



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Funding of Replacement Contracts

File: B-232616

Date: December 19, 1988

DIGEST

Funds originally obligated in one fiscal year, for a contract that is terminated for convenience in response to a court order (or a determination by the General Accounting Office or other competent authority) that the contract award was improper, remain available in a subsequent fiscal year to fund a replacement contract, provided the original contract was awarded in good faith, the agency has a continuing bona fide need for the goods or services involved, and the replacement contract is awarded without undue delay and on the same basis as the original contract. 60 Comp. Gen. 591 (1981) is modified accordingly.

DECISION

This decision is in response to a request from the Chief, Operations Accounting and Reporting Division, United States Mint (Mint), Department of the Treasury, for our decision on whether funds originally obligated in fiscal year 1988 by the Mint for an asbestos abatement contract are available in a subsequent fiscal year after a federal district court orders the Mint to terminate the award and resolicit the contract. As explained below, since the Mint is compelled to terminate the contract for the convenience of the government, the funds in question remain available to the Mint in fiscal year 1989 to fund a replacement contract for asbestos removal, provided the Mint still has a bona fide need for such services and the replacement contract is awarded without undue delay and on the same basis as the original contract. Our decision reported at 60 Comp. Gen. 591 (1981) is modified accordingly.

BACKGROUND

On June 15, 1988, under a negotiated procurement, the Mint awarded a \$1.8 million contract to LVI Environmental, Inc. (LVI), to remove asbestos-containing materials from the

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Denver Mint in Denver, Colorado. Thereafter, an unsuccessful offeror, A&B Asbestos Abatement, Inc. (A&B), filed a motion in the Federal District Court for the District of Colorado for a temporary restraining order on the grounds that the award of the contract was "arbitrary, capricious, and not in accordance with law."^{1/} The court granted A&B's motion for a temporary restraining order. Subsequently, on November 1, 1988, the court issued a permanent injunction enjoining the Mint from awarding the contract to LVI and ordering the Mint to resolicit new proposals "conditioned on the availability of funds". A&B Asbestos Abatement, Inc. v. United States, Civil Action No. 88-F-1267 (D. Colo. November 1, 1988).

In light of the court's order, the Mint will be required to terminate the contract with LVI under the termination for the convenience of the government clause of the contract. The Mint does not have sufficient funds in its budget for fiscal year 1989 to fully fund a new contract, nor are there sufficient funds allocated in its budget for fiscal year 1990 for the removal of asbestos from the Denver Mint. Therefore, the Mint will be unable to resolicit the contract unless the funds previously obligated for the contract with LVI remain available for the reprocurement or a supplemental appropriation can be obtained.

ISSUE

Specifically, the Mint requested our decision as to

"whether funds originally obligated in fiscal year 1988 for an awarded asbestos abatement contract will be deobligated if a federal district court orders the aforesaid contract to be cancelled."

The court has now enjoined the Mint from awarding the contract to LVI and has ordered it to resolicit the contract. As stated in the Mint's submission, the current position of our Office regarding the availability of funds originally obligated in one fiscal year to fund a "replacement contract" in a subsequent fiscal year is set forth in our decision reported at 60 Comp. Gen. 591 (1981).

^{1/} Before A&B filed its motion for a temporary restraining order with the court, it filed a protest with our Office. We dismissed the protest as untimely. B-232128.1, July 29, 1988. Subsequently, A&B requested reconsideration of our dismissal of its protest. We dismissed the request for reconsideration upon learning that the matter was before a federal district court. B-232128.2, September 20, 1988.

forth in our decision reported at 60 Comp. Gen. 591 (1981). While our decision in that case stated that funds obligated for a contract in one fiscal year would not remain available to fund a replacement contract in a subsequent fiscal year if the original contract was terminated for the convenience of the government, the Mint has requested that we modify that decision "by carving out an exception to the deobligation rule if a government agency is ordered by a Court to terminate a contract."

