21 March 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF
v.	)	Crim. App. No. ACM 38027
Senior Airman (E-4) CANDICE N. CIMBALL SHARPTON, USAF *Appellee.*	)	USCA Dkt. No. 14-0158/AF

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUE PRESENTED

WHETHER THE AIR FORCE COURT ABUSED ITS DISCRETION IN FINDING THE EVIDENCE LEGALLY SUFFICIENT TO SUPPORT A CONVICTION FOR LARCENY FROM THE AIR FORCE.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ). This Court has discretionary jurisdiction to review this case under Article 67(a)(3).

STATEMENT OF THE CASE

Appellant's Statement of the Case is accepted.

STATEMENT OF FACTS

On 26 April 2010, Appellant was appointed as a cardholder on a Government-wide Purchase Card (GPC) master account. (J.A. at 113.) Appointment as a GPC cardholder authorizes an individual to purchase medical supplies. (J.A. at 42.) Payment

for purchases made on a GPC are made by the Defense Finance and Accounting Service (DFAS). (J.A. at 57.) The monies used by DFAS are allotted to the Air Force by the Department of Defense and are classified as "appropriated money, defense capital working funds, and so on and so forth." (J.A. at 58.) Appropriated money "is money that's truly designated by congress for a specific thing, and then the defense capital worker funds is more the supply type items that comes down." (Id.) Appellant, and her defense counsel, stipulated that she used her GPC to make $20,733.78 worth of purchases at AAFES and Walgreens which were paid for by DFAS using United States Government funds. (J.A. at 67.) In an interview with Investigator Kacy Castro, Appellant admitted that she used the GPC to make unauthorized purchases at AAFES and Walgreens. (J.A. 54-55.)

Appellant was found guilty, with an exception, of the larceny charge. (J.A. at 87.) The military judge excepted the words "military property," but Appellant was nevertheless convicted of stealing money which was property of the United States. (J.A. at 87, 13.1.)

Despite pleading not guilty, at no point did Appellant contest her guilt of the larceny charge. Appellant originally attempted to plead guilty to the charge, but the military judge entered a plea of not guilty when the government was unwilling to support a conditional guilty plea. United States v.

Sharpton, 72 M.J. 777, 779 fn. 3 (A.F. Ct. Crim. App. 2014). The defense attempted to enter a conditional guilty plea in order to preserve a motion to suppress statements. (J.A. at 30.) In closing argument, defense counsel stated "we tried to plead guilty to the original charge and specification along with Additional Charge II, Specifications 2 and 3, so we are not going to spend any time addressing those." (J.A. at 78.)

ARGUMENT

CONSIDERING APPELLANT'S TACTICAL APPROACH AT TRIAL, THIS ISSUE HAS BEEN WAIVED. REGARDLESS, THE VICTIM OF APPELLANT'S LARCENIES IS THE UNITED STATES AIR FORCE.

Standard of Review

This Court reviews issues of legal sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." United States v. Humphreys, 57 M.J. 83, 94 (C.A.A.F. 2002).

"Failure to object to the issue of a specification's legal sufficiency does not constitute a waiver or any such legal sufficiency. Rule for Court-Martial 905(e). However, '[s]pecifications which are challenged immediately at trial will

be viewed in a more critical light than those which are challenged for the first time on appeal.' United States v. French, 31 M.J. 57, 59 (C.M.A. 1990) (citations omitted). *See also* United States v. Bryant, 30 M.J. 72, 73 (C.M.A. 1990)." United States v. Burley, ACM S31866 (A.F. Ct. Crim. App. 24 January 2012) at *1.

A. This is an issue of factual, rather than legal, sufficiency. Consequently, Appellant waived this right by failing to object to the larceny specification at trial.

Although Appellant has styled this issue as one of legal sufficiency it is, actually, an issue of factual sufficiency. The distinction between the concepts of legal and factual sufficiency is often fine, but in this case it is apparent that factual sufficiency is in question. Factual sufficiency is beyond this Honorable Court's purview.

In her brief, Appellant claims, in essence, that she cannot be guilty of the larceny specification because the Air Force was wrong when it identified itself as the victim. If this is true, then it is factually impossible for Appellant to have committed the crime as charged because, according to Appellant, the Air Force has not lost anything of value.

This is not to say, however, that the specification was legally insufficient. Contained within the charged specification of larceny are all four of the required elements: (1) that Appellant wrongfully took, obtained, or withheld

certain property from the possession of the owner or of any other person; (2) that the property belonged to a certain person; (3) that the property was of a certain value, or of some value; and (4) that the taking, obtaining, or withholding by Appellant was with the intent to permanently deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the appellant or for any person other than the owner. Manual for Courts-Martial, United States (2008 ed.), Part IV, 46(b)(1)("MCM 2008"). Since the specification was proper in its form, encompassed all the required elements, and properly stated an offense, it placed Appellant on notice of what she was required to defend against. Consequently, the specification is legally sufficient.

Since this is an issue of factual rather than legal sufficiency, Appellant waived this issue by not raising it at trial. And, because under Article 67(c) this Court may only review questions of law, the factual sufficiency of Appellant's conviction is beyond this Court's jurisdiction. Appellant attempted to plead guilty and only failed in this attempt because the Government wouldn't agree to a conditional guilty plea to preserve a suppression motion. Appellant neither argued that she was not guilty of larceny of Air Force property nor entered evidence indicating lack of guilt. Moreover, she affirmatively agreed, through a stipulation of fact, that it was

the Air Force that bore the ultimate cost of her thefts.

A guilty plea waives complaints regarding the factual sufficiency of the evidence. *See* Rule for Courts-Martial 910(j), Manual for Courts-Martial, United States (2012 ed.). While the military judge entered a not guilty to this specification, it must be recognized that Appellant's plea was a tactical decision solely to preserve a particular motion. At no point did Appellant ever mount a defense to the larceny allegation, and at no point did she contest her guilt. This plea was designed to grant Appellant two windfalls--the ability to preserve her objection to her statement to law enforcement while still being able to argue a guilty plea in mitigation. (J.A. at 104.) This was a guilty plea in fact, if not in form. As such, Appellant should not now be able to claim a third windfall by being able to escape the consequences of her conscious decision to lodge no objection to the specification.

B. Even if this issue is not waived, the Air Force was the victim of Appellant's crime.

TSgt Coleen Sago testified at length about how the Government Purchase Card is paid by DFAS. (J.A. at 38-46.) Mr. Samuel Boles went on to explain that DFAS paid off the GPC bill in this case with money from an account allotted to the United States Air Force. (J.A. at 58.) In fact, Appellant even stipulated at trial that DFAS paid for these purchases. (J.A.

at 66-67.) Moreover, Appellant's brief concedes that the bill for these purchases was paid by DFAS with funds provided to the Air Force by the Department of Defense. (App. Br. at 5.) The evidence that the money stolen was the property of the United States Air Force was overwhelming at trial. Applying the standard of review for legal sufficiency, it remains so.

Consideration of Government contract law sheds further light on why the Air Force was the victim of Appellant's crimes. While Congress may be able to borrow funds, agencies of the Executive Branch do not have the same luxury. Pursuant to the Anti-Deficiency Act (ADA), an "officer or employee of the United States Government" may not authorize an expenditure exceeding the amount available in an appropriation or involve the Government in an obligation for the payment of money before an appropriation is made. 31 U.S.C. §1341(a) and (b).

This principle is aptly summed up in the concept of augmenting an appropriation. An Antideficiency Act violation occurs if an agency retains (aka "augments") and spends funds received from outside sources, absent statutory authority. Unauthorized Use of Interest Earned on Appropriated Funds, B-283834, 2000 WL 276935 (Comp.Gen.), Feb. 24, 2000 (unpub.) (an agency spending interest it earned on its appropriation was an unauthorized augmentation of funds). Thus, if an agency improperly receives and retains funds from a source other than

Congress, then the agency improperly augmented its appropriation, leading to an ADA violation.

> These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditure or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriations under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, *in advance of appropriations made* for such purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made.

To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272, 275 (1962).

Consequently, the ADA prohibits an agency of the United States Government from entering into an agreement to obtain credit from an outside source to finance its operations. In this case, the Air Force is prohibited from entering into a traditional credit card arrangement with U.S. Bank. While U.S. Bank may act as a conduit of the funds associated with the Government Purchase Card account, it cannot actually provide credit to the Government.

Even if a duly appointed agent violates the ADA, the agent may still have either the authority to obligate Government

funds. While the Government is not necessarily bound by actions of an agent who exceeds their contracting authority, it may be held responsible under either an equitable estoppel or an implied authority theory. Under equitable estoppel, detrimental reliance on the statements or actions by a Government agent can prevent the Government from denying liability. *See* Emeco Industries, Inc. v. United States, 485 F.2d 652, 657-59 (Ct.Cl. 1973)(when four elements are met, doctrine applies to prevent a defendant from denying existence of a contractual agreement). Implied authority binds the Government when the questionable acts are part of that person's assigned duties. *See* H. Landau & Co. v. United States, 886 F.2d 322, 324 (C.A. Fed. 1989)(implied actual authority to bind the Government exists when it is an integral part of the agent's duties). Under either of these theories the Government can be held monetarily responsible for the actions of Appellant.

Appellant erroneously relies on United States v. Lubasky, 68 M.J. 260, 263 (C.A.A.F. 2010). In Lubasky, this Court found that a larceny had occurred, but that the prosecution had charged the wrong victim, i.e. the cardholder, since "Appellant did not obtain anything from [the charged victim]." Id. at 263. In this case though, the United States Air Force, the victim, did in fact lose money.

Crucial to the holding in Lubasky was the language in the

2002 amendment to the Manual for Courts-Martial, that "[W]rongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense. Such use to obtain goods is usually a larceny of those goods from the merchant offering them." Id. (internal citations omitted). Nevertheless, this Court recognized that "alternative charging theories remain available if warranted by the facts" and pointed out two circumstances that indicated the correct victim was alleged in the specification regarding misuse of a debit card. Id. at 264. First, the accused obtained access to the funds under false pretenses by representing that he would only use the funds in an authorized manner when he had the actual intent to use the funds for his own purposes. Id. Second, the authority granted to the accused limited him to using the funds to make purchases for the victim and not purchase things for his own use. Id.

Both of these factors exist in this case. Appellant was appointed as GPC holder in order to purchase supplies for the Air Force, but instead used Air Force funds as her personal account. (J.A. at 42, 112-17, 123-83.) Her intent to convert Air Force funds to her own use can be seen in her appointment as a GPC holder on 26 April 2010, using the GPC for her own benefit at AAFES on 7 June 2010, being reappointed a GPC holder on 27 July 2010, and then continuing to steal from the Air Force through use

of her GPC authorization. (J.A. at 113, 123, 112, 124-83.) It could, possibly, be argued that any purchases after her initial appointment and before her re-appointment as a GPC holder were simply a crime of opportunity. This argument is belied by the facts that her thefts occurred before, and continued after, her re-appointment, demonstrating a clear intent on Appellant's part to misuse her GPC despite knowing the limits on her authority.

Furthermore, in Lubasky, the Court found that the credit card issuer is the actual victim of a larceny, unlike debit cards, where the victim is the named individual on the card from whose checking account the money is taken. Id. at 261. Here, there is a significant distinction in that the GPC is in the name of Appellant. However, she is only authorized to make approved purchases for certain specific authorized purposes. The GPC acts very much like a personal debit card in that there is a certain pot of money set aside by the Air Force to pay the balance on the GPC cards. The difference is that there is a middleman who issues the purchase cards since the United States Government is not in the business of manufacturing credit or debit cards. While this Court found that in Lubasky the accused obtained nothing from the alleged victim, in this case, Appellant's actions resulted in her obtaining gift cards, products, and services. More importantly, unlike in Lubasky, where the credit card issuer was the victim of the fraudulent purchases and had to

pay the amount, U.S. Bank merely issues GPC cards. It is the United States Air Force that had to pay for the purchases made by Appellant. (J.A. at 57-58.)

