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DECISION



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

FILE: B-200886

DATE: November 26, 1980

MATTER OF: Synthetic Fuel Purchase Contracts Under
Defense Production Act

DIGEST: Under section 305 of Defense Production Act of 1950, as amended, President or delegate may enter into contracts for purchase or commitment to purchase synthetic fuels as long as there are sufficient appropriations in advance to pay the amount by which the contract price exceeds the estimated market price for the fuel at the time for performance.

The Deputy Assistant Secretary of Defense has requested our opinion on the authority of the President, or his delegate, to enter into long-term contracts for the purchase of synthetic fuels in advance of appropriations under section 305 of the Defense Production Act of 1950, as added by section 104(e) of the Defense Production Act Amendments of 1980, Pub. L. No. 96-294, 94 Stat. 611, 619 (to be codified at 50 U.S.C. App. § 2095).

Section 305 authorizes the President to enter into contracts to purchase synthetic fuels for purposes of national defense. The Act requires that any contract entered under this authority contain a provision allowing the President to refuse delivery of the fuel and instead to pay the contractor the amount by which the price specified in the contract exceeds the prevalent market price for that fuel at the time delivery under the contract is required. The Deputy Assistant Secretary specifically asks whether it is necessary to have appropriations in advance to cover the full price of the contracts, or whether it is sufficient only to have advance appropriations to cover the difference between the contract price and the estimated market price at the time of scheduled delivery should the President refuse to accept delivery of the fuel.

For the reasons indicated below, we conclude that the President or his delegate may lawfully enter into contracts to purchase synthetic fuels so long as there are sufficient appropriations in advance to cover the estimated payments which will be due in the event the President chooses to refuse delivery of the fuel.

Public Law 96-294 amended the Defense Production Act by adding a new section 305. Section 305 directs the President to take immediate action to achieve production of synthetic fuel to meet national defense needs. He may issue loan guarantees, make direct loans, or

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"contract for purchases of, or commitments to purchase, synthetic fuels for Government use for defense needs.* * *" (Section 305(b)(1)(A)(i)).

Funds to carry out Section 305 were appropriated by the Supplemental Appropriations and Rescission Act, 1980, Pub. L. No. 96-304, 94 Stat. 857, 880. The act appropriated \$3 billion for this purpose, to remain available until expended.

Subject to price ceiling limitations, purchases or commitments to purchase authorized by section 305 may be made

"(A) without regard to the limitations of existing law (other than the limitations contained in this Act) regarding the procurement of goods or services by the Government; and

"(B) subject to section 717(a), for such quantities, on such terms and conditions (including advance payments subject to paragraph (3)) and for such periods as the President deems necessary." (Section 305(c)(1) Emphasis added.)

The section 717(a) referred to authorizes all activities under the Defense Production Act through September 30, 1981, and contains a proviso

"* * * That all authority hereby or hereafter extended under title III of this Act shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation Acts. * * *" (50 U.S.C. App. § 2166(a)).

The incorporation of the language of section 717(a) into section 305 makes it clear that the President cannot enter into purchase contracts until an appropriation for the purpose has been enacted. We previously interpreted the language of section 717(a) in a letter to the Chairman, Senate Committee on Banking, Housing, and Urban Affairs. B-96983, August 1, 1979. We said:

"In our opinion, this proviso requires that, with respect to the authorities granted in sections 302 and 303 of the Act, the exercise of which will result in the actual expenditure of funds, Congress must appropriate these funds before the authorities can be used."

The fuel purchase authority in section 305 will also result in the expenditure of funds and thus the reasoning in our letter applies to section 305.

Section 305(d)(3) of the Act provides:

"(3) Any contract for such purchases or commitments to purchase shall provide that the President has the right to refuse delivery of the synthetic fuel involved and to pay the person involved an amount equal to the amount by which the price for such synthetic fuel, as specified in the contract involved, exceeds the market price, as determined by the Secretary of Energy, for such synthetic fuel on the delivery date specified in such contract."

The Deputy Assistant Secretary has not provided us with a sample of a contract for purchase or commitment to purchase to be used under section 305. However, based on the inclusion of the provision required by section 305(d)(3), the contract would allow the Government two options, either of which would constitute full performance. At the time of performance, the Government could either accept the fuel and pay the contractor the price set by the contract, or refuse the fuel and pay the contractor the difference between that contract price and a lower market price.

Unless the market price for fuel at the time for performance is zero, the likelihood of which we view as very nearly impossible, the amount the Government must pay the contractor if it chooses not to accept the fuel will be less than the full contract price. It is thus within the sole power of the Government to limit its potential liability under the contract to the difference between contract price and market price while still fully performing.

In our opinion when a contract gives the Government the option of two performances at different prices, then the Government has incurred an obligation only for the lesser amount because the Government cannot be held to any greater liability. The Government can lawfully enter

into such a contract, without violating the prohibition against contracting in advance of appropriations, if at the time it enters the contract it has sufficient appropriations available to pay the lesser amount. Cf. Newport News Shipbuilding and Drydock Co., 55 Comp. Gen. 812, 826 (1976).

Therefore, it is our opinion that the President may enter into synthetic fuel purchase contracts without violating section 717(a) of the Act so long as he has sufficient appropriations in advance to pay any anticipated difference between the contract price and the estimated market price at the time of performance.

Our view is supported by section 305(d)(5) of the Act, which provides:

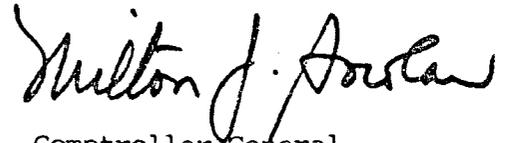
"(5) In any case in which the President, under the provisions of this section, accepts delivery of any synthetic fuel, such synthetic fuel may be used by an appropriate Federal agency. Such Federal agency shall pay for such synthetic fuel the prevailing market price for the product which such synthetic fuel is replacing, as determined by the Secretary of Energy, from sums appropriated to such Federal agency for the purchase of fuel, and the President shall pay, from sums appropriated for such purpose pursuant to the authorizations contained in sections 711(a)(2) and 711(a)(3), an amount equal to the amount by which the contract price for such synthetic fuel as specified in the contract involved exceeds such prevailing market price."

This provision makes it clear that Congress intended the funds appropriated to carry out section 305 to be used only to pay the amount by which the contract price exceeds the market price for the fuel. (Also see H.R. Rept. No. 96-165, 96th Cong., 1st Sess. 24 (1979).) If the Government decides to purchase the fuel, the part of the price equal to the market price is to be paid from the appropriations for fuel purchases of the agency which will actually use the fuel. Since it cannot be known until the time for performance whether the Government will accept the fuel, or which agency will actually use it if accepted, the Congress did not intend that the market price portion of the cost would be paid from an appropriation current at the time the contract is entered. Rather it intended that this portion of the purchase price would be paid from the using agency's appropriation current at the time of performance.

Further support is found in section 305(g). The first paragraph of this provision requires each contract entered under section 305 to specify in dollars the maximum liability of the Government under the contract. The second paragraph states that in determining this maximum liability,

"purchase agreements shall be valued as of the date of each such contract based upon the President's estimate of the maximum liability under such contract * * *"

Since the full contract price would be known at the time the contract was entered, the only liability that the President could estimate would be the difference between that price and the market price at the date for performance. Thus the maximum liability, which the Government would have to have sufficient appropriations in advance to cover, is only the difference between the contract and market prices.



For the Comptroller General
of the United States