DOCUMENT RESUME

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Obtaining Goods and Services from Nonappropriated Fund Activities through Intra-Departmental Procedures. B-148581; B-189651; B-190650. November 21, 1978. 9 pp.

Decision re: Department of Defense; Department of the Army; by Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel: General Government Matters.

Authority: Nonappropriated Fund Instrumentalities Act (66 Stat. 138, as amended; 5 U.S.C. 2105(c)). Armed Services Procurement Act of 1947 (10 U.S.C. 2301). Tucker Act, as amended (P.L. 91-350). 28 U.S.C. 1346. 28 U.S.C. 1491. 31 U.S.C. 71. 31 U.S.C. 74. 49 Comp. Gen. 578. 49 Comp. Gen. 580. 44 C.F.R. 20. DOD Directive 1330.2. Army Regulation 230-1. Army Regulation 420-81. Army Regulation 37-103. B-178786 (1973). B-182437 (1976). Standard Oil Company of California v. Johnson, 316 U.S. 481 (1942). United States v. State Tax Comission of Mississippi, 412 U.S. 363 (1973). United States v. Howell and Cochran, 318 F.2d 162 (9th Cir. 1963). Harlow v. United States, 301 F.2d 361 (5th Cir. 1962). Rizzoto v. United States, 298 F.2d 748 (10th Cir. 1961). Aetna Insurance Company v. O'Keefe, 356 F.2d 660, 662 (5th Cir. 1966).

Advance decisions were requested in three cases involving the certification for payment of vouchers in favor of nonappropriated fund instrumentalities (NAFIs) and the use of intra-Army orders for obtaining goods and services from NAFIs. Since the Department of Defense (DOD) NAFIs do not receive appropriations from the Congress and thus are not subject to requirements of the Armed Services Procurement Act, procurement from NAFIs is tantamount to procurement from non-Governmental sources, and the regular purchase/delivery order should be used. Since the basic mission of DOD NAFIs is to promote morale and welfare, the sale by NAFIs to regular DOD activities is generally not their proper function unless procurement is properly justified. The Army's purchase of mattresses from a NAFI was contrary to applicable law and regulations, but since the Army has received a benefit, payment may be made on a quantum valebant basis. (HTW)

DECISION

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

8402

FILE: B-148581, B-189651, B-190650

DATE: November 21, 1978

MATTER OF: Obtaining Goods and Services from Nonappropriated Fund Activities Through Intra-Departmental Procedures

DIGEST:

1. Department of Defense nonappropriated fund instrumentalities, although instrumentalities of the United States, differ from regular Governmental activities in that they are self-supporting, do not receive moneys appropriated by Congress and thus are not subject to requirements of the Armed Services Procurement Act.

2. In light of differences, from appropriation and procurement standpoint, between regular Governmental activities and nonappropriated fund instrumentalities (NAFIs), Army's procurement of goods and services from NAFIs is tantamount to procurement from non-Governmental, commercial sources, so that regular purchase/delivery order, and not Intra-Army order, should be used.

3. Since basic mission of Department of Defense (DOD) nonappropriated fund instrumentalities (NAFIs) is to promote morale and welfare of military personnel and dependents, as a general proposition sale by NAFIs to regular DOD operating activities would be regarded as outside scope of NAFIs' proper functions except where circumstances require that agency obtain goods or services from NAFI and such requirement is properly documented and justified as sole-source procurement.

4. Army's purchase of $40,000 worth of mattresses from Army and Air Force Exchange System, in lieu of following normal procurement procedures, is contrary to applicable law and regulations. Since record indicates Army has obtained and received benefit of mattresses,

payment may be made on quantum valebant basis upon ratification of purchase by appropriate contracting official. Similarly, where record is not sufficient to indicate propriety of Army's obtaining services from NAFIs, payment for services may be made on quantum meruit basis pending resolution of the matter.