In this case, Appellant admitted to these unauthorized purchases, and the record clearly shows that the United States Air Force ultimately had to pay for these purchases. Under the relevant facts, and in accordance with Lubasky, the Air Force was properly alleged as the victim. It was Appellant who abused the authority granted her as a GPC holder, and it was the Air Force that was required to pay off the illicit balances on Appellant's GPC account. As noted by the Air Force Court of Criminal Appeals, at no point did U.S. Bank or the merchants stand to lose anything--the only victim of Appellant's larcenies was the United States Air Force.[1]

Appellant's argument also does not benefit from her reliance on United States v. Franchino, 48 M.J. 875 (C.G. Ct. Crim. App. 1998). In Franchino, the accused pled guilty to "obtaining merchandise by means of the false pretense of paying with a credit card he had no authority to use for that transaction, effectively representing that he did have such authority." Id. at 878. During his plea inquiry, the accused admitted that he intended for the Coast Guard to pay the bill,

[1] "Because the Air Force was required to reimburse the bank for purchases made by authorized users of the card, the bank suffered no loss and therefore could not be a 'victim' of the larceny as the Air Force was monetarily liable for the appellant's use of the card." Sharpton, 72 M.J. at 781.

but he "never admitted facts amounting to a taking . . . of money from the *Government* as charged. That is, he never admitted that money, or any other property, left the hands of the Government. In fact, when the Military Judge asked whether the Coast Guard ever paid the bill, Appellant said he didn't know. . . ." Id. (emphasis in original). The obvious implication of this holding is that if the accused had known that the Government paid the charges the accused illegally made, the guilty plea would have been upheld and the Coast Guard Court would not have needed to analyze whether Appellant's guilty plea could be saved by either affirming a finding of guilty of attempted larceny from the Government or larceny by government credit card of merchandise from a business as closely related to the charged offense. Id.

Relying on United States v. Schaper, 42 M.J. 737 (A.F. Ct. Crim. App. 1995), Appellant also alleges that the Air Force Court erred in its determination that she did not misrepresent her authority. But Schaper does not stand for this contention. In Schaper, the accused voluntarily registered for a Citicorp Diners Club credit card through the Diners Club Government Card program. Id. at 738. The user agreement was between Citicorp and the accused, and the accused agreed to be bound by that agreement. Id. The accused subsequently violated the terms of the agreement and misused the card. Id. at 738-39.

In analyzing a charge of larceny, the Air Force Court stated the accused "made three implicit representations:(1) that he was authorized to use the particular Diners Club card he inserted into the ATMs to withdraw funds; (2) that he was authorized by a travel authorization to withdraw that amount of money from the ATMs; and (3) that the ATM cash withdrawals were obtained for official Government business related to his official travel." Id. at 739. Only the first of these representations was true. Id. Like the situation in Appellant's case, the accused in Schaper was authorized to use the card but misrepresented his authority when he made purchases on that card. Id. at 740.

The Air Force Court, in Appellant's case, recognized that someone can be an authorized card user but still exceed the scope of that authorization. Although stated in the context of analyzing Lubasky, the Air Force Court held: "Unlike Lubasky, who purported to be an authorized user of the credit card but in fact was not, the appellant here was authorized to use the GPC, but did so in a manner not sanctioned by the Air Force." Sharpton, 72 M.J. at 781. This holding comports not only with the holding in Schaper but also with Appellant's own analysis in her brief.[2] (App. Br. at 11-12.)

[2] Appellant claims, in her brief, that the United States repaid Schaper's debt. (App. Br. at 11.) There is, however, nothing in the Schaper opinion to indicate the United States paid the debt. In fact, the opinion stated

Finally, Appellant claims the Air Force Court erred by likening the GPC to a debit card rather than a credit card. The Air Force Court never stated that the GPC was a debit card, but rather this Court's analysis of the debit card in Lubasky is comparable to the facts in Appellant's case. In doing so, the Air Force Court held "[A]s with a debit card where the cardholder is liable for unauthorized purchases someone else makes, here the Government was ultimately liable for the unauthorized purchases the appellant made." Sharpton, 72 M.J. at 781. Whether the GPC is more akin to a credit card or a debit card is a distinction without a difference. The question is simply who lost something of value. In this case, the charges accrued on the GPC never became the responsibility of Appellant and belonged to the Air Force. As was demonstrated through the testimonies of TSgt Sago and Mr. Boles, the charges were the responsibility of the Air Force and those charges were paid for using Air Force funds.

The situation in this case was succinctly summarized by the Air Force Court.

> At the time of the various transactions, the appellant had not misrepresented her authority to either the merchant or US Bank to use the card. As far as US Bank was aware, the appellant had full authority to use the GPC. Because the Air Force was required to reimburse the bank for purchases made by authorized

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"Appellant was aware that charges made on his Diners Club were his own personal financial responsibility, not those of the government." Schaper, 42 M.J. at 739.

> users of the card, the bank suffered no loss and therefore could not be a "victim" of the larceny as the Air Force was monetarily liable for the appellant's use of the card. The appellant violated her agreement with the Air Force, and as a result, the Air Force became liable to US Bank to pay for the purchases. The Government did in fact fulfill its obligation, resulting in the Government spending about $20,000 in funds it otherwise would not have had to spend. US Bank was in no way a victim in this situation, and there is no evidence in the record that the Government could have recouped its payments from US Bank, or that it in fact did so.

Sharpton, 72 M.J. at 781. The Air Force is the victim of Appellant's larcenies and her conviction is legally sufficient.

CONCLUSION

Appellant was properly charged with, and convicted of, stealing monies from the United States Air Force. Consequently, the allegations raised by Appellant are without merit and her request for relief should be denied.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 21 March 2014.

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COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

☒ This brief contains 4,320 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

☒ This brief has been prepared in a monospaced typeface using Microsoft Word Version 2010 with 12 point font using Courier New.

/s/

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Date: 21 March 2014

Attachments

886 F.2d 322, 35 Cont.Cas.Fed. (CCH) P 75,719
(Cite as: 886 F.2d 322)

H

United States Court of Appeals,
Federal Circuit.
H. LANDAU & COMPANY, Plaintiff–Appellant,
v.
The UNITED STATES, Defendant–Appellee.

No. 89–1199.
Sept. 18, 1989.
As Amended on Grant of Rehearing Dec. 11, 1989.

Supplier to government contractor brought action against Government, alleging that Small Business Administration officials guaranteed payment for materials that supplier delivered to contractor. The Claims Court, 16 Cl.Ct. 35, Eric G. Bruggink, J., entered summary judgment in Government's favor, and supplier appealed. The Court of Appeals, Bissell, Circuit Judge, held that sufficient actual authority to bind Government existed if local SBA officials had implicit authority to assure payment to supplier by reason of terms of government contract, under which local SBA officials were granted responsibility for administration of contract.

Vacated and remanded.

West Headnotes

[1] Public Contracts 316H 106

316H Public Contracts
316HI In General
316Hk106 k. Powers of officers to contract. Most Cited Cases
(Formerly 393k60, 393k78(4))

United States 393 60(1)

393 United States
393III Contracts
393k60 Powers of Boards or Officers to Contract
393k60(1) k. In general. Most Cited Cases
(Formerly 393k60, 393k78(4))

Although apparent authority will not suffice to hold Government bound by acts of its agents, implied actual authority, like express actual authority, will suffice.

[2] Public Contracts 316H 106

316H Public Contracts
316HI In General
316Hk106 k. Powers of officers to contract. Most Cited Cases
(Formerly 393k60)

United States 393 60(2)

393 United States
393III Contracts
393k60 Powers of Boards or Officers to Contract
393k60(2) k. Particular boards or officers. Most Cited Cases
(Formerly 393k60)

If local Small Business Administration officials had implicit authority to assure suppliers of governmental contractor that they would be paid for providing materials, by reason of Small Business Administration contract which granted local SBA officials responsibility for contract's administration, Government would be bound by local official's

886 F.2d 322, 35 Cont.Cas.Fed. (CCH) P 75,719
(Cite as: 886 F.2d 322)

guarantees of payment to supplier, notwithstanding internal SBA operating procedures which required original contracting officer to review any requested disbursements.

[3] Federal Courts 170B 3783

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(L) Determination and Disposition of Cause
170Bk3779 Directing New Trial or Other Proceedings Below; Remand
170Bk3783 k. Issues or questions not passed on below. Most Cited Cases
(Formerly 170Bk939)

Remand to Claims Court was necessary to determine whether local SBA officials had had implicit authority to guarantee payment to suppliers of government contractor where Claims Court did not reach issue in rejecting supplier's claim against Government.

***323** Ruth E. Ganister, Rosenthal and Ganister, West Chester, Pa., argued, for plaintiff-appellant.

Stephen J. McHale, Commercial Litigation Branch, Dept. of Justice, Washington, D.C., argued, for defendant-appellee; with him on the brief were John R. Bolton, Asst. Atty. Gen. and David M. Cohen, Director.

Before MARKEY, Chief Judge, and NEWMAN, and BISSELL, Circuit Judges.

BISSELL, Circuit Judge.

H. Landau & Co. (Landau) appeals the United States Claims Court's judgment granting the government's summary judgment motion and dismissing the complaint. *See H. Landau & Co. v. United States,* 16 Cl.Ct. 35 (1988). We vacate and remand.

BACKGROUND

In 1983, the Defense Personnel Support Center (DPSC), pursuant to Section 2 [8] (a) of the Small Business Act, 15 U.S.C. § 637(a) (1982 & Supp.V 1987), contracted with the Small Business Administration (SBA) to supply 25,000 sleeping bags. SBA then subcontracted with Carilee, Inc. to supply and deliver the bags to DPSC for $3,613,125. The subcontract provided that "the responsibility for administering this subcontract has been delegated to the [Defense Logistics Agency (DLA) office in Pittsburgh] and that [Carilee] will honor directions of any requests for changes by that [office] in like manner as if issued by SBA."

A modification to the subcontract provided Carilee with advance financing of $1,139,000 and required that any advance payments be made through a joint bank account requiring for withdrawals the signatures of both an authorized SBA representative and an authorized Carilee representative. Robert Harris and Earl Johnson of the Pittsburgh office were designated as the authorized SBA countersignatories although neither was the contracting officer (CO) who entered into the DPSC contract on SBA's behalf. An internal SBA operating procedure, however, required that the CO review any requested disbursements from the account and approve, in writing, the countersigning of any withdrawals.

Carilee began fulfilling the contract and placing orders for cloth with Landau, a textile converter. Due to Carilee's unstable financial situation, Landau was reluctant to extend credit to Carilee. To allay Landau's concern, Harris informed Landau that SBA would provide letters guaranteeing payment of each order, provided adequate funds to cover each invoice existed in the joint bank account at the time letters were to be issued. SBA's counsel and Pittsburgh district director assured Harris that he had the authority to issue such letters under the agreed upon

terms. In fact, SBA's law department assisted in drafting and/or approving the specific language used in the letters of guarantee.

The first SBA letter guaranteed payment of about $250,000 for Carilee's initial lots of cloth and was executed by Harris. After delivering the lots and submitting the invoices, Landau was paid in full by checks drawn on the joint account. Harris, on SBA's behalf, issued two more letters, guaranteeing a total of $268,135.78. Another letter, guaranteeing $122,834.30, was ***324** issued by Johnson with Harris's approval. Landau delivered $390,970.08 worth of cloth in reliance upon the later three letters. Although SBA was paid in full by DPSC for the sleeping bags, Landau received only $266,568.75 for the cloth delivered under those letters of guarantee. Landau sued the United States, demanding the unpaid balance of $124,401.33.

