U.S. Department of Justice
Office of Legal Counsel

John -

Attached are two opinions from GAO. The first required the Navy to include termination expenses as part of the obligated amount for the purposes of the Antideficiency Act. Russ Rettman of OMB claims that both the Navy fund at issue in the GAO opinion and the GSA Building Fund are intragovernmental revolving funds and thus that the status of the Navy fund does not distinguish the GAO opinion from the case before us.

The second opinion discusses an early example of Congress's excepting a program from the scope of the Antideficiency Act. It also suggests that even when Congress creates such an exception, the Congressional Budget and Impoundment Act may still require the agency to present to Congress the full extent to which it

obligating the United States
in a given year.

John McGinnis

only one contract of this magnitude, which it was currently completing. Further, additional information submitted by Bradley during the course of its appeals to the ZHA and HUD in support of its qualifications is not germane. It was the obligation of Bradley to submit with its prequalification package all information available to support its qualifications. At the time of the determination by the ZHA, the only evidence submitted by Bradley bearing on its qualifications was considered and reasonably determined inadequate.

In view of our conclusion that Bradley's bid was properly rejected under the first solicitation and it was not the low bidder under the second solicitation, we find it unnecessary to consider Bradley's allegations concerning what it characterizes as "Inferences of Fraud, Gross Mismanagement of Abuse," such as the failure of HUD to cancel the resolicitation and an alleged change in the cost limitation applicable to the procurement.

We deny Bradley's complaint.

[B-174839]

Vessels—Charters—Long-Term—Obligational Availability—Navy Industrial Fund—Anti-Deficiency Act Compliance

The Antideficiency Act, 31 U.S.C. 1431, would not prevent the Navy from entering into the TAKX long-term ship leasing program, to be financed through the Navy Industrial Fund, so long as the unobligated balance of the Fund is sufficient to cover the Government's obligation until commencement of the lease period. Navy may not, through acceptance of vessel delivery, agree to commencement of the lease arrangement if the obligational availability of the Fund is at that time insufficient to cover any consequential increase in the Government's obligation.

Vessels—Charters—Long-Term—Obligational Availability—Navy Industrial Fund—Termination Expenses

Under the Navy's TAKX ship leasing program, ship charters will cover a base period of 5 years, renewable up to 20 years at 5-year intervals, and with substantial termination costs for failure to renew. Such contracts, once in effect, should be recorded as firm obligations of the Navy Industrial Fund at an amount sufficient to cover lease costs for the 5-year base period, plus any termination expenses for failure to renew.

Matter of: Navy Industrial Fund: Obligations in connection with long-term vessel charters, January 28, 1983:

By letter dated December 2, 1982, the Comptroller of the Navy requested our opinion as to the proper manner in which to record certain obligations of the Navy Industrial Fund, in connection with two Military Sealift Command programs to build/convert and charter TAKX Maritime Prepositioning Ships and build and charter T-5 Tankers.

The question as originally presented related to the manner of recording termination expenses under the charter contracts. While we shall address that question below, it has become clear from our discussions with Navy officials that their principal concern is with

the total amount that should be presently recorded as a firm obligation of the Government under the TAKX program. As is explained in detail below, it is our view that the Navy must record the TAKX program as a firm obligation only to the extent of the Government's maximum potential liability prior to commencement of the initial lease period. Once the Navy, through acceptance of vessel delivery, agrees to commencement of the lease, it must record the TAKX charter agreements as firm obligations in an amount sufficient to cover lease costs for the base period, plus termination expenses.[1]

BACKGROUND

Under the TAKX program, vessels are constructed or converted to meet military requirements and are subsequently time-chartered to the Military Sealift Command. The program consists of 13 vessels, provided by three different contractors. The Navy enters into two different agreements with each contractor: an Agreement to Charter and a Charter Party. The Agreement to Charter binds the Government until it accepts delivery of the TAKX vessels (in about 2 years, we are told). The Charter Party is the actual charter agreement, setting out the rights and responsibilities of the various parties throughout the lease period. Although both contracts are signed at the same time, the Charter Party does not become effective until the "Commencement Date," the date of the Government's acceptance of delivery of the vessels.