This decision is in response to requests from a United States Army Finance and Accounting Officer, for advance decisions in three related cases. All three cases involve the propriety of certifying for payment vouchers in favor of nonappropriated fund instrumentalities, specifically the Ansbach (Germany) Military Community's BOQ/VOQ/BEQ Fund (B-148581), the Heilbronn Area Club System (B-189651), and the Army and Air Force Exchange Service (AAFES) (B-190650), and the use of intra-Army orders for obtaining goods and services from those nonappropriated fund instrumentalities.

The goods and services were provided to different Department of the Army operating activities, with the nonappropriated fund initially financing the cost of providing the goods or services. In two cases (B-148581 and B-189651), the goods and services were provided pursuant to an Intra-Army Order for Reimbursable Services (Department of the Army Form 2544). In the third case (B-190650), only a Purchase Request and Commitment was utilized.

B-148581 involves the providing of custodial services to common use areas of BOQ (Bachelor Officers Quarters), VOQ (Visiting Officers Quarters) and BEQ (Bachelor Enlisted Quarters) buildings by employees of the nonappropriated fund. Under Army regulations, the cleaning of such areas is the responsibility of the operating activity and is to be paid for out of appropriated funds. The BOQ/VOQ/BEQ Fund used its own employees to clean the common use areas pursuant to the Intra-Army Order and billed the Army operating activity for that work.

B-189651 involves the cost of laundry and dry cleaning incurred by an officers club, a nonappropriated fund activity. The club in question is designated an officers essential mess. Army regulations provide that appropriated funds will be used to defray certain costs of essential messes. Pursuant to the Intra-Army Order, the club arranged and paid for the laundry and dry cleaning services and now seeks reimbursement from appropriated funds.

In B-190650, a Purchase Request and Commitment for 700 mattresses was submitted directly to the Army and Air Force Exchange Service-Europe (AAFES) instead of to the servicing procurement office as required. AAFES accepted the purchase request, delivered the mattresses, and billed the Army.

In each case, the Finance and Accounting Officer (FAO) questioned the propriety of an appropriated fund activity obtaining goods or services from a nonappropriated fund instrumentality (NAFI) by means of an Intra-Army order. The FAO believes that when appropriated funds are utilized to procure goods or services from a NAFI, a contract or purchase order, "processed through a Purchasing and Contracting Officer," should be used so that there will be "sufficient safeguards * * * to preclude the misappropriation of appropriated funds." According to the FAO, a "reimbursable order is not reviewed by a Purchasing and Contracting Officer and does not contain appropriate safeguards to preclude possible misappropriation of appropriated funds." He also questions whether a NAFI can "be considered an installation or activity of the Army and therefore be a party to an Intra-Army Order" or is actually "a party outside the Government."

The Department of the Army takes the position that NAFIs are Department of Defense (DOD) activities, that they have been judicially recognized as being instrumentalities of the Government, and that there is:

> "* * * no reason why the NAFIs should be considered for this limited purpose [using intra-Army orders for reimbursable services] to be other than the governmental instrumentalities they are classified as for all other purposes."

The Army further states that if NAFIs are not regarded as Government entities, the following "undesirable results" may arise:

> (1) NAFIs "would be placed in direct competition with commercial sources, contrary to Department of Defense policy." Moreover, because NAFIs "Have certain benefits flowing from their categorization as Government agencies, that direct competition might unduly favor the NAFI."
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> (2) A contract would be required for an appropriated fund activity to order goods or services from a NAFI. "Resolution of disputes under that contract would be awkward at best, and at the worst could result in the Government suing an entity generally considered to be part of the Government."

It is clear that DOD and the Army consider NAFIs to be Government entities. For example, Army Regulation 230-1, para. 1-4(a) states:

> "NAFIs authorized by this regulation are instrumentalities of the U.S. Government * * *."