Landau contended that an express or implied-in-fact contract with the government required payment of the monies. The Claims Court disagreed and held that neither Harris nor Johnson had actual authority to bind the government because the CO's approval was required before either could countersign checks drawn on the joint account. *H. Landau*, 16 Cl.Ct. at 37.

ISSUE

Whether the Claims Court erred in granting summary judgment and holding that no contract existed between Landau and SBA because Harris and Johnson lacked the authority to obligate the government to guarantee payments.

OPINION

[1] To recover for breach of an express or implied-in-fact contract with the United States, Landau must show "that the officer whose conduct is relied upon had actual authority to bind the government in contract." *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed.Cir.1984), *cert. denied*, 474 U.S. 818, 106 S.Ct. 64, 88 L.Ed.2d 52 (1985). Although apparent authority will not suffice to hold the government bound by the acts of its agents, *see Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947), implied actual authority, like expressed actual authority, will suffice. *Cf. Branch Banking & Trust Co. v. United States*, 98 F.Supp. 757, 766, 120 Ct.Cl. 72 (explaining that "an officer authorized to make a contract for the United States has the implied authority thereafter to modify the provisions of that contract particularly where it is clearly in the interest of the United States to do so"), *cert. denied*, 342 U.S. 893, 72 S.Ct. 200, 96 L.Ed. 669 (1951). "Authority to bind the [g]overnment is generally implied when such authority is considered to be an integral part of the duties assigned to a [g]overnment employee." J. Cibinic & R. Nash, *Formation of Government Contracts* 43 (1982); *see also United States v. Bissett–Berman Corp.*, 481 F.2d 764, 768–69 (9th Cir.1973) (holding that the government's attorney had the implicit authority to bind the government although the CO had the expressed authority).

Here, the Claims Court focused solely on whether Harris and Johnson had the express authority to bind the government. Noting that prior written approval was required before checks drawn on the joint account could be signed, the Claims Court found the requisite authority lacking. The court failed to consider whether Harris and Johnson had the implicit authority to obligate SBA to guarantee the payments.

[2][3] The SBA–Carilee subcontract required Carilee to treat requests from the Pittsburgh DLA office as if issued by the SBA and granted responsibility for the subcontract's administration to that office. Part of that responsibility certainly included the duty to see that the subcontractor acquired the necessary raw materials to fulfill its obligation under the contract. That duty, coupled with

the authority to draw checks on the joint bank account, may have carried with it the implicit authority to assure suppliers that they would be paid for providing the materials. Because the Claims Court did not reach this issue, we remand rather than decide it ourselves. If the Claims Court finds that such implicit authority existed here, Landau has established the actual authority required to bind the government.

COSTS

Each party is to bear its own costs.

VACATED AND REMANDED.

C.A. Fed.,1989.
H. Landau & Co. v. U.S.
886 F.2d 322, 35 Cont.Cas.Fed. (CCH) P 75,719

END OF DOCUMENT

United States Court of Claims.
EMECO INDUSTRIES, INC.
v.
The UNITED STATES.

No. 547-71.
Oct. 17, 1973.

Suit arising from dispute over government contract. The Court of Claims adopted opinion of Joseph V. Colaianni, Trial Judge, which held that solicitation did not preclude split awards, that parties did not enter into a formal contract for the manufacture and delivery of 31,893 index card boxes, but that government was estopped from denying existence of such a contract under facts presented and that recovery was to be calculated in accordance with termination for convenience article and should not include prospective profits or consequential damages.

Judgment for plaintiff.

Kunzig, Judge, did not participate.

West Headnotes

[1] Public Contracts 316H 153

316H Public Contracts
316HII Bidding and Bid Protests
316Hk152 Award
316Hk153 k. In general. Most Cited Cases
(Formerly 393k64.5, 393k64)

United States 393 63.50(1)

393 United States
393III Contracts
393k63.1 Bidding and Bid Protests
393k63.50 Award
393k63.50(1) k. In general. Most Cited Cases
(Formerly 393k64.5, 393k64)

Solicitation for index card boxes wherein government reserved right to make an award on any item for quantity less than quantity offered at unit prices offered unless contractor specified otherwise in his offer did not preclude government from splitting award in absence of required specification to contrary.

[2] Public Contracts 316H 184

316H Public Contracts
316HIII Formation of Contract
316Hk184 k. Formal requisites. Most Cited Cases

United States 393 65

393 United States
393III Contracts
393k65 k. Formal requisites of contracts. Most Cited Cases

Mere signing of offer by contracting officer for government did not result in a contract authorizing contractor to manufacture 31,896 index card boxes where it appeared that government did not sign solicitation until after it had determined to split award and give contractor responsibility for manufacture of only 2,713 boxes.

[3] Estoppel 156 90(1)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k89 Acquiescence
156k90 Assent to or Ratification of Acts of Others in General
156k90(1) k. In general. Most Cited Cases

In order to establish an estoppel, it is necessary for party seeking estoppel to show that party against whom estoppel is sought acquiesced in transaction in such a manner as to change relationship of parties and make its repudiation of proceedings contrary to equity and good conscience.

[4] Estoppel 156 52(2)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(2) k. Basis of estoppel. Most Cited Cases

It is not essential for party against whom estoppel is urged to have made a representation of any kind.

[5] Estoppel 156 52(2)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(2) k. Basis of estoppel. Most Cited Cases

A party who engages in a course of conduct, even without misrepresentation, upon which another party has a right to believe he is intended to act or upon which first party intends him to act will be estopped from repudiating effect of such conduct.

[6] Estoppel 156 62.2(3)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k62 Estoppel Against Public, Government, or Public Officers
156k62.2 States and United States
156k62.2(3) k. United States government, officers, and agencies in general. Most Cited Cases

It is essential to a holding of estoppel against United States that the course of conduct or representations be made by officer or agents of the United States who are acting within scope of their authority.

[7] Estoppel 156 62.2(4)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k62 Estoppel Against Public, Government, or Public Officers
156k62.2 States and United States
156k62.2(4) k. Particular United States officers, agencies, or proceedings. Most Cited Cases

Government was estopped to deny existence of a contract with contractor for 31,896 index card boxes where contractor could reasonably conclude, from actions and/or inactions on part of government, that it would be awarded contract and, regardless of whether government so intended, had a right to rely thereon and, in fact, did so to its detriment.

[8] Public Contracts 316H 416(2)

316H Public Contracts
316HX Rights and Remedies of Contractors
316Hk409 Remedies of Contractors
316Hk416 Damages and Amount of Recovery
316Hk416(2) k. Cancellation or termination. Most Cited Cases
(Formerly 393k74(12))

United States 393 74(12.1)

393 United States
393III Contracts
393k74 Rights and Remedies of Contractors
393k74(12) Damages and Amount of Recovery
393k74(12.1) k. In general. Most Cited Cases
(Formerly 393k74(12))

Recovery under a government contract containing a termination for convenience article must be calculated in accordance with that article and should not include prospective profits or consequential damages.

***653** Alexander M. Heron, Washington, D. C., atty. of record, for plaintiff. Murray S. Simpson, Jr., Pope, Ballard & Loos, Washington, D. C., of counsel.

Russell W. Koskinen, Washington, D. C., with whom was Acting Asst. Atty. Gen. Irving Jaffe, for defendant.

Before COWEN, Chief Judge, and DAVIS, SKELTON, NICHOLS, KASHIWA and BENNETT, Judges.

OPINION

PER CURIAM:

This case comes before the court on plaintiff's motion, filed August 23, 1973, for judgment and for adoption of the recommended decision filed May 30, 1973, by Trial Judge Joseph V. Colaianni pursuant to Rule 134(h), defendant having withdrawn its previously filed notice of intention to except to said decision. Upon consideration thereof, without oral argument since the court agrees with the Trial Judge's decision, as hereinafter set forth,[FN*] it hereby affirms and adopts the same as the basis for its judgment in this case. Therefore, plaintiff is entitled to recover and judgment is entered for plaintiff with the amount of recovery to be determined pursuant to Rule 131(c).

FN* Whereas the court adopts the trial judge's separate findings of fact, which are set forth in his report filed May 30, 1973, they are not printed herein since such facts as are necessary to the decision are contained in his opinion. KUNZIG, Judge, took no part in the consideration and decision of this case.

OPINION OF TRIAL JUDGE

COLAIANNI, Trial Judge:

The claim in this case arises from a September 24, 1969, solicitation from defendant, acting through the Federal Supply Service of its General Services Administration, hereinafter referred to as "GSA," for the manufacture of 31,896 index card boxes. The solicitation indicated that the boxes were to be delivered in varying specified quantities to 1,500 addresses, and bids were requested F.O.B. destination.

Following the bid opening, defendant on October 16, 1969, requested a plant inspection report to determine if plaintiff's facilities were capable of producing the entire 31,896 boxes within the time specified by the solicitation. The inspection was completed on October 24, 1969, and the report

indicated that plaintiff was capable of performing the contract within the 70 days required by the contract, notwithstanding that plaintiff had never manufactured index card boxes before. The report further noted that plaintiff had made arrangements to purchase four dies, at a total cost of $10,300, which were essential in order for it to manufacture the boxes. The dies were to be delivered within 30 days after defendant had approved plaintiff's preproduction sample.

In the meantime, although unknown to plaintiff, defendant on October 17, 1969, received a late bid from Art Steel Company,***654** Inc. On October 22, 1969, following an investigation, defendant's contracting officer concluded that the late receipt of Art Steel's bid was due solely to a delay in the mail and that the bid should therefore be considered for award. Art Steel offered to build boxes to defendant's specifications at a price of $2.78 each, but limited its bid by the following clause, to only 29,183 boxes:

Bidding on quantity less than specified, in accordance with provision contained in paragraph 10C of Standard Form 33A. Bid covers all quantities specified except 2,713 boxes for Navy requirements * * *.

The fact that Art Steel's offer to manufacture and ship 29,183 boxes was low was not communicated to plaintiff or any of the other six bidders whose offers had been opened on October 14, 1969.

Further, although the date of its occurrence is not established in the record, there is no doubt that the contracting officer signed plaintiff's offer to supply the entire quantity of boxes. Equally well established, however, is the fact that the signed contract was never delivered to plaintiff. The record also indicates that defendant originally intended to award the entire contract to a single bidder. However, following the receipt of Art Steel's late bid, the contracting officer apparently decided that it would be in the best interest of the Government to split the award between plaintiff and Art Steel. The offerors whose bids had been opened on October 14, 1969, were not told of defendant's intention to split the award.

Plaintiff on December 8, 1969, received defendant's December 3, 1969, purchase order for 2,713 boxes, representing the entire requirement of the Navy, at a total price of $8,247.52. The 2,713 boxes were to be shipped to 1,355 of the contract's 1,500 destinations. Immediately upon receipt of the purchase order, plaintiff set about to manufacture a preproduction sample by hand. After receiving defendant's approval of its preproduction sample, plaintiff began placing orders for the necessary dies. The dies and other necessary tooling were on hand by February 1970. Plaintiff had also, by December 16, 1969, begun to place orders for the necessary material for the production of the entire quantity of 31,896 boxes, and by February 23, 1970, all of the necessary material had been ordered.

Plaintiff began producing boxes on February 4, 1970. The 2,713 boxes covered by the December 3, 1969, purchase order were completed and delivered to the specified destinations within the agreed time. Plaintiff, however, did not discontinue production upon completion of the 2,713 boxes. Plaintiff, apparently with an eye towards manufacturing all of the 31,896 boxes called for by defendant's original solicitation, instead continued with the production of the remaining number of boxes.