Once effective, each Charter Party provides for an initial hire term of 5 years following the construction period, with options to renew for four consecutive 5-year periods. Failure to exercise such options subjects the Government to substantial termination expenses. The capital hire rate during the entire 25-year term of the initial and optional charter periods is computed to repay to the equity bondholders and the owners the full value of their investments, plus interest. The Government may terminate the charter at the end of any 6-month period after the initial 5-year base period, but is thereby subject to termination expenses. Termination expenses are calculated to pay the outstanding principal and interest on the bonds, and to return to the owners their investments plus a rate of return to the date of termination (the "termination value"), less the proceeds of any sale of the vessel (or insurance proceeds in the case of a loss).

The Navy's concerns about recording obligations under the TAKX program arise from the fact that current available resources

[1] We do not here address the more fundamental question of whether the Navy Industrial Fund is a proper source for funding such long-term lease arrangements. As we approved the use of the Fund to finance similar contracts in our decision 51 Comp. Gen. 598 (1972), we would not object to the TAKX program on that basis. Nonetheless, this issue will be reexamined by this Office in an upcoming in-depth review of the practice of obligating the Federal Government for multi-billion dollar programs such as the TAKX Prepositioning Ship Program through the use of Industrial funds. *See* H.R. Rep. No. 943, 97th Cong., 2nd Sess. 48-49 (1982). Similarly, we do not here address the wisdom of long-term leasing, as opposed to purchase, of TAKX vessels.

of the Navy Industrial Fund are sufficient to cover only about $2.2 billion of new obligations. Thus, if the Navy must record firm obligations for the 13-ship TAKX program in excess of that amount, it would be necessary to scale-back the program to avoid a violation of the Antideficiency Act. The Antideficiency Act provides that:

> An officer or employee of the United States Government or of the District of Columbia government may not—
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve either Government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1), recodified from 31 U.S.C. § 665(a) (1976).

DISCUSSION

I. Current TAKX Program Obligations

As indicated above, two contracts govern the Navy's obligation under the TAKX program. The first, the Agreement to Charter, is effective upon its signing: it obligates the Navy to accept delivery of vessels conforming to the specifications of the contract. Although the Navy may terminate for convenience at any time prior to accepting delivery, it would be required to pay any amount of basic capitalized costs incurred by the Shipowner up to the date of termination. The second contract, by comparison, is entirely contingent upon completion of the first. The Navy's obligation under the Charter Party agreement does not commence until it has accepted delivery of the TAKX vessels. Termination of the Agreement to Charter would simultaneously terminate the Charter Party, with no additional liability on the part of the Government.

Because the Navy's obligation under the Charter Party will not commence until it has accepted delivery of the TAKX vessels, it is our view that the Navy is not required to record a firm obligation under that contract until the contract becomes effective. Nevertheless, until the vessels are delivered there is, through the Agreement to Charter, a contingent liability, based on the possibility that the Government will in fact be bound by the Charter Party. That potential liability, however, is limited by the Navy's own power to terminate the Agreement to Charter at any time prior to delivery. In our opinion, therefore, the Navy should record an obligation in an amount sufficient to cover its maximum potential liability prior to acceptance of the TAKX vessels. As we have been informed by the Navy that the current unobligated balance of the Navy Industrial Fund is sufficient to cover this obligation for all 13 TAKX vessels, we do not consider the Antideficiency Act to be a bar to the Navy's present program. We would caution, however, that once the delivery of vessels is accepted by the Navy, any new obligation, based on the terms of the Charter Party, may not exceed the unobligated balance of the Fund at that time.

II. Recording of Charter Party Obligations

As mentioned above, the question initially raised by the Navy related to the manner in which Charter Party termination expenses should be considered for purposes of recording obligations of the Navy Industrial Fund. While Charter Party obligations need not be recorded until the Navy accepts delivery of the TAKX vessels, there is some concern on the part of Navy officials that the unobligated balance of the Navy Industrial Fund may at that time be insufficient to cover all obligations, particularly if the Navy is required to include charter termination expenses. To avoid overobligating the Fund, the Navy has proposed to record as firm obligations under TAKX Charter Parties only the lease amounts due during the 5-year base period. Any additional expenses (*i.e.* termination costs after the base period) would not be recorded as firm obligations, but would be treated as contingent liabilities, shown as footnotes to the financial records of the Fund.