It is also clear that NAFIs have been considered to be Government instrumentalities in a variety of situations. See, e.g., Standard Oil Company of California v. Johnson, 316 U.S. 481 (1942); United States v. State Tax Commission of Missippi, 412 U.S. 363 (1973) and 421 U.S. 597

(1975); United States v. Howell and Cochran, 318 F.2d 162 (9th Cir. 1963); Harlow v. United States, 301 F.2d 361 (5th Cir. 1962), cert. denied, 371 U.S. 814 (1962), rehearing denied 371 U.S. 906 (1962); Rizzoto v. U.S., 298 F.2d 748 (10th Cir. 1961). This Office has also observed that "the Army and Air Force Exchange Service is a Government instrumentality which functions as an agency of the Army and Air Force * * *," 49 Comp. Gen. 578, 580 (1970), and the Congress, although not explicitly authorizing the establishment of NAFIs, has recognized their existence and provided certain specific provisions regarding them. See, for example, the Nonappropriated Fund Instrumentalities Act, approved June 19, 1952, ch. 444, 66 Stat. 138, as amended, codified in part at 5 U.S.C. 2105(c) (1976), which specifies that employees of such Department of Defense NAFIs are not to be regarded as employees of the United States for purposes of the civil service laws, but that "the status of these nonappropriated fund activities as Federal instrumentalities" is not affected.

Although the NAFIs are recognized as being Government activities, they differ significantly from other Governmental activities, particularly with respect to budgetary and appropriation requirements. The NAFIs are generally self-supporting; they do not receive moneys appropriated by the Congress, Aetna Insurance Company v. O'Keefe, 356 F.2d 660, 662 (5th Cir. 1966), and have not been depositing their receipts into the Treasury. Swiff-Train Company v. United States, 443 F.2d 1140, 1141 (5th Cir. 1971). Generally, the contractual obligations of the NAFIs are not regarded as obligations of the United States, Standard Oil Company of California v. Johnson, supra; Jaeger v. United States, 394 F.2d 994 (D.C. Cir. 1968); G.L. Christian and Associates v. United States, 312 F.2d 418 (Ct. Cl. 1963), rehearing 320 F.2d 345, cert. denied, 375 U.S. 954 (1963), although in 1970 the Tucker Act was amended by Public Law 91-350 to permit suits directly against the United States in connection with contracts of post exchanges (but not other NAFIs).

See 28 U.S.C. 1346, 1491 (1976); Hopkins v. United States, 513 F.2d 1360 (Ct. Cl. 1975).

Moreover, since the NAFIs do not directly receive appropriated funds for their purchasing operations, but instead are self-supporting, the requirements of the Armed Services Procurement Act, 10 U.S.C. 2301 et seq. (1976) and the implementing provisions of the Armed Services Procurement Regulation/Defense Acquisition Regulation (ASPR/DAR) are not applicable to NAFI procurements. See B-178786, July 13, 1973. Consequently, procurements conducted by or on behalf of NAFIs are not subject to most of the requirements governing the procurements of the Defense Department; neither have they been subject to review by this Office under our Bid Protest Procedures, 4 C.F.R. Part 20 (1978).

We believe that it is these differences, rather than the status of NAFIs as Government instrumentalities, which must be controlling here. In all three cases, what is involved is the transfer of moneys from the Army's appropriation accounts to the accounts of the NAFIs over which there is no direct control either by the Congress (through the appropriation process) or this Office (through the account settlement authority of 31 U.S.C. 71, 74 (1970)). Thus, for all practical purposes from an appropriation and procurement standpoint, the obtaining of goods and services from a NAFI is tantamount to obtaining them from non-Governmental, commercial sources.

This does not mean that Defense Department NAFIs must now compete with regular commercial contracting services. NAFIs exist to help foster the morale and welfare of military personnel and their dependents. DOD Directive 1330.2; Army Regulation 230-1. Providing regular Defense Department operating activities with goods or services is not directly related to that purpose. This is particularly so with respect to the resale NAFIs such as the exchanges, which operate for the purpose of selling goods and services primarily to miltary personnel and dependents; they are not expected to sell to the "Government" itself. Thus, as a general proposition, we would view the sale of goods and services by NAFIs to regular Governmental operating activities to be outside the scope of the

NAFIs' proper functions. Accordingly, as a general rule there should be no competition between NAFIs and commercial sources simply because NAFIs are not in the business of supplying the Government with its procurement needs.