During early March of 1970, while checking a delivery requirement with the Department of Defense, plaintiff accidentally, and for the first time, learned that defendant had placed an order for the remaining 29,183 boxes with Art Steel Company, Inc. Plaintiff immediately stopped its production process, but by this time it had already completed some 6,000 boxes over the 2,713 required by defendant's purchase order. In addition, plaintiff wrote a letter of protest to the defendant.

In an exchange of letters that followed, plaintiff learned of Art Steel's late bid to manufacture 29,183 boxes for delivery to the 145 destinations at a price of $2.78 each. Plaintiff was further advised that Art Steel's bid was determined to have been timely, since the delay in its arrival was found to be the fault of the Post Office. Defendant further advised plaintiff that Art Steel's bid, although not directed to the entire quantity of boxes stated in the solicitation, was still felt to be responsive since a partial bid was authorized by article 10(c) of the instructions that accompanied the solicitation. Defendant went ***655** on to admit that it had originally intended to award the entire contract at a single price to a single bidder, but that upon reflection it was felt to be in the Government's best interest to resort to a split award between plaintiff and Art Steel. After failing to resolve the matter on an informal basis, plaintiff filed suit in this court on July 19, 1971.

The questions which must be resolved are whether plaintiff was justified under the circumstances of this case in incurring expenses which would only have been required and necessary if it had been awarded a contract for manufacturing the entire quantity of boxes covered by defendant's solicitation, and, if it was, what is it entitled to recover?

I. SOLICITATION DID NOT PRECLUDE SPLIT AWARDS

Plaintiff, in the main, argues that the solicitation as written was intended to obligate defendant to purchase the entire quantity of 31,896 boxes from a single source. Building on that theme, plaintiff argues that the solicitation was for a definite quantity and that a split award was therefore not permitted. In support of its position, plaintiff initially points to the schedule section of the solicitation which contains the following notation under the "Supplies/Services" column:

Definite Quantity Contract for FSC Class 7520– Box, Index Card

In addition, plaintiff argues that the continuation page of the solicitation was set up to require a single bid on the definite quantity of 31,896 boxes. Plaintiff further contends that defendant, by its own admission, intended to award the contract to a single bidder.

Finally, plaintiff argues that if the contract can be construed to permit partial awards to more than one source, it is ambiguous and defendant, as author of the contract, should suffer the consequences.

Defendant argues that the intention to award the contract to a single bidder does not appear in the solicitation, and that in any event–

* * * in view of the fact that Art Steel's bid was responsive and low, the contracting officer had no choice except to make the award to Art Steel up to the limitation specified in * * * [Art Steel's] bid, as well as the * * * award to plaintiff for the balance of the quantity.

Defendant further contends that article 10(c) of the solicitation was designed to permit a bidder to place limitations on the quantities bid, and to reserve to the Government the right to make awards on such a basis unless the bidder otherwise specified in its bid.

[1] A careful reading of article 10(c) supports defendant's position. In the first place, the article clearly allows the Government to–

* * * accept any item or group of items of any offer, unless the offeror qualifies his offer by specific limitations.

Plaintiff placed no limitations on its bid. Going on, the article further provides that the–

* * * Government reserves the right to make an award on any item for a quantity less than the quantity offered at the unit prices offered unless the offeror specifies otherwise in his offer.

Again plaintiff placed no conditions on its bid, and in the light of this defendant made an award to plaintiff for 2,713 boxes instead of the entire quantity of 31,896. Furthermore, plaintiff's argument that article 42, entitled "All or None" bids of the GSA supplemental provisions, prevented it from limiting its bid to an "all or none" offer, is incorrect. That article clearly was intended to limit the use of an "all or none" bid in requirements and indefinite quantity contracts. Since the solicitation in question is entitled a definite quantity contract, article 42 was clearly not applicable, and plaintiff could have conditioned or limited its offer.

***656** Further, plaintiff's argument alleging an ambiguity in the terms of the solicitation is found to be unpersuasive. An objective reading of the entire contract fails to indicate the existence of an ambiguity with respect to the specifications. Article 10(c) clearly, and in bold face type, informs the bidders of their right, in the absence of language to the contrary in the schedule section of the solicitation, to submit offers on less than the quantity specified. Nothing in the schedule of the solicitation in question conflicts with the option given to the bidders by article 10(c). It is, accordingly, concluded that the terms of the specifications are clear and unambiguous.

In sum, there is nothing in the solicitation which precluded defendant from making a split award to both plaintiff and Art Steel Company, Inc.

II. PARTIES DID NOT ENTER INTO A FORMAL CONTRACT FOR MANUFACTURE AND DELIVERY OF 31,893 BOXES

Plaintiff makes much of the fact that defendant's contracting officer signed the solicitation which plaintiff had filled out, signed, and submitted in time for the October 14, 1969, bid opening. Plaintiff contends that the signing of its solicitation by defendant's contracting officer amounts to an acceptance by defendant of its offer. Defendant, on the other hand, points out that a signed copy of plaintiff's solicitation has never been delivered to plaintiff. Defendant then argues that a binding contract cannot come into existence if defendant's acceptance was never communicated to the offeror. While the record is not clear, it appears that plaintiff was not aware that defendant had signed its solicitation until after the split awards to both it and Art Steel for the manufacture of the 31,896 boxes had been made.

Plaintiff's argument is unpersuasive, for while there is no single or best way for an acceptance to be communicated to an offeror, there is no doubt that an acceptance must be communicated. In a case involving a similar issue, this court, after a thorough review of relevant law, held that communication of an acceptance must be made before a valid contract can come into being. See Slobojan v. United States, 136 Ct.Cl. 620 (1956). Specifically, this court stated, at p. 626:

The Federal courts follow the principles set forth above and hold that where the validity of a bilateral contract is involved it is necessary that acceptance of the offer be communicated to the offeror before a valid and binding contract is made. Burton v. United States, 202 U.S. 344, 384-385, [26 S.Ct. 688, 50 L.Ed. 1057] (1906); Dickey v. Hurd, 33 F.(2d) 415, 418 (C. A. 1, 1929), certiorari denied, 280 U. S. 601 [50 S.Ct. 82, 74 L.Ed. 646]; Barnebey v. Barron G. Collier, Inc., 65 F.(2d) 864, 868 (C.A. 8, 1933); Shubert Theatrical Co. v. Rath, 271 Fed. 827, 833-834 (C.A. 2, 1921). * * * This court has recently held

that even if a letter containing an acceptance of an offer is mailed, the acceptance is not final until the letter reaches its destination, and can be withdrawn at any time prior to receipt by the offerer. Rhode Island Tool Company v. United States, 130 C.Cls. 698, 128 F. Supp. 417 (1955); Harvey Franklin Dick v. United States, 113 C.Cls. 94, 82 F.Supp. 326 (1949).

Plaintiff also argues that the purchase order for 2,713 boxes was merely defendant's way of making payment, and that a contract nonetheless existed for the definite quantity of 31,896 boxes. In support of its position, plaintiff points to box 27 of the solicitation, which is entitled "Payment Will Be Made By" and contains the insertion "To Be Shown On Orders Issued Under This Contract."

The mere statement of the proposal indicates the fallacy of plaintiff's position. The quoted language does indeed suggest a program by which payments were to be made, but that program presupposed the existence of a contract. As has been previously pointed out, no ***657** contract for 31,896 boxes was ever entered into by plaintiff and defendant.

[2] In sum, it is concluded that the mere signing of plaintiff's offer by defendant's contracting officer did not result in a contract authorizing plaintiff to manufacture 31,896 recipe card boxes.

III. DEFENDANT IS ESTOPPED TO DENY THE EXISTENCE OF A CONTRACT WITH PLAINTIFF FOR 31,896 BOXES

[3][4][5][6] The final question to be considered is whether or not sufficient grounds exist for applying the doctrine of equitable estoppel against the defendant. The recent case of Manloading & Management Assoc., Inc. v. United States, 461 F.2d 1299, 198 Ct.Cl. 628, (1972), indicates that this court will, in appropriate cases, apply that doctrine to prevent defendant from denying the existence of a contractual agreement. In order to establish an estoppel it is necessary for plaintiff to show, as this court has previously held in the case of Stevens Manufacturing Co. v. United States, 8 F.Supp. 720, 80 Ct.Cl. 183, 192-193, (1934), that:

* * * the party against whom an equitable estoppel is set up acquiesced in the transaction in such a manner as to change the relationship of the parties and make its repudiation of the proceedings contrary to equity and good conscience.

It is not, however, essential that the party against whom an estoppel is urged to have make a representation of any kind. See Robbins v. United States, 21 F.Supp. 403, 86 Ct.Cl. 39 (1937). This latter view is in accord with those cases that hold that a party who engages in a course of conduct, even without misrepresentation, upon which another party has a right to believe he is intended to act or upon which the first party intends him to act, will be estopped from repudiating the effect of such conduct. See United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970). Of Course, it is essential to a holding of estoppel against the United States that the course of conduct or representations be made by officers or agents of the United States who are acting within the scope of their authority. See United States v. Georgia-Pacific Co., *supra*, at 100-101; Manloading & Management Assoc., Inc. v. United States, *supra*, 461 F.2d at 1302-1303, 198 Ct.Cl. at 634-635.

[7] After a complete consideration of the controversy between the parties, it is concluded, for reasons which follow, that grounds for estoppel against the defendant exist.

The court in Georgia-Pacific, *supra*, 421 F.2d at 96, indicated that the following four elements must be present in order to establish an estoppel:

(1) The party to be estopped must know the

facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

All of these essential elements are present in the case at bar.

A. DEFENDANT KNEW THE FACTS

As has been previously discussed, only defendant knew all of the facts and the complete story surrounding the solicitation in question. It should be initially pointed out that plaintiff submitted the lowest of the six bids which were received in time for the October 14, 1969, opening. The fact that defendant on October 17, 1969, received a bid from Art Steel that had been delayed by the Post Office was not made known to plaintiff or any of the five other bidders. Further, plaintiff was not aware of the October 22, 1969, decision by defendant's contracting officer to consider Art Steel's bid in making the award. The failure of defendant to so inform plaintiff appears to be particularly regrettable since plaintiff's offer was the lowest received at the public bid opening of October 14, 1969, and plaintiff could therefore reasonably conclude that it ***658** would be given the contract. In fact, the failure of defendant to notify plaintiff of the receipt of a lower successful bid is a violation of its own procurement regulation[FN1] dealing with such matters, and which provides in pertinent part that:

FN1. 41 C.F.R. § 1-2.408, Information to bidders.

(2) Notification of rejection also shall be given to any unsuccessful higher bidder where the circumstances were such that he may have had reason to believe he might receive an award, e. g., the bidder was requested to extend his bid acceptance time or clarify his bid, or the bidder knew that his bid was the lowest received by bid opening time (but the lower successful bid was received late).

Further support for plaintiff's expectations can reasonably be inferred from defendant's request of October 16, 1969, to its resident inspector at plaintiff's plant to conduct a plant facility survey to determine if plaintiff was capable of satisfactorily performing the contract requirements, *i. e.*, building 31,896 boxes within 70 days after being awarded the contract. As plaintiff further points out, the preaward on-site inspection is significant since defendant's own published regulations indicate that it is not necessary in connection with contracts of less than $10,000.[FN2] Thus, plaintiff argues that the inspection was another reason why it could logically assume that it was being seriously considered to manufacture all 31,896 boxes.

FN2. See 41 C.F.R. § 1-1.310-9, Pre-award onsite evaluation:

"(b) Pre-award on-site evaluations need normally not be performed when the information sources stated in § 1-1.310-7 yield sufficient data to enable a contracting officer to make a determination regarding the responsibility of a prospective contractor. Generally, pre-award on-site evaluations are not necessary in connection with contracts of less than $10,000."