The Navy has argued that its proposed treatment of TAKX Charter Party termination expenses is consistent with title 2, section 13 of our *Policy and Procedures Manual for Guidance of Federal Agencies,* which describes the types of liabilities to be recorded as obligations. Subsection 13.2 of the Manual provides that contingent liabilities need be recorded as expenses only to the extent it is probable that a liability will be incurred and its amount reasonably estimated. Otherwise, as is indicated in our decision 37 Comp. Gen. 691, 692 (1958), contingent liabilities may be shown as footnotes to the appropriate financial statements.

Having examined the contracts in question and the proposed treatment of termination expenses, we cannot agree that those expenses may be shown as footnote items. We recognize that these specific expenses are technically "contingent" in that they will arise only upon the happening of one of several events (for example, failure to renew, termination for convenience of the Government, or loss after delivery). If none of the contingent events arises, however, the Government will have a substantial alternative obligation. A principal example would be the continuation of the charter through the Navy's exercise of the renewal option. Renewal by the Navy would at that time create a new obligation to pay lease costs for the second 5-year period, plus termination expenses (unless, of course, the second renewal option was in turn taken). This process of replacing one obligation with another would continue throughout the full 25-year period, with the unliquidated obligation at each renewal period (*i.e.* the termination cost) being replaced by that created by continuation of the contract.

It is probable from the nature of these contracts that the Navy will choose to renew at each 5-year period. Nonetheless, any new obligation created by continuation of the contract will in fact exceed termination expenses after the 5-year base period. Whether the

contract is continued only for one additional 5-year period (including termination costs) or up to the full 25 year lease term of the charter (at a cost over that period of about $13 billion, we are told), the total expense to the Government of continuing the lease past the initial base period will be more costly than termination. It is our view, therefore, that each Charter Party, once in effect, should be recorded as a firm obligation to pay lease costs for a 5-year base period, plus termination costs after that time. This would represent the least amount for which the Government will be liable under the contract. *See* 48 Comp. Gen. 497, 502 (1969), in which we stated in the context of revolving funds that we would have no objection to contracting for a basic period with renewal options, provided that funds were obligated to cover the cost of the basic period, plus any charges payable for failure to exercise the options.[2]

Based on the above, it appears that the Navy may be precluded from accepting delivery of (and thereby chartering) all 13 ships under the TAKX program, unless the obligational availability of the Navy Industrial Fund is increased in some manner. There are several ways that this might be accomplished. One would be by the direct infusion of funds through appropriations, or by transfers from other Defense Department accounts. Another way would be through enactment of specific "contract authority" for this program (specific authority to contract in excess or advance of appropriations). *See, e.g.,* 56 Comp. Gen. 437, 444 (1977). Finally, the Navy might ask the Congress for specific statutory authority, at least for this particular program, to include anticipated reimbursements from future orders as budgetary resources of the Navy Industrial Fund. The Department of Defense has previously stated that it already has such authority with respect to its Industrial funds. We do not share this view. See our report "The Air Force has Incurred Numerous Overobligations in its Industrial Fund," AFMD-81-53, App. III, August 14, 1981.

CONCLUSION

Based on the foregoing, we have no legal objection to the Navy's TAKX program, so long as current obligational availability of the Navy Industrial Fund is sufficient to cover the Government's present obligation, that is, until the Navy, through acceptance of vessel delivery, agrees to the commencement of TAKX leases. Once TAKX charter agreements become effective, the Navy must record

[2] In 51 Comp. Gen. 598, 604 (1972), we sanctioned an arrangement very similar to the present one, and in so doing, distinguished 48 Comp. Gen. 497 (1960). Our 1972 decision, however, did not reflect a different view of the types of commitments that must be recorded at the time that a contract becomes effective. Instead, we distinguished 48 Comp. Gen. 497 (1960) on the basis that the Navy had no need to rely solely on cash reserves of the Navy Industrial Fund in order to cover its obligations under the lease program. In 1972 we were persuaded that sufficient budgetary resources were available to cover all obligations under the program through exercise of the Navy's authority to transfer funds from other sub-accounts of the Navy Industrial Fund, or from other working capital funds. In the present case, however, the Navy is unable to assure us that it would be able to cover all TAKX Charter Party obligations in this manner.

such agreements as firm obligations of the Fund to the extent of lease costs for the 5-year base period, plus any termination expenses for failure to renew. The obligational availability of the Fund must at that time be sufficient to cover any increase in the Government's obligation by reason of commencement of the lease period.