We recognize, however, that there may be circumstances where, as a practical matter, procurement through a NAFI may be necessary. For example, there may be organizational or functional reasons which dictate the impracticability of having services furnished by other than a NAFI. There may also be extreme exigency situations where only a NAFI can provide urgently required goods or services. In such cases, appropriate sole-source justifications should be prepared, and, in light of the discussion above, regular purchase orders, i.e., DD Form 1155, should be utilized rather than intra-agency orders.

With the above in mind, we turn to the three specific situations presented for decision. In B-190650, the submission of the mattress requirement to the Exchange Service, and the Exchange's acceptance of the purchase request, was clearly improper. As indicated, the Exchange Service is not authorized to engage in selling merchandise to regular Army activities. Moreover, the submission of the purchase request to the Exchange Service instead of to the procurement office resulted in a clear circumvention of the Armed Services Procurement Act and the ASPR/DAR since more than $40,000 worth of mattresses was obtained by the Army, with payment to be made from appropriated funds, without regard to the dictates of those statutory and regulatory requirements.

The record does not provide a sufficient basis for us to reach any conclusion regarding the propriety of the Army's obtaining services from the NAFIs in the other two cases. In B-148581, it is reported that under Army Regulation 420-81 custodial services of BOQ/BEQ common use areas are to be performed by Army civilian employees or by contract, that a U.S. Army Europe supplement to the regulation provides that the custodial services "may be accomplished by other than [Army] personnel using appropriated funds," and that the supplement is interpreted

to mean the NAFI can perform the services with its own employees and then be reimbursed with regular Army funds. The record is silent, however, as to why U.S. Army Europe finds it necessary to allow such a procedure or why that procedure was followed in this case. If indeed it is impracticable for the Army to make separate cleaning arrangements for common use areas of the billeting facilities, the use of BOQ/VOQ/BEQ Fund employees on a reimbursable basis would not be objectionable, provided the need to obtain those services from the Fund was properly documented and was ordered (via DD Form 1155) in accordance with the discussion above.

Similarly, in B-189651, it is reported that various Army regulations permit appropriated fund support for officers and enlisted clubs under certain circumstances, including when officers clubs are designated as essential messes. However, it is not reported why these regulations, dealing with custodial and janitorial services (which, as defined in Army Regulation 420-81, do not appear to encompass laundry/dry cleaning), permit the Army to reimburse an officers club for laundry and dry cleaning expenses, or why, if charge to the Army appropriation account is appropriate, the Army cannot procure directly the laundry and dry cleaning services for which it may be responsible.

Accordingly, since we view the purchase of the mattresses through the Exchange Service to be improper, the need to procure the cleaning and laundry services through NAFIs to be unjustified on the present record, and in any event the use of intra-Army orders in lieu of regular purchase orders to be inappropriate, the vouchers based on those transactions may not be paid and will be retained in this Office. By separate letter, we are requesting the Secretary of the Army to advise us regarding the basis for having the NAFIs provide those cleaning and laundry services to regular Army activities. We are further informing the Secretary that in the interim, in light of the lengthy period of time that has elapsed since the goods and services were provided to the Army and since the Army has apparently had the use and benefit of these goods

and services, NAFI providers may be paid on a quantum meruit/quantum valebant basis provided the purchases are ratified by an appropriate contracting official of the Army. Monitor Products Company, Inc., B-182437, July 27, 1976, 76-2 CPD 85.

Finally, the FAO questions whether SF 1034, Public Voucher For Purchases And Services Other Than Personal, is the appropriate vehicle for effecting payment in light of Army Regulation 37-103, which indicates that SF 1080, Voucher For Transfers Between Appropriations and/or Funds, should be used for transactions involving NAFIs. In view of our holding above that purchases from NAFIs are tantamount to purchases from commercial entities, we believe the appropriate voucher form is the SF 1034.

Deputy Comptroller General
of the United States