Although the inspection was not completed until October 24, 1969, defendant made no attempt to inform plaintiff of Art Steel's late bid or to cancel the inspection because of the receipt of the late bid.

Furthermore, defendant was aware that plaintiff had never manufactured boxes before and that it was necessary for it to purchase dies at a cost of over $10,000 in order to be able to perform the contract. This is of particular importance since it is

inconceivable that plaintiff would have incurred such an expense if it had known that it would only receive an $8,247.52 award.

Defendant obviously also knew that plaintiff's bid of $3.04 per box was an average that took into consideration the costs for manufacturing the 31,896 boxes, and, as well, the costs involved in shipping the boxes to the 1,500 addresses. It also goes without saying that defendant must have known that the Navy's portion of the solicitation, which called for 2,713 boxes to be sent to some 1,355 destinations, was the most costly and the least desirable segment of the contract.

B. PLAINTIFF HAD RIGHT TO ACT IN RELIANCE ON DEFENDANT'S CONDUCT

From the facts outlined in section III(A), it is not necessary to consider if defendant and/or its representative intended that plaintiff act in reliance on defendant's actions and/or inactions, for it is clearly established that plaintiff had a reasonable right to act in reliance thereon. From all of defendant's actions or inactions, plaintiff could reasonably conclude that it was to receive the $96,963.84 contract for the entire quantity of boxes. It is only necessary to focus on a few of the above facts to illustrate why it was reasonable for plaintiff, being the low bidder at the October 14, 1969, bid opening, to assume that it would receive a contract for the entire quantity. Under the circumstances of this case, it is important to stress the failure of defendant to inform plaintiff of the receipt of Art Steel's late bid, for only when this is kept clearly in mind is one able to understand why plaintiff ***659** acted as it did. Along the same line, it is important to refrain from evaluating plaintiff's acts from a hindsight vantage point, based on all the facts, since all the facts were not known to plaintiff at the time it acted.

At the time plaintiff received the $8,247.52 order for the 2,713 boxes, it was unaware of Art Steel's bid. In addition, the Government had concluded an on-site inspection, which is not normally done where contracts of less than $10,000 are involved. Further, defendant knew that plaintiff, not previously having manufactured such boxes, would have to purchase dies that cost several thousand dollars more than the $8,247.52 award. Under these circumstances alone, it was reasonable for plaintiff to conclude that the 2,713 box award, which dealt solely with the Navy's requirements, was only the first of several orders, and that it would shortly receive orders for the Army, Marine and Air Force requirements.

C. PLAINTIFF WAS IGNORANT OF TRUE FACTS

Plaintiff did not know of defendant's award to Art Steel to manufacture 29,183 boxes until, by chance, it was so advised in early March 1970. Until that time, plaintiff was under the impression that it had received the entire 31,896 box award. Moreover, by that time plaintiff had already procured the necessary dies, tooling and material to manufacture the entire quantity of boxes.

D. PLAINTIFF RELIED ON DEFENDANT'S ACTS TO ITS DETRIMENT

The record clearly establishes that plaintiff relied on defendant's action and/or inaction to its detriment. Specifically, upon receipt of the 2,713 order, plaintiff immediately ordered dies at a cost of $10,300. In addition, since plaintiff reasonably assumed that the order was only the first, and that others would follow until all 31,896 boxes were manufactured, material for the production of the entire quantity was immediately ordered. As further justification for its action, plaintiff explains that the solicitation required the entire 31,896 boxes to be produced within 70 days. Accordingly, plaintiff concluded that it would have to immediately assemble all of the necessary material, if it hoped to meet the 70-day delivery schedule.

Of course, plaintiff stopped its manufacturing process in early March of 1970 when it learned of

defendant's award to Art Steel for the remaining 29,183 boxes. But by this time it had already ordered and received all of the necessary material and tooling for completion of the entire quantity of boxes.

It is found that defendant knew all of the facts surrounding the placement of awards to both plaintiff and Art Steel, and plaintiff did not; that plaintiff had a right to act in reliance upon defendant's conduct; and that in reliance upon defendant's action plaintiff incurred expenses in connection with the necessary dies, tooling and material to manufacture 31,896 boxes. It is, therefore, concluded that defendant is estopped to deny the existence of a contract with plaintiff for 31,896 boxes.

IV. RECOVERY

[8] Having concluded that defendant is estopped to deny the existence of a contract with plaintiff for 31,896 boxes, it follows that plaintiff is entitled to recover. However, this court has already held in Manloading & Management Assoc., Inc. v. United States, *supra*, that in contracts, such as the one at bar, which contain a termination for convenience article, recovery must be calculated in accordance with that article and should not include prospective profits, or consequential damages. The parties have not addressed themselves to the question of what plaintiff is entitled to recover on the basis of the termination for convenience article, and, the record is accordingly devoid of the needed information to make the required calculations. It is, therefore, necessary that the amount of recovery be determined in ***660** subsequent proceedings under Rule 131(c), unless the parties are able to reach an agreement on that point.

CONCLUSION OF LAW

Upon the findings of fact and the foregoing opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover and judgment is entered to that effect. The amount of recovery will be determined in subsequent proceedings pursuant to Rule 131(c).

Ct.Cl.,1973.
Emeco Industries, Inc. v. U. S.
202 Ct.Cl. 1006, 485 F.2d 652

END OF DOCUMENT

42 Comp. Gen. 272, B- 144641, 1962 CPD P 63, 1962 WL 1829 (Comp.Gen.)

COMPTROLLER GENERAL

**1 TO THE SECRETARY OF THE AIR FORCE

NOVEMBER 30, 1962

*

272

APPROPRIATIONS - AVAILABILITY - CONTRACTS - FUTURE NEEDS

A 3-YEAR CONTRACT FOR SERVICES AND SUPPLIES NOT CONTINGENT ON THE ISSUANCE OF ORDERS BUT TO BE FURNISHED AUTOMATICALLY INCIDENT TO LANDINGS OF GOVERNMENT AIRCRAFT AT WAKE ISLAND, THE COST TO BE CHARGED TO THE DEPARTMENT OF DEFENSE APPROPRIATION ACT, 1962, IS NOT A REQUIREMENTS CONTRACT WHICH DOES NOT OBLIGATE FUNDS UNDER SECTION 1311, SUPPLEMENTAL APPROPRIATION ACT, 1955, 31 U.S.C. 200, UNTIL ORDERS ARE ISSUED AGAINST THE CONTRACT AND, THEREFORE, THE CONTRACT IS NOT EXEMPT FROM THE STATUTORY PROHIBITIONS AGAINST OBLIGATING THE GOVERNMENT IN ADVANCE OF APPROPRIATIONS AND BEYOND THE EXTENT AND AVAILABILITY OF THE AUTHORIZING APPROPRIATION, ACCORDINGLY, THE 3-YEAR CONTRACT EXCEEDING THE BONA FIDE NEEDS WITHIN THE FISCAL YEAR AVAILABILITY OF THE APPROPRIATION, THE GOVERNMENT IS ONLY BOUND TO THE EXTENT OF THE FISCAL YEAR; HOWEVER, BECAUSE OF THE NATURE OF THE CONTRACT IT MAY BE COMPLETED, BUT LONG-TERM CONTRACT AUTHORITY SHOULD BE REQUESTED FROM CONGRESS IF FUTURE SIMILAR NEEDS CANNOT BE MET ON AN ANNUAL BASIS, WITH RENEWAL OPTIONS FROM YEAR TO YEAR.

REFERENCE IS MADE TO LETTER OF MARCH 30, 1962, FROM THE ASSISTANT SECRETARY, REPLYING TO OUR LETTER OF FEBRUARY 7, 1962, QUESTIONING THE AUTHORITY FOR COMMITTING THE GOVERNMENT TO A CONTRACT FOR SERVICES AND SUPPLIES INCIDENT TO LANDINGS OF GOVERNMENT AIRCRAFT AT WAKE ISLAND FOR A PERIOD EXTENDING BEYOND THE END OF THE FISCAL YEAR FOR WHICH THE APPROPRIATION WAS MADE.

THE CONTRACT WAS AWARDED TO FACILITIES MANAGEMENT CORPORATION FOR THE ESTIMATED AMOUNT OF $6,185,599.32, UNDER INVITATION FOR BIDS NO. 104-687-62-1, ISSUED OCTOBER 9, 1961, BY THE WESTERN TRANSPORT AIR FORCE (MATS). IT OBLIGATES THE

CONTRACTOR TO FURNISH FOR A TERM OF 3 YEARS BEGINNING JANUARY 1, 1962, THROUGH DECEMBER 31, 1964, ALL LABOR, EQUIPMENT, MATERIALS AND SUPPLIES FOR SERVICING OF SUCH AIRCRAFT, WHEN REQUIRED, FOR BILLETING OF MILITARY AND CIVILIAN GOVERNMENT PERSONNEL, PASSENGER AND CREWS, AND FOR PERFORMING A NUMBER OF OTHER RELATED SERVICES OF AIR BASE MANAGEMENT ON THE ISLAND. THE CONTRACTOR COMMENCED PERFORMANCE ON JANUARY 1, 1962, AS REQUIRED BY THE TERMS OF THE CONTRACT AND WE UNDERSTAND THAT THE APPLICABLE ANNUAL APPROPRIATION PROVIDED FOR ‘OPERATION AND MAINTENANCE, DEPARTMENT OF THE AIR FORCE‘ WILL BE CHARGED WITH THE SERVICES AND SUPPLIES TO BE FURNISHED THEREUNDER.

IN OUR LETTER WE QUESTIONED THE AUTHORITY OF THE AIR FORCE TO ENTER INTO THE CONTRACT EXTENDING BEYOND THE SINGLE FISCAL YEAR PERIOD OF ***273** AVAILABILITY OF THE APPROPRIATION INVOLVED AND COVERING A PERIOD OF THREE FISCAL YEARS CITING 41 U.S.C. 11 WHICH PROVIDES, IN EFFECT, THAT CONTRACTS CANNOT BE ENTERED INTO WHICH WILL CONTINUE AS BINDING OBLIGATIONS BEYOND THE LIFETIME OF THE APPROPRIATION UNDER WHICH THEY ARE MADE. IN THE REPLY, IT IS STATED THAT THE CONTRACT IS CLASSED AS A REQUIREMENTS CONTRACT OF THE TYPE AUTHORIZED FOR USE IN THE MILITARY DEPARTMENTS BY PARAGRAPH 3-405.5 (B), ARMED SERVICES PROCUREMENT REGULATION (NOW 3-409 (B)). THAT IS, THE CONTRACTOR HAS AGREED TO FURNISH, ON ORDER, THE GOVERNMENT'S REQUIREMENTS FOR SUPPLIES AND SERVICES OF THE TYPE SPECIFIED IN THE SCHEDULE OF THE CONTRACT. THE AIR FORCE BELIEVES, FOR REASONS HEREINAFTER STATED, THAT THIS FORM OF CONTRACT IS MOST APPROPRIATE FOR USE IN THE CIRCUMSTANCES OF THIS PROCUREMENT AND THAT IT COMPLIES WITH THE TERMS OF 31 U.S.C. 665 (A) AND 41 U.S.C. 11.

