the project. We suggested that the requesting agency (which apparently had not over-obligated its available appropriations) thus might be absolved of any responsibility, and that the only theory for the Army avoiding a violation was if the additional expenditures were in furtherance of its own mission and consequently a proper use of its own appropriations.[2] We asked that the Comptroller review that tentative finding.

Thus, the principle of the Manual and the concern in our 1989 letter address an expenditure by the performing agency that exceeds the requester's appropriation and, unless the work involved represents a necessary expense of the performing agency, violates the Antideficiency Act. If the problem was created by the performing agency and is not a necessary expense of that agency, it is the performing agency that should secure the necessary funds. Here, in contrast, when the expenses in issue were incurred USIA did have funds in the appropriation it has used for the Pavilion, subject only to a statutory requirement that

---

[2]31 U.S.C. § 1301(a) limits the application of appropriations to those objects for which they were made.

reprogrammings within the appropriation be reported to specified congressional committees.

We also have considered the issue involved here in our decision in 22 Comp. Gen. 74 (1942). There, the U.S. Engineer's Office, War Department, agreed to perform foundation investigations for the Soil Conservation Service in connection with the planned building of two dams. Although the District Engineer told the Service that the investigations would cost $7,500-$10,000, the Service advised that it had been allotted only $3,500 for the work. The parties therefore agreed that the Service would reimburse the Engineer's Office on an actual cost basis for work up to $3,500, and that if more money was needed the Engineer's Office would give the Service a detailed estimate before incurring any more costs, so that the Service could try to obtain additional funds. The agreement anticipated a new agreement if reimbursement over the original $3,500 limit was necessary.

The Engineer's Office billed the Service almost $6,000, without having furnished any advance notice or estimate of expenses in excess of the agreed-upon $3,500, and the Service asked our Office whether it could properly pay the excess. We held that there was no legal impediment to additional reimbursement by the Service, although that agency was under no legal obligation to pay more than the specified amount.

In the cited case there was no indication that the requesting agency was aware of the excess costs until presented the bill by the performing agency, or was in any way responsible for incurring them. Here, although there may have been no formal notice by the Navy to USIA about the funding situation, USIA officials were at the construction site and were aware of the extraordinary efforts the Navy was making toward fulfilling USIA's stated critical objective: the completion of the Pavilion by April 20. Moreover, while USIA may not have been aware of the full monetary impact of completing the project, it clearly participated in decisions that led to the special Navy and contractor efforts needed to ensure the undertaking's success. As explained above, we disagree with the basic premise of USIA's argument, i.e., in our view both parties to the MOA share responsibility for the excess costs.

In sum, neither the Policy and Procedures Manual nor the 1989 letter, cited by USIA to support its position, or other decisions by our Office require in these circumstances that the performing agency be held liable for amounts in excess of those set out in an interagency agreement.

Finally, the only authority for the Navy, which received no benefit from the project, to spend its own appropriations for this construction is the Economy Act, 31 U.S.C. § 1535, which states that the performing agency will be reimbursed on the basis of actual costs. Thus, Navy payment to Entrecanales for the additional work without reimbursement would constitute a violation of 31 U.S.C. § 1301(a) (use of appropriations for objects other than those for which the appropriations were made) as well as the Antideficiency Act.

In view of the above, we believe that USIA--the construction project's direct beneficiary--should fund the excess costs under the contract. We also recommend that the Defense Contract Audit Agency be asked to audit the contract payment, to ensure its correctness. We are sending a similar response to Chairman Hamilton and to Chairman Berman.

Sincerely yours,

Milton J. Socolar

for Comptroller General
of the United States