ANALYSIS

When a government contract is terminated for default, we have consistently taken the position that the funds obligated for the original contract are available in a subsequent fiscal year to fund a replacement contract.^{2/} 55 Comp. Gen. 1351, 1353 (1976); 40 Comp. Gen. 590, 591 (1966); 34 Comp. Gen. 239, 241 (1954). However, when contracts are terminated for reasons other than the contractor's default, or when the termination for default is subsequently changed to a termination for convenience,^{3/} our position has been less consistent.

As pointed out by the Mint, our current position regarding funding of replacement contracts in situations involving terminations for convenience is set forth in 60 Comp. Gen. 591, 595-596 (1981), as follows:

"The original funding obligation is extinguished upon termination of the contract and the funds will not remain available to fund a replacement contract:

^{2/} In this context, a replacement contract is a new contract the agency enters into to satisfy a continuing bona fide need for the goods or services covered by the original contract that was terminated. 55 Comp. Gen. 1351, 1353 (1976). In addition, the replacement contract must be of substantially the same size and scope as the original contract and should be executed "without undue delay" after the original contract is terminated. 60 Comp. Gen. 591, 595 (1981).

^{3/} A termination for default could be changed to a termination for convenience if a competent administrative or judicial authority determines that the contractor had not defaulted or that the default was excusable. B-197279, September 29, 1980.

"(1) where the contracting officer terminates an existing contract for the convenience of the Government, either on his own initiative or upon the recommendation of the General Accounting Office; or

"(2) where the contracting officer has terminated an existing contract for default and has not executed a replacement contract on the date that a competent administrative or judicial authority orders the conversion of the original termination for default to a termination for convenience of the Government."

Thus, in 60 Comp. Gen. 591 we said that when an agency terminates a contract for convenience, even if it does so to comply with an order of a competent administrative or judicial authority or a recommendation of the General Accounting Office, the original obligation ordinarily would be extinguished and prior fiscal year funds would not be available to fund the replacement contract. Adherence to that principle in this case would require us to hold that, even though the court, in effect, has required the Mint to terminate the contract for convenience, funds obligated for the contract in fiscal year 1988 would not be available to the Mint to fund a replacement contract in a subsequent fiscal year.

On the other hand, in a number of decisions predating 60 Comp. Gen. 591, we allowed replacement contracts to be funded with prior fiscal year funds even when the original contract was terminated for reasons other than the contractor's default, including several cases involving terminations for convenience. See 55 Comp. Gen. 1351, 1353 (1976), and cases cited therein.

Particularly relevant is our holding in 55 Comp. Gen. 1351. After discussing the general rule allowing funding of replacement contracts when the original contract is terminated for default, we said the following:

"In addition, where contracts have been terminated for reasons other than contractor default, e.g., where contract awards were erroneously made, we have allowed the use of fiscal year funds after the expiration of the fiscal year to fund replacement contracts, if the foregoing conditions [a continuing bona fide need for the goods or services involved] have been satisfied." 55 Comp. Gen. at 1353.

Furthermore, our discussion of the underlying reasons behind the establishment of the replacement contract funding rule, as enunciated in 60 Comp. Gen. 591, would support a broader application of the rule. In that case we explained the basis for the establishment of the replacement contract funding rule as follows:

"When a contract is terminated for default, the funds obligated for the contract generally remain available for a replacement contract whether awarded in the same or the following fiscal year. . . . The obligation established for the original contract is not extinguished because the replacement contract is considered to represent a continuation of the original obligation rather than a new contract. . . . This rule was founded on policy considerations as early as 1902 . . . and with a few special exceptions, has been maintained by this Office ever since. . . . The primary reason for the rule was to facilitate contract administration. Under a termination for default clause, the Government can terminate the contract when the contractor's performance fails to satisfy critical requirements of the contract. The default clause provisions allow the Government to repurchase the terminated performance and charge the defaulted contractor for any excess costs. This reprocurement arrangement became known as a replacement contract. If all replacement contracts were treated as new contracts, an agency whose contractor defaults would be required to deobligate prior year's funds which support the defaulted contract, and reprogram and obligate current year funds, even though the particular expenditure was budgeted for the prior year. Because contractor defaults can neither be anticipated nor controlled, a great deal of uncertainty would be introduced into the budgetary process. In some cases agencies would have to request supplemental appropriations to cover those unplanned and unprogrammed deficits which could result in costly program overruns. The rule, therefore, avoids many administrative problems that cause procurement delays." 60 Comp. Gen. at 592-93. (Emphasis added.)