****2** IN EXPLANATION OF THE MATTER, IT IS STATED IN THE LETTER AS FOLLOWS:

> * * * IN PARAGRAPH 27 OF THE GENERAL PROVISIONS, THE CONTRACT PROVIDES: ‘ESTIMATED REQUIREMENTS
>
> ‘/A) THE QUANTITIES OF SUPPLIES AND SERVICES WHICH THE GOVERNMENT ESTIMATES THAT THE GOVERNMENT WILL REQUIRE AT WAKE ISLAND PER MONTH DURING THE PERIOD COVERED BY THIS CONTRACT ARE SET FORTH UNDER PARAGRAPH II.1. OF THE SCHEDULE. THESE QUANTITIES ARE ESTIMATED ONLY AND ARE NOT PURCHASED HEREBY.
>
> ‘/B) THE GOVERNMENT AGREES TO CALL ON THE CONTRACTOR FOR ALL REQUIREMENTS FOR SUCH SUPPLIES AND SERVICES OF THE GOVERNMENT ACTIVITY DESIGNATED IN PARAGRAPH (A) ABOVE. THE CONTRACTOR AGREES TO FURNISH SUCH SUPPLIES AND SERVICES WHEN CALLED FOR BY THE GOVERNMENT.
>
> ‘/C) IN THE EVENT THAT THE REQUIREMENTS OF THE GOVERNMENT ACTIVITY NAMED IN PARAGRAPH (A) ABOVE DO NOT MATERIALIZE IN THE ESTIMATED QUANTITIES SPECIFIED IN PARAGRAPH II.1. OF THE SCHEDULE, SUCH FAILURE SHALL NOT CONSTITUTE GROUNDS FOR EQUITABLE ADJUSTMENT UNDER THIS CONTRACT.’

SEE ALSO SCHEDULE CLAUSE N.1. :

> ‘ORDERS AND PAYMENT

> '1. THE CONTRACTING OFFICER SHALL ISSUE ORDERS FOR SERVICES HEREUNDER WHICH SHALL SET FORTH THE SERVICES TO BE PERFORMED DURING THE PERIOD COVERED BY THE ORDER. THE CONTRACTOR SHALL NOT PERFORM SERVICES IN EXCESS OF THE AMOUNT SET FORTH IN EACH ORDER.'

UNDER THIS LANGUAGE, THE ONLY OBLIGATION OF THE GOVERNMENT IS TO ORDER FROM THE CONTRACTOR SUCH REQUIREMENTS AS THE GOVERNMENT MAY HAVE—- THAT IS, NOT TO DEAL WITH ANOTHER FOR THE FILLING OF THE GOVERNMENT'S REQUIREMENTS. THE GOVERNMENT NEED NOT HAVE REQUIREMENTS. SUCH A SITUATION MIGHT OCCUR IF NO FUNDS WERE MADE AVAILABLE TO THE AIR FORCE FOR THIS TYPE OF SERVICE; IT MIGHT OCCUR IF THE AIR FORCE DETERMINED THAT THE SERVICES WERE UNNECESSARY FOR OPERATIONAL OR OTHER REASONS; IT MIGHT OCCUR EVEN IF THE AIR FORCE HAD FUNDS AVAILABLE FOR THIS TYPE OF SERVICES BUT CHOSE NOT TO EXPEND THEM FOR THE SERVICES COVERED BY THIS CONTRACT AT THIS BASE, SO LONG AS THE AIR FORCE ACTED IN GOOD FAITH IN MAKING SUCH A DECISION AND DID NOT ATTEMPT TO ELIMINATE THE REQUIREMENT FOR SERVICES FROM THIS CONTRACTOR JUST FOR THE PURPOSE OF OBTAINING SUBSTANTIALLY THE SAME SERVICES FROM ANOTHER COMPANY.

AS INDICATED ABOVE, THE GOVERNMENT DOES HAVE AN OBLIGATION UNDER THIS CONTRACT, AND THIS OBLIGATION IS SUFFICIENT TO MEET THE ESSENTIAL MUTUALITY REQUIREMENT FOR THE EXISTENCE OF A CONTRACT. BUT THE OBLIGATION IS LIMITED; IT IS A NEGATIVE ONE, THAT THE GOVERNMENT WILL NOT DEAL WITH ANOTHER. IT DOES NOT OBLIGATE THE GOVERNMENT TO PROCURE FROM THE CONTRACTOR. THIS COMMITMENT CAN BE SATISFIED WITHOUT THE EXPENDITURE OF FUNDS AND THUS NEEDS NO ***274** APPROPRIATION. IT OBLIGATES NO APPROPRIATION. SUCH COMMITMENTS HAVE NOT BEEN CONSTRUED AS REQUIRING OR PERMITTING THE RECORDING OF AN OBLIGATION UNDER SECTION 1311, P.L. 663, 83RD CONGRESS, 31 U.S.C. 200, UNTIL AN ORDER UNDER THE CONTRACT IS ISSUED. * * *

* * * * * * *

IN THE SPECIFIC CASE OF THE CONTRACT FOR SERVICES AT WAKE ISLAND, WE ARE SATISFIED THAT THE PROPER FACTS ARE PRESENT. THE EXTREMELY ISOLATED POSITION OF THE FACILITY TO BE OPERATED, THE DIFFICULT PROCUREMENT AND LOGISTICS PROBLEMS THEREBY POSED FOR THE CONTRACTOR IN TERMS OF EQUIPMENT, SUPPLIES, AND PERSONNEL, AND THE DIFFICULTIES OF TRANSITION OF THE WORK FROM ONE CONTRACTOR TO ANOTHER, LEADING TO LOSSES IN PERFORMANCE AND MONEY FOR BOTH THE CONTRACTOR AND THE GOVERNMENT, WEIGH HEAVILY FOR AN EXTENDED TERM CONTRACT. EACH NEW CONTRACTOR MUST EXPECT AND PROVIDE FOR THE AMORTIZATION OF SUBSTANTIAL STARTING-LOAD AND LEARNING COSTS, MORE APPROPRIATELY DISTRIBUTED OVER A PERIOD LONGER THAN ONE YEAR. UNDER A RIGID ONE YEAR CONTRACT SYSTEM, A SUCCESSFUL BIDDER IN ONE YEAR MAY BE EXPECTED TO AMORTIZE SUCH COSTS IN FULL IN THE FIRST YEAR; ON SUBSEQUENT PROCUREMENTS, THE IN-PLACE CONTRACTOR HAS A SUBSTANTIAL COST ADVANTAGE OVER

THE BIDDER WHO MUST PROVIDE ANEW FOR SUCH COSTS, AND LITTLE OF THIS COST ADVANTAGE MAY BE EXPECTED TO ACCRUE TO THE GOVERNMENT.

**3 SUMMARIZED, IT IS THE DEPARTMENT'S POSITION THAT THE CONTRACT DOES NOT OBLIGATE ANY FUNDS, EITHER FOR THE CURRENT FISCAL YEAR OR FOR FUTURE FISCAL YEARS; THAT SUCH FUNDS ARE NOT OBLIGATED, WITHIN THE MEANING OF THAT TERM AS DEFINED IN SECTION 1311 OF THE SUPPLEMENTAL APPROPRIATION ACT, 1955, 68 STAT. 800, 830, 31 U.S.C. 200, UNLESS AND UNTIL ORDERS ARE ISSUED TO THE CONTRACTOR FOR THE FURNISHING OF SERVICES AND SUPPLIES; AND THAT THE CONTRACT DOES NOT COMMIT THE GOVERNMENT TO ACCEPT FROM THE CONTRACTOR ANY SERVICES OR SUPPLIES FOR A PERIOD BEYOND THE CURRENT FISCAL YEAR. IT IS CONTENDED THAT THE SOLE OBLIGATION OF THE AIR FORCE UNDER THE CONTRACT IS LIMITED TO ORDERING ITS REQUIREMENTS FROM THE CONTRACTOR, THAT IS, NOT TO PURCHASE SUCH REQUIREMENTS ELSEWHERE. IN FURTHER SUPPORT OF THE CONTRACT THERE ARE CITED CERTAIN DECISIONS OF THE GENERAL ACCOUNTING OFFICE AS A BASIS FOR EXTENDING THE CONTRACT INVOLVED BEYOND THE AVAILABILITY OF FISCAL YEAR APPROPRIATIONS. AND, THE VIEW IS EXPRESSED THAT THE DEPARTMENT DOES NOT REGARD THE LIMITS PLACED ON THE USE OF APPROPRIATED FUNDS IN 31 U.S.C. 665 AND 41 ID. 11, TO APPLY TO REQUIREMENTS CONTRACTS IN SUCH A WAY AS TO IMPEDE THE USE OF THIS FORM OF CONTRACT FOR PERIODS IN EXCESS OF A YEAR AND COVERING MORE THAN ONE FISCAL YEAR.

CONSIDERATION OF THE PROPRIETY OF THE CONTRACT IN QUESTION NECESSARILY INVOLVES THE PROVISIONS OF SECTIONS 3732 AND 3679, REVISED STATUTES, AS AMENDED, AND SECTION 1 OF THE ACT OF JULY 6, 1949, DERIVED FROM SECTION 3690, REVISED STATUTES, CODIFIED AS 41 U.S.C. 11; 31 ID. 665 (A); ID. 712A, RESPECTIVELY, IN PERTINENT PART AS FOLLOWS:

> NO CONTRACT OR PURCHASE ON BEHALF OF THE UNITED STATES SHALL BE MADE, UNLESS THE SAME IS AUTHORIZED BY LAW OR IS UNDER AN APPROPRIATION ADEQUATE TO ITS FULFILLMENT * * *.

NO OFFICER OR EMPLOYEE OF THE UNITED STATES SHALL MAKE OR AUTHORIZE AN EXPENDITURE FROM OR CREATE OR AUTHORIZE AN OBLIGATION UNDER ANY APPROPRIATION OR FUND IN EXCESS OF THE AMOUNT AVAILABLE THEREIN; NOR SHALL ANY SUCH OFFICER **275 OR EMPLOYEE INVOLVE THE GOVERNMENT IN ANY CONTRACT OR OTHER OBLIGATION, FOR THE PAYMENT OF MONEY FOR ANY PURPOSE, IN ADVANCE OF APPROPRIATIONS MADE FOR SUCH PURPOSE, UNLESS SUCH CONTRACT OR OBLIGATION IS AUTHORIZED BY LAW.

EXCEPT AS OTHERWISE PROVIDED BY LAW, ALL BALANCES OF APPROPRIATIONS CONTAINED IN THE ANNUAL APPROPRIATION BILLS AND MADE SPECIFICALLY FOR THE SERVICE OF ANY FISCAL YEAR SHALL ONLY BE APPLIED TO THE PAYMENT OF EXPENSES PROPERLY INCURRED DURING THAT YEAR, OR TO THE FULFILLMENT OF CONTRACTS PROPERLY MADE WITHIN THAT YEAR.

THESE STATUTES EVIDENCE A PLAIN INTENT ON THE PART OF THE CONGRESS TO PROHIBIT

EXECUTIVE OFFICERS, UNLESS OTHERWISE AUTHORIZED BY LAW, FROM MAKING CONTRACTS INVOLVING THE GOVERNMENT IN OBLIGATIONS FOR EXPENDITURES OR LIABILITIES BEYOND THOSE CONTEMPLATED AND AUTHORIZED FOR THE PERIOD OF AVAILABILITY OF AND WITHIN THE AMOUNT OF THE APPROPRIATION UNDER WHICH THEY ARE MADE; TO KEEP ALL THE DEPARTMENTS OF THE GOVERNMENT, IN THE MATTER OF INCURRING OBLIGATIONS FOR EXPENDITURES, WITHIN THE LIMITS AND PURPOSES OF APPROPRIATIONS ANNUALLY PROVIDED FOR CONDUCTING THEIR LAWFUL FUNCTIONS, AND TO PROHIBIT ANY OFFICER OR EMPLOYEE OF THE GOVERNMENT FROM INVOLVING THE GOVERNMENT IN ANY CONTRACT OR OTHER OBLIGATION FOR THE PAYMENT OF MONEY FOR ANY PURPOSE IN ADVANCE OF APPROPRIATIONS MADE FOR SUCH PURPOSE; AND TO RESTRICT THE USE OF ANNUAL APPROPRIATIONS TO EXPENDITURES REQUIRED FOR THE SERVICE OF THE PARTICULAR FISCAL YEAR FOR WHICH THEY ARE MADE.