[B-208701]

Bids—Late—Hand Carried Delay—Commercial Carrier—Failure to Deliver to Designated Office

Government did not frustrate carrier's ability to deliver bid package where commerical carrier that contracted with protester to deliver bid to office designated in the solicitation instead asked an agency employee—who was not affiliated with the contracting activity—to deliver an unmarked package containing protester's bid. 57 Comp. Gen. 119 and B-202141, June 9, 1981, are distinguished.

Bids—Late—Mishandling Determination—Improper Government Action—Not Primary Cause of Late Receipt—Hand Carried Delay

Where carrier for its own convenience gives an unmarked package containing protester's bid to an agency employee rather than delivering it to the proper office, subsequent misrouting of bid by another agency employee was not the paramount reason for the late arrival of the bid at the contracting office and bid was properly rejected.

Matter of: Visar Company, Inc., January 31, 1983:

Visar Company, Inc. protests the refusal of the Department of the Army, Corps of Engineers, to consider its bid under invitation for bids (IFB) No. DACW57-82-B-0094. Visar contends that its bid was received after the time set for bid opening because a Corps employee frustrated its carrier's ability to deliver the bid. Alternatively, Visar contends that the Corps mishandled the bid after its timely receipt at the Government installation. For the reasons that follow, we deny the protest.

The solicitation, for miscellaneous earthwork construction, was issued on June 18, 1982, and called for bid opening at 2 p.m., July 22. It contained the standard clauses regarding the conditions under which a late bid would be considered. It also stated that hand-carried bids should be left in the depository in Room G-12 of the Multnomah Building, 319 S.W. Pine Street, Portland, Oregon.

When bids were opened as scheduled on July 22, E. W. Eldridge, Inc. was the apparent low bidder at $244,300. Visar's bid of $226,556.50 would have been low but for the fact it was not received in the contracting office until 8:50 on the morning of July 23. The contracting officer determined that under the circumstances the solicitation provisions that permit consideration of late bids would not apply to Visar's bid. Therefore, by letter of July 26, the Corps informed Visar that its bid would not be considered. Visar protested this determination to the Corps but prior to the

CPD 283. In those cases we held that where an agency properly awarded a sole-source contract, no prejudice accrued to those who were not aware of the procurement or who could not have provided an acceptable article in a timely manner. Those cases are inappropriate here because sole-source awards have not been justified.

Therefore, we recommend that the Smithsonian (1) reevaluate its minimum needs in light of this decision and the preference for competitive procurement; (2) at such time as is practicable, and if appropriate, hold a competitive procurement for the services in question; and (3) after such procurement process has been executed, terminate the existing contracts for the convenience of the Government, if award under the competitive procurement would be more advantageous to the Government.

Because our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referred to in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970). That section requires the Smithsonian to submit written statements concerning the action taken with respect to our recommendation to the House and Senate Committees on Appropriations, the House Committee on Government Operations, and the Senate Committee on Governmental Affairs.

[B–187278]

Contracts—Term—Continuing Contracts—Army Corps of Engineers

33 U.S.C. 621, which provides that public works projects adopted by Congress may be prosecuted by direct appropriations, continuing contracts, or both, permits Corps of Engineers to obligate full price of continuing contracts in advance of appropriations where projects have been specifically authorized by Congress. Therefore, Corps may modify standard "Funds Available for Payments" clause of continuing contract which now limits Government's obligation to amounts actually appropriated from time to time. 2 Comp. Gen. 477, overruled.

Appropriations—Obligation—Contracts—Continuing—Army Corps of Engineers

Recognition that under 33 U.S.C. 621 Corps of Engineers may obligate full amount of continuing contract price for authorized public works projects in advance of appropriations requires change in current budgetary procedures, under which budget authority is presented only as appropriations are made for yearly contract payments, since new theory of continuing contract obligations alters their budget authority status for purposes of Public Law 93–344. Corps should consult with cognizant congressional committees in developing revised budgetary procedures.

In the matter of the Army Corps of Engineers' continuing contracts, March 28, 1977:

The Chief of Engineers, Department of the Army, has requested our opinion as to the legality of proposed revisions to the Corps of Engi-

neers' standard "Funds Available for Payments" clause used in "continuing contracts" for the prosecution of public works projects.

The "continuing contracts" here involved are authorized by section 10 of the River and Harbor Act of 1922, 33 U.S.C. § 621 (1970), which provides as follows:

> Any public work on canals, rivers, and harbors adopted by Congress may be prosecuted by direct appropriations, by *continuing contracts*, or by both direct appropriations and continuing contracts. [Italic supplied.]

