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

In Reply
Refer To: B-194912

August 24, 1981

The Honorable Paul Trible
House of Representatives

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Dear Mr. Trible:

You requested our opinion concerning payment to the Hampton Roads Sanitation District (HRSD), Virginia Beach, Virginia, for Langley Air Force Base's (Langley), Virginia, share of the costs of the Boat Harbor Facilities/North Shore Maintenance Complex. This was in connection with a grant by the Environmental Protection Agency (EPA) under the Federal Water Pollution Control Act, as amended, (33 U.S.C § 1251, et seq.). Enclosed was a copy of correspondence received from HRSD relating to this matter.

In his letter to you, dated March 23, 1981, the General Manager of HRSD states that although the Navy has paid its share of the District's Army Base Facility and the Army has contributed funds for the Boat Harbor Wastewater Treatment Facility, the Air Force has not committed itself to pay for Langley's share of the North Shore Maintenance Complex.

Both of these payments were made pursuant to our decisions, referred to below, under which funds specifically made available under recent military construction authorization and appropriation acts could be substituted for amounts excluded by EPA from its 75 percent construction grants for wastewater treatment projects, to the extent they serve major Federal facilities.

As explained below, we are of the opinion that the Air Force may not contribute the share attributed by EPA to Langley for HRSD's North Shore Maintenance Complex construction costs.

In brief, on July 28, 1977, HRSD requested a letter of intent from the Air Force for the Federal facility share of the construction cost of the District's relocated North Shore Maintenance Facility. The estimated cost was $600,000. Of this $6,225 was attributed to Langley, and $2,700 for Bethel Manor I, a military housing area maintained by the Air Force. HRSD had received a grant offer from EPA under which the base was to pay a share of the construction cost under EPA's Program Requirements Memorandum (PRM) No. 75-35, December 29, 1975.

On August 31, 1977, the Langley Base Commander replied stating that under Air Force policy such payment was forbidden where an installation already was being served under a contract for sewage treatment.

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HRSD indicated in its letter to the Air Force that of the estimated construction cost of its relocated maintenance facility it was paying 25 percent; EPA 72.9375 percent; and Federal facilities--Langley, Bethel Manor I and Fort Monroe, Virginia, were charged with tne remainder. The amount attributed to Fort Monroe apparently was included as part of Army's payment for the Fort's share of the Boat Harbor Plant. We were informally advised by an official of HRSD that Bethel Manor I was a base housing development for Langley and that the sewer use for each of the facilities exceeds 250,000 gallons each day. (Under PRM No. 75-35 Federal facilities producing more than 250,000 gallons daily are considered "major" and therefore subject to EPA's contribution requirement.) We were also told that the North Shore Maintenance Complex was relocated as a result of the construction of the Boat Harbor Plant, which itself does not serve Langley. However, the maintenance facility does serve Langley and, consequently the base is considered responsible for a part of its construction cost.

We were told by an Air Force official that there had been no additional consideration of payment since the Langley Base Commander's 1977 letter and that no appropriation had been requested for this purpose.

On October 4, 1979, we forwarded to you a copy of our decision of the same date, B-194912 and B-195507, 59 Comp. Gen. 1, which included consideration of the payment by the Navy of the Federal facility share of HRSD's Army Base Plant. In the decision we stated as follows:

> "The question of the authority of Federal installations to make the requested capital contribution was first presented to this Office in 1977 by the Department of the Air Force. The Air Force, as was true of the Navy and other Department of Defense (DOD) components, had no independent authority comparable to EPA's to make construction grants to States and localities for improvements to wastewater treatment plants. The Air Force contended that the capital improvements in question could be financed only through a general rate increase applicable to all users without further consideration. It could not terminate or negotiate its existing utility contracts to make a lump-sum payment for these additional costs unless it received an additional benefit (consideration) over and above the improved sewage services which the contractor was required to provide under the contract anyway. We concurred in the Air Force position. B-189395, April 27, 1978.
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> "The Congress has attempted to break the funding impasse by specifically authorizing and appropriating

> funds for 'sewer connections' in named locales, including the naval bases within the HRSD * * *. Nevertheless, the Navy claims that it still cannot pay the Navy's share of the upgraded sewage projects. It contends that a modification of its existing contract for sewer services would be required and that, in accordance with the above-mentioned Comptroller General decision to the Air Force and general contract principles, it cannot agree to such a modification without consideration.* * *"