****4** IN 21 OP.ATTY.GEN. 244, 248, THE ATTORNEY GENERAL POINTED OUT THAT THE OBJECT OF THESE STATUTES WAS TO PREVENT EXECUTIVE OFFICERS FROM INVOLVING THE GOVERNMENT IN EXPENDITURES OR LIABILITIES BEYOND THOSE CONTEMPLATED AND AUTHORIZED BY THE LAW-MAKING POWER. IN WILDER V. UNITED STATES, 16 CT.CL. 528, 543, THE COURT OF CLAIMS SAID THAT THESE STATUTES RESTRICT IN EVERY POSSIBLE WAY THE EXPENDITURES, EXPENSES, AND LIABILITIES OF THE GOVERNMENT, SO FAR AS EXECUTIVE OFFICERS ARE CONCERNED, TO THE SPECIFIC APPROPRIATION FOR EACH FISCAL YEAR. IN PARSHALL V. UNITED STATES, 147 FED. 433, 435, THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, CITING SECTIONS 3678 (31 U.S.C. 628) AND 3679, REVISED STATUTES, STATED IT TO BE ‘THE SETTLED AND RECOGNIZED POLICY OF CONGRESS TO KEEP ALL THE DEPARTMENTS OF THE GOVERNMENT, IN THE MATTER OF INCURRING OBLIGATIONS FOR EXPENDITURES, WITHIN THE APPROPRIATIONS ANNUALLY MADE FOR CONDUCTING ITS AFFAIRS.’SEE, ALSO, SUTTON V. UNITED STATES, 256 U.S. 575;LEITER V. UNITED STATES, 271 U.S. 204;GOODYEAR CO. V. UNITED STATES, 276 U.S. 287;GAY STREET CORPORATION OF BALTIMORE, MARYLAND V. UNITED STATES, 130 CT.CL. 341, 347.

HERE, THE CONTRACT INVOLVES THE FURNISHING OF LABOR, SUPERINTENDENCE, TRANSPORTATION, EQUIPMENT, MATERIAL, AND SUPPLIES FOR THE PERFORMANCE OF NONPERSONAL SERVICES INCIDENT TO THE OPERATION AND MAINTENANCE OF AN AIR BASE AT WAKE ISLAND IN SUPPORT OF MATS AND OTHER GOVERNMENT AIRCRAFT AND PERSONNEL DURING THE PERIOD JANUARY 1, 1962, ***276** THROUGH DECEMBER 31, 1964. BY THE TERMS OF THE AGREEMENT, THE CONTRACTOR GUARANTEED TO THE AIR FORCE, AMONG OTHER THINGS, THAT IT HAS ASSIGNED AT WAKE ISLAND A QUALIFIED AND COMPETENT WORK FORCE OF APPROXIMATELY A MINIMUM OF 400 SPECIFIED POSITIONS TO PERFORM THE SERVICES REQUIRED UNDER THE CONTRACT. A PART OF THE CONSIDERATION FOR THE CONTRACT IS CERTAIN UNIT RATES TO BE PAID BY THE AIR FORCE FOR THE VARIOUS SERVICES FURNISHED CERTAIN OF WHICH ARE MEASURED BY THE VOLUME OF OPERATIONS. SUCH PAYMENTS, IT IS STATED, ARE MADE CONTINGENT UPON THE ISSUANCE OF ORDERS TO THE CONTRACTOR FOR SERVICES AND SUPPLIES AS ‘CALLED FOR‘ BY THE AIR FORCE.

THE AUTHORITY TO MAKE THE CONTRACT UNDER CONSIDERATION IS DERIVED FROM THE APPROPRIATION ‚OPERATION AND MAINTENANCE, AIR FORCE' CONTAINED IN THE DEPARTMENT OF DEFENSE APPROPRIATION ACT, 1962, PUBLIC LAW 87-144, APPROVED AUGUST 17, 1961, 75 STAT. 365, 369. THIS APPROPRIATION IS MADE AVAILABLE IN GENERAL TERMS FOR NECESSARY EXPENSES FOR, AMONG OTHER THINGS, THE OPERATION, MAINTENANCE, AND ADMINISTRATION OF THE AIR FORCE DURING THE FISCAL YEAR 1962. IN APPLYING THE QUOTED STATUTES DEALING WITH GOVERNMENT CONTRACTING, THE DECISIONS OF THE COURTS AND THE ACCOUNTING OFFICERS HAVE CONSISTENTLY HELD THAT CONTRACTS EXECUTED AND SUPPORTED UNDER AUTHORITY OF FISCAL YEAR APPROPRIATIONS CAN ONLY BE MADE WITHIN THE PERIOD OF THEIR OBLIGATION AVAILABILITY AND MUST CONCERN A BONA FIDE NEED ARISING WITHIN SUCH FISCAL YEAR AVAILABILITY. SEE 32 COMP. GEN. 565; 36 ID. 683; 37 ID. 60; ID. 155. ALSO, SUCH DECISIONS HOLD THAT CONTRACTS ENTERED INTO UNDER FISCAL YEAR APPROPRIATIONS PURPORTING TO BIND THE GOVERNMENT BEYOND THE FISCAL YEAR INVOLVED MUST BE CONSTRUED AS BINDING UPON THE GOVERNMENT ONLY TO THE END OF THE FISCAL YEAR; AND EVEN WHERE THE CONTRACT CONTAINS AN OPTION IN THE GOVERNMENT TO RENEW FROM YEAR TO YEAR TO THE END OF THE STATED TERM CONTINGENT UPON THE AVAILABILITY OF FUTURE AVAILABLE APPROPRIATIONS, AFFIRMATIVE ACTION, IN EFFECT MAKING A NEW CONTRACT AND COMPLYING WITH THE ADVERTISING REQUIREMENTS, IS REQUIRED IN ORDER TO EXERCISE THE GOVERNMENT'S OPTION OF RENEWAL. SEE THE LEITER AND GOODYEAR CASES CITED ABOVE; 28 COMP. GEN. 553; 29 ID. 91; 33 ID. 90; 36 ID. 683; AND B-88974 OF NOVEMBER 10, 1949, TO THE SECRETARY OF AGRICULTURE. THIS WAS THE LIMIT OF AUTHORITY OF THE AIR FORCE TO MAKE CONTRACTS OR PURCHASES ON BEHALF OF THE GOVERNMENT INVOLVING THE USE OF THIS APPROPRIATION.

****5** HOWEVER, BY THE TERMS OF THE CONTRACT IN QUESTION, IT WAS SOUGHT TO OBLIGATE THE GOVERNMENT TO PAY FOR SERVICES AND SUPPLIES, IF AND WHEN ORDERED FROM THE CONTRACTOR, TO MEET NOT ONLY THE NEEDS OF THE FISCAL YEAR 1962, BUT, IN CASE OF SERVICES AND SUPPLIES TO BE ORDERED AND FURNISHED DURING THE FISCAL YEARS 1963, 1964 AND 1965, IT ALSO WAS SOUGHT TO MAKE THE TERMS OF THE CONTRACT OPERATIVE AND THE LIABILITY ASSUMED BY IT BINDING UPON ANTICIPATED FUTURE APPROPRIATIONS, AND WITHOUT ***277** AFFIRMATIVE RENEWAL OF THE CONTRACT UNDER THE APPLICABLE APPROPRIATION FROM WHICH THE PAYMENTS ARE TO BE MADE.

THE DEPARTMENT JUSTIFIES THE CONTINUING LIABILITY TERMS OF THE CONTRACT ON THE BASIS THAT SUCH LIABILITY DOES NOT RESULT IN APPROPRIATION OBLIGATIONS WITHIN THE MEANING OF SECTION 1311 UNLESS AND UNTIL ORDERS ARE ISSUED UNDER FUTURE AVAILABLE APPROPRIATIONS. CONCEDING THAT THE INTEGRITY OF THE AVAILABLE APPROPRIATIONS WOULD BE MAINTAINED, THERE IS TO BE CONSIDERED THE FACT THAT THE APPLICABLE RESTRICTIONS OF THE REVISED STATUTES PROHIBIT CONTRACTUAL AGREEMENTS UNDER FISCAL YEAR APPROPRIATIONS WHICH INVOLVE THE GOVERNMENT BEYOND SUCH PERIOD OF AVAILABILITY NOT ONLY IN APPROPRIATION OBLIGATIONS, BUT ANY OTHER OBLIGATION OR LIABILITY WHICH MAY ARISE THEREUNDER AND ULTIMATELY REQUIRE THE EXPENDITURE OF FUNDS. ALSO, UNDER THE HOLDING OF THE LEITER CASE, THE CONTRACT CEASES TO EXIST AT

THE END OF THE FISCAL YEAR CURRENT AT THE TIME OF ITS EXECUTION AND AFFIRMATIVE ACTION IS REQUIRED TO RENEW THE CONTRACT. CONSEQUENTLY, IT IS CLEAR THAT THE CONTRACT WENT BEYOND THE AUTHORITY CONFERRED BY THE APPROPRIATION AT THE TIME OF ITS EXECUTION AND, IN SUBSTANCE AND EFFECT, VIOLATES THE ABOVE-QUOTED STATUTES. WE DO NOT AGREE WITH THE DEPARTMENT'S POSITION THAT THE CONTRACT ITSELF CREATES NO OBLIGATION OF CURRENT OR FUTURE APPROPRIATIONS; THAT IT DOES NOT OBLIGATE THE GOVERNMENT TO PROCURE FROM THE CONTRACTOR; AND THAT THERE IS NO ‚COMMITMENT' THEREUNDER UNLESS (1) FUNDS AFTER JUNE 30, 1962, ARE MADE AVAILABLE, (2) THERE IS AN ADMINISTRATIVE DETERMINATION THAT A REQUIREMENT EXISTS, (3) AN ADMINISTRATIVE ALLOCATION OF AVAILABLE FUNDS TO MEET THAT REQUIREMENT IS MADE, AND (4) THERE IS AN AFFIRMATIVE ADMINISTRATIVE ACT ORDERING SERVICES UNDER THE CONTRACT TO MEET SUCH REQUIREMENT.

WHILE PARAGRAPH 27 OF THE GENERAL CONDITIONS PURPORTS TO PROTECT THE GOVERNMENT AGAINST LIABILITY IN THE EVENT ITS 'REQUIREMENTS' ARE LESS THAN THE STATED ESTIMATES, AND TO LIMIT ITS OBLIGATIONS TO PAYMENT FOR SUCH SERVICES AND SUPPLIES AS ARE 'CALLED FOR.' REFERENCE TO THE SCHEDULE OF ITEMS COVERED BY THE CONTRACT SHOWS THAT THE MAJORITY OF THEM ARE AUTOMATICALLY REQUIRED OF THE CONTRACTOR WHENEVER A GOVERNMENT AIRCRAFT LANDS AT WAKE ISLAND. ONE, ITEM 11, APPEARS TO CREATE A COMPLETE AND OUTRIGHT OBLIGATION FOR PROVISIONING AND MAINTENANCE OF A LARGE STOCK OF SPECIFIED SUPPLIES AND FOR KEEPING OPERATIONAL A SUBSTANTIAL QUANTITY OF OPERATING EQUIPMENT, AND ALTHOUGH PROVISION IS MADE FOR APPORTIONING THE MONTHLY PAYMENT FOR THESE SERVICES IN THE EVENT LESS THAN THE FULL MONTH'S SERVICES ARE REQUIRED, WE SEE NO PROVISION IN THE CONTRACT FOR ELIMINATING THE REQUIREMENT EXCEPT BY TERMINATION OF THAT PART OF THE CONTRACT FOR THE CONVENIENCE OF THE GOVERNMENT.