The rationale we stated in 60 Comp. Gen. 591 is equally applicable to a situation in which an agency, whose need for the goods or services covered by the original contract remains unchanged, cannot allow the contractor to complete performance because it has subsequently been determined that

the contract award was improper. Such situations in which the agency must terminate the contract for convenience, like those involving terminations for default, can "neither be anticipated nor controlled," and, as stated by the Mint, would result in "an undue hardship" for government agencies if they were "faced with the possibility of completely losing the obligated funds earmarked for a particular contract." These considerations lead us to conclude that the replacement contract funding rule should apply to terminations for convenience in this type of situation, as well as to terminations for default.

Our discussion of this principle in a recent case recognizes that the issue of "control" is useful in determining whether to allow a replacement contract to be funded with prior year money. In 66 Comp. Gen. 625 (1987) we considered the availability of prior year money to fund a replacement contract for two vessels that were deleted from the original contract by a modification initiated by the Navy. In holding that the Navy could not use prior year funds for the replacement contract in those circumstances, we discussed the replacement contract doctrine as set forth in 60 Comp. Gen. 591, and said the following:

"However this concept is not available to the Navy in this case. An essential element of the replacement contract rule, as reflected in decisions such as 60 Comp. Gen. 591, is that the failure by the original contractor to complete performance must be beyond the agency's control. Thus, the originally obligated funds remain available for the replacement contract in the case of a termination for default, but not in the case of a termination for convenience. 60 Comp. Gen. at 595." (Emphasis added.)

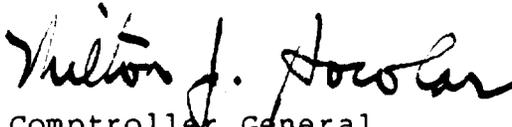
In the type of case at issue here, where a court determines that a good faith contract award by the agency was not made in accordance with law, or was otherwise improper, and, in effect, orders the agency to terminate the contract, a termination for convenience is, in fact, beyond the control of the agency. A termination for convenience under these circumstances creates the same problems and uncertainties for agencies in contract administration and budgeting that our decision in 60 Comp. Gen. 591 was intended to alleviate.

While the question presented to us here involves an order issued by a court, we conclude the same principle should also be applied when other competent authority, such as a board of contract appeals or the General Accounting Office, determines that a contract was improperly awarded and should

be terminated. In such circumstances, an agency, whose actions necessarily must conform with all applicable statutes and regulations, has no legitimate choice other than to terminate the contract for convenience once a competent authority has determined that the contract award was not made in accordance with such laws or regulations and was thus improper.

Accordingly, funds originally obligated in one fiscal year, for a contract that is later terminated for convenience, in response to a court order or determination by another competent authority that the contract award was improper, remain available in a subsequent fiscal year to fund a replacement contract, subject to the following conditions: (1) the original award was made in good faith, (2) the agency has a continuing bona fide need for the goods or services involved, (3) the replacement contract is of the same size and scope as the original contract, and (4) the replacement contract is executed without undue delay after the original contract is terminated for convenience.

In accordance with the foregoing, we would not object to the Mint's use of funds, originally obligated in fiscal year 1988 for the asbestos abatement contract with LVI, to pay for a replacement contract in a subsequent fiscal year, provided the stated conditions are satisfied. 60 Comp. Gen. 591 is modified in accordance with this decision.

for 
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