We found that while under § 202(a)(1) of the Federal Water Pollution Control Act (33 U.S.C. § 1282(a)(1)--

> "* * * EPA is not authorized to exclude a portion of an otherwise eligible project solely because that portion would serve a Federal facility* * *.
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> "* * * There is no need for Navy to amend its contracts with the providers of sewer services * * * (and therefore no further consideration is needed) provided that the contribution merely replaces the amount that would have been provided by EPA but for its restrictive funding policy. Its authority to pay for 75 percent of the portion of the construction costs attributable to the Navy's use of the sewer system is separate and independent of its authority to enter into sewer service arrangements.* * *
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> "In summary, while we do not believe that EPA's funding policy is authorized by law, the Congress has chosen to make up the shortfall in construction grant support of wastewater treatment facilities by specifically appropriating funds to cover the Navy's share of the costs. If Navy contributes no more than 75 percent of the costs attributable to its use of a treatment system, no further consideration to offset this contribution is necessary.* * *"

In a subsequent decision, B-199534 and B-200086, October 2, 1980, we held that the Army was authorized to make a contribution in lieu of EPA funding of 75 percent of the construction cost attributed to Fort Monroe for HRSD's Boat Harbor Plant. Here, military construction appropriations were available for this specific purpose since the Congress intended to

make up the construction grant shortfall which resulted from EPA's funding policy.

In 1977 the Air Force refused to pay for part of the maintenance complex construction cost because Langley was already being served under a sewage contract with HRSD. The apparent rationale was that in the absence of a further benefit to the Air Force, there could be no contribution. However, under our decision at 59 Comp. Gen. 1, above, in which we considered the applicable Air Force policy, we held that no further benefit was needed provided the contribution only replaced the amount that would have been provided by EPA, assuming the existence of authorization and appropriation language specifying such payment, as was the case with similar payments by the Army and the Navy. Accordingly, there would be no legal bar to Air Force payment of this amount in lieu of the 75 percent EPA grant for its Federal facility share if payment had been directed by the Congress. However, in the case at hand, unlike Fort Monroe and the Norfolk Naval Base Complex, there is no indication of an appropriation which is available to offset the reduced EPA grant.

In 59 Comp. Gen. 1, above, we found that EPA did not have the authority to reduce a 75 percent grant solely because some users are Federal facilities. Subsequently, the General Counsel of the Office of Management and Budget requested a Department of Justice opinion as to whether EPA may exclude from its grant funding for municipal sewage treatment the costs that reflect service to a Federal facility, leaving that portion to be paid by appropriations for the agency operating the Federal facility.

The Assistant Attorney General, Office of Legal Counsel, in a memorandum dated July 3, 1980, disagreed with our decision. He concluded that "EPA's interpretation that the FWPCA does not require it to provide grant funds for federal facility use of local treatment works is a sufficiently reasonable one to be entitled to deference." Based on this memorandum, EPA has recently reaffirmed its intention to continue its practice of making deductions from wastewater treatment works grants which serve major Federal facilities.

We have considered the arguments raised in the memorandum prepared by Justice's Office of Legal Counsel. We find no reason to change our view that EPA lacks authority to reduce a 75 percent grant award (to 72.9375 percent in the present case) because of Federal facility use, and that in the absence of specific statutory authority, Federal agencies do not have authority to make up "shortfalls" in EPA's construction grant funding due to EPA's desire to spread available grant funds to cover additional projects.

In the absence of specific congressional approval for the use of military construction funds or other funds to supplement the reduced EPA

grant, or legislation prohibiting EPA from making the deduction, we are aware of no available source for payment of the amount in question to HRSD. Accordingly, we are are of the opinion that the Air Force may not contribute the share attributed by EPA to Langley for HRSD's North Shore Maintenance Complex construction costs.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

B-194912

Digest

EPA refused to fund part of 75 percent Federal Water Pollution Control Act grant to Hampton Roads Sanitation District, Virginia, for wastewater treatment works construction (maintenance complex). A portion of deducted amount was attributed to Langley Air Force Base, Virginia. Contribution may not be made by Air Force in absence of congressional intention to make up construction grant shortfall resulting from EPA's funding policy. See 59 Comp. Gen. 1 (1979) and B-199534 and B-200086, October 2, 1980.