****6** IN THESE CIRCUMSTANCES, SINCE THE SERVICES COVERED BY THE CONTRACT ARE FOR THE MOST PART AUTOMATIC INCIDENTS OF THE USE OF THE AIR FIELD, THEIR FURNISHING DOES NOT IN FACT INVOLVE ANY ‚ADMINISTRATIVE ***278** DETERMINATION THAT A REQUIREMENT EXISTS,' OR 'AN AFFIRMATIVE ADMINISTRATIVE ACT ORDERING SERVICES UNDER THE CONTRACT.'THE ONLY DETERMINATION WHICH COULD ELIMINATE THE REQUIREMENT FOR SERVICES UNDER THE CONTRACT WOULD BE A DETERMINATION TO DISCONTINUE USE OF THE AIR FIELD, WHICH WOULD SEEM TO BE A REMOTE POSSIBILITY. HENCE, WE DOUBT THAT THE ENTIRE CONTRACT IS SUCH A 'REQUIREMENTS' CONTRACT AS CONTEMPLATED BY ASPR 3-409 (B) NOR IS IT SIMILAR TO ANY OF THE ‚REQUIREMENTS ' CONTRACTS HERETOFORE CONSIDERED IN OUR DECISIONS.

WITH REFERENCE TO A-60589, DATED JULY 12, 1935, AND OTHER DECISIONS OF OUR OFFICE CITED IN THE LETTER TO SUPPORT THE PROPRIETY OF THE INSTANT CONTRACT, OUR STUDY THEREOF DISCLOSES THAT THE FACTS AND CIRCUMSTANCES CONSIDERED THEREIN ARE DISSIMILAR FROM THOSE INVOLVED HERE, AND, THEREFORE, MAY NOT BE REGARDED AS PRECEDENT OR CONTROLLING IN THIS CASE. WE RECOGNIZE THAT THE STATUTORY

RESTRICTIONS IMPOSED ON CONTRACTS ENTERED INTO UNDER AUTHORITY OF FISCAL YEAR APPROPRIATIONS MAY GIVE RISE TO DIFFICULT PROCUREMENT PROBLEMS, WITH REFERENCE TO ACTIVITIES CONDUCTED BY THE AIR FORCE IN ISOLATED AREAS, AND THAT THE MAKING OF EXTENDED TERM CONTRACTS IN SUCH AREAS COULD PRODUCE MORE FAVORABLE BID PRICES TO THE GOVERNMENT. HOWEVER, THE AUTHORITY FOR SUCH ACTION IS A MATTER FOR CONSIDERATION BY THE CONGRESS AND MAY NOT BE ACCOMPLISHED INDIRECTLY BY A PATTERN OF CONTRACTING WHICH SEEKS TO MAKE USE OF REQUIREMENTS CONTRACTS EXTENDING BEYOND THE CURRENT FISCAL YEAR TO MEET SUCH SITUATIONS. IN THIS CONNECTION, SEE 10 U.S. CODE 2388 AUTHORIZING THE SECRETARIES OF THE MILITARY DEPARTMENTS TO CONTRACT FOR THE STORAGE, HANDLING AND DISTRIBUTION OF LIQUID FUELS FOR 5-YEAR PERIODS WITH OPTIONS TO RENEW FOR ADDITIONAL LONG-TERM PERIODS. ALSO, SEE SECTION 202 (B) OF THE ACT FOR INTERNATIONAL DEVELOPMENT OF 1961, APPROVED SEPTEMBER 4, 1961, PUBLIC LAW 87-195, 75 STAT. 426, 22 U.S.C. 2162 (B), AUTHORIZING THE PRESIDENT TO EXECUTE LONG-TERM AGREEMENTS COMMITTING FUNDS TO BE APPROPRIATED, SUBJECT ONLY TO ANNUAL APPROPRIATION OF SUCH FUNDS, AND 43 U.S.C. 388, 48ID50D, AND ID. 50D-1, AUTHORIZING THE SECRETARY OF THE INTERIOR, UNDER CERTAIN CONDITIONS, TO INCUR OBLIGATIONS FOR THE PURCHASE OF MATERIALS, SUPPLIES, AND EQUIPMENT IN ADVANCE OF AND IN EXCESS OF APPROPRIATIONS PROVIDED FOR SUCH PURPOSES.

FOR THE FOREGOING REASONS, IT IS OUR VIEW THAT THE CONTRACT IN QUESTION CONTRAVENES THE REQUIREMENTS OF THE STATUTES QUOTED ABOVE. HOWEVER, IN VIEW OF THE CIRCUMSTANCES OF THE AWARD, WE WILL NOT OBJECT TO COMPLETION OF THE CONTRACT TERM SUBJECT TO THE UNDERSTANDING THAT IF THE DEPARTMENT'S REQUIREMENTS FOR THIS TYPE OF SERVICE CANNOT BE MET ON AN ANNUAL BASIS WITH RENEWAL OPTIONS FROM YEAR TO YEAR, SPECIFIC STATUTORY AUTHORITY FOR LONG-TERM CONTRACTS SHOULD BE REQUESTED OF THE CONGRESS.

****7** THE CONTRACT AF 104/687/-4 TRANSMITTED WITH THE LETTER OF MARCH 30, IS RETURNED HEREWITH.

42 Comp. Gen. 272, B- 144641, 1962 CPD P 63, 1962 WL 1829 (Comp.Gen.)

END OF DOCUMENT

B- 283834, 2000 WL 276935 (Comp.Gen.)

COMPTROLLER GENERAL

***1 Matter of:**
Mr. John A. Carver
Trustee, Court Services and Offender Supervision Agency for the District of Columbia
633 Indiana Avenue, N.W. 12th Floor
Washington, DC 20004

February 24, 2000

Subject: Unauthorized Use of Interest Earned on Appropriated Funds

Dear Mr. Carver:

Pursuant to a request from the Chairman of the House Subcommittee, District of Columbia Appropriations, we reviewed interest earnings on federal funds paid to various District of Columbia government entities from fiscal year 1995 through fiscal year 1999. During our review, we learned that the Court Services and Offender Supervision Agency of the District of Columbia (CSOSA) earned interest on funds appropriated to it and spent the interest in 1998 and 1999. As discussed below, we conclude that CSOSA lacked the requisite statutory authority to spend the interest earned.

Congress appropriated to CSOSA $43 million for fiscal year 1998 and $59.4 million for fiscal year 1999. [FN1] Based on the information your agency provided us, CSOSA earned approximately $1.693 million in interest by depositing the 1998 appropriation in an interest bearing account. [FN2] Of the interest earned, CSOSA spent approximately $1.575 million--approximately $450,000 for 1999 contracts, approximately $688,000 for 1998 contracts and approximately $437,000 for interagency services. Because CSOSA obligated all but approximately $159,000 of its fiscal years 1998 and 1999 appropriations, CSOSA's spending of the $1.575 million in interest resulted in CSOSA spending in fiscal years 1998 and 1999 more than the budgetary resources Congress provided in the appropriations acts.

The National Capital Revitalization and Self-Government Reorganization Act of 1997 (Revitalization Act), Pub. L. No. 1105-33, Title XI, 111 Stat. 712 (1997) transferred a number of activities related to offender supervision from District agencies to CSOSA. CSOSA will become an agency of the executive branch of the federal government when the CSOSA Trustee certifies, and the Attorney General concurs, that CSOSA can carry out the functions assigned to it. [FN3] Until then, the functions are carried out under the authority of the CSOSA Trustee, an independent officer of the District of Columbia government. [FN4]

The District of Columbia Home Rule Act provides that no amount may be obligated or expended by a District government officer or employee unless such amount has been approved by an act of Congress and then only according to such act. [FN5] The Antideficiency Act prohibits an officer or employee of the District of Columbia Government from making or authorizing an expenditure or obligation in excess of or in advance of an appropriation. [FN6] Within this statutory framework, when Congress appropriates an amount for the CSOSA Trustee, that amount establishes the authorized program spending level beyond which the CSOSA Trustee may not operate in the absence of additional authority.

When an agency retains and spends funds received from outside sources, it augments its appropriation to the extent that such amount results in agency spending in excess of the level established by the appropriation act. An agency's authority to augment its appropriation is no greater than its authority to spend funds in the absence of an appropriation. Further, even when a law authorizes an officer or employee to receive funds from outside sources, the authority to then spend the funds must be provided in law. The authority to spend may not be inferred from the absence of an express prohibition to spend in the law authorizing the collection. [FN7]

***2** When Congress wants to authorize entities funded with appropriations to earn and spend interest on appropriated funds, it expressly provides the requisite legislative authority. For example, after Congress passed legislation in 1995 establishing the Financial Responsibility and Management Assistance Authority, the Congress amended the legislation in 1997 to authorize the Authority to spend interest earned on various accounts, including its annual appropriation. [FN8] Similarly, after we reported that DC Courts had improperly spent interest earned on appropriated funds in fiscal year 1998, Congress expressly provided for how DC Courts may spend interest earned in fiscal year 1999. District of Columbia Appropriations Act, 2000, Pub. L. No. 106-113, Div. A., Title I, 113 Stat. 1501, 1503 (1999). Congress has not, however, enacted similar authority for CSOSA.

Early in our review, we solicited your agency's views regarding the legal authority relied upon for CSOSA to spend interest earned on deposits. Subsequently, we briefed CSOSA officials on our preliminary view that CSOSA spent interest without the requisite authority. CSOSA's General Counsel provided explanations that we considered in analyzing the issue. [FN9] Having considered the material CSOSA provided, we conclude that CSOSA lacked the requisite statutory authority to spend interest earned on appropriations, and that CSOSA's spending the interest therefore constitutes an unauthorized augmentation of its appropriation. To the extent the interest spent in 1998 and 1999 exceeds the unobligated balances of the appropriations made to CSOSA for those fiscal years, CSOSA committed a reportable violation of the Antideficiency Act. [FN10]

Sincerely yours,
Robert P. Murphy
General Counsel

FN1. Pub. L. No. 105-100, 111 Stat. 2160, 2161 (1997); Pub. L. No. 105-277, 112 Stat. 2681, 2681-123 (1998).

FN2. Congress changed the appropriation act language for fiscal year 1999 to provide that Treasury would transfer the appropriated funds to CSOSA only as needed to liquidate obligations. As a result, CSOSA did not earn interest

on the 1999 appropriation.

FN3. Sections 11232(h) and 11233 of the Revitalization Act, as amended, D.C. Code Ann. §§ 24-1232(h) and 1233 (1981, 1996 Replacement Vol. and 1999 Supp.)

FN4. D.C. Code Ann. § 24-1232(a).

FN5. Pub. L. No. 93-198, § 446, 87 Stat. 774, 801 (1973), D.C. Code Ann. § 47-304 (1981, 1997 Replacement Vol. and 1999 Supp.)

FN6. 31 U.S.C. § 1341 (1994).

FN7. We reached a similar conclusion regarding D.C. Courts spending interest earned on federal appropriations. D.C. Courts, Planning and Budgeting Difficulties During Fiscal Year 1998, GAO/AIMD/OGC-99-226, p. 10 (September 1999).

FN8. D.C. Code Ann. § 47-391.6(d)

FN9. CSOSA's comments focused primarily on the mitigating circumstances relating to its spending in excess of available amounts and the corrective action it has taken to prevent a recurrence.

FN10. 31 U.S.C. § 1351. See OMB Cir. A-34, §§ 22.6 (November 1997) providing guidance on the contents of an Antideficiency Act report to the President and Congress.

B- 283834, 2000 WL 276935 (Comp.Gen.)

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