The use of continuing contracts permits large multi-year civil works projects to be accomplished in a comprehensive manner, rather than through a series of yearly work units. Under the Corps' long-standing continuing contract practices, a multi-year contract is entered into for the completion of certain construction work. However, appropriations are sought each year only to cover contract payments to be made in that year. The current Funds Available for Payments clause limits the Government's obligation under the continuing contract to the amounts actually appropriated from time to time for contract payments. As discussed hereafter, the basic effect of the Corps' proposed revisions to the Funds Available for Payments clause would be to permit obligation of the full amount of a continuing contract in advance of appropriations adequate for its fulfillment.

In order to examine these proposed revisions in the proper context, a brief review of the origin and background of continuing contracts is necessary. Prior to enactment of section 10 of the River and Harbor Act of 1922, it had been the practice of the Corps to seek appropriations covering the entire cost of civil works projects at the outset. The Congress would adopt and fund these projects by enacting for each specific project a line-item appropriation in the annual River and Harbor appropriation acts. See, *e.g.*, the River and Harbor Act of 1912, approved July 25, 1912, ch. 253, 37 Stat. 201.

The Corps was required to obtain full funding in advance for its civil works projects, including appropriations covering the full amounts of construction contracts, by virtue of the "Antideficiency Act," section 3679 of the Revised Statutes, now 31 U.S.C. § 665 (1970 & Supp. V. 1975), and related statutes—41 U.S.C. §§ 11(a) and 12 (1970)—which prohibit obligations in excess of, or in advance of, appropriations unless authorized by law. The applicability of these statutory prohibitions to river and harbor projects was specifically confirmed by the United States Supreme Court in *Sutton* v. *United States*, 256 U.S. 575 (1921), which held that work performed under a river and harbor contract in excess of the amount appropriated did not create a valid obligation against the Government.

The full funding practice described above resulted in the Corps holding large balances of unexpended appropriations during the initial

stages of multi-year projects. However, starting with the River and Harbor Act of 1892, 27 Stat. 88, and continuing intermittently through the River and Harbor Act of 1916, 39 Stat. 391, statutory language was included which authorized the Corps to enter into contracts for completion of a limited number of specific public works projects in advance of appropriations necessary to cover the work. This language was usually worded in the following manner:

> * * * *Provided*, That contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete the present project of improvement, *to be paid for as appropriations may from time to time be made by law*, not to exceed in the aggregate one million nine hundred and fifty-three thousand dollars, exclusive of the amount herein and heretofore appropriated. *E.g.*, 27 Stat. 91 (improvement of Charleston Harbor). [Italic supplied.]

In the years following 1892, increasing numbers of specific projects were funded in this manner. These contracts were commonly referred to as "continuing contracts." In an 1896 opinion, 21 Ops. Atty. Gen. 379, the Attorney General recognized that such "continuing contract" authority constituted an exception to the Antideficiency Act:

> Under the present [river and harbor] statute, authority is expressly given to the head of the War Department to contract for the construction of public works in certain cases which may require many years to complete, and under the contracts so made the Government will be involved for the future payment of money largely in excess of the amount already appropriated. *Id.* at 380.

Of course, the opinion went on to point out that the contractor must be content to remain a creditor of the Government until funds were appropriated to pay the full contract price. Also a 1905 decision of the Comptroller of the Treasury, 12 Comp. Dec. 11, implicitly recognized that these contracts were exempt from the Antideficiency Act in holding that the Secretary of War had authority to require contractors under "continuing contracts" to do work beyond the amount of appropriations available at the time.

In 1922 the Corps requested from Congress permanent authority to enter into "continuing contracts," whereby Congress would initially authorize a project to its completion and each year thereafter appropriate enough funds to pay for the work planned for that year. The Congress responded by enacting section 10 of the River and Harbor Act of 1922, 33 U.S.C. § 621, *supra*.

Shortly after the enactment of section 10, the Corps requested our decision on whether it could lawfully enter into a contract, pursuant to section 10, where the contract price was in excess of the current year appropriation. We held in 2 Comp. Gen. 477 (1923) that such authority existed under section 10 so long as the contract contained a "funds available for payments" clause (as proposed by the Corps) which contained language to preclude Government liability for any work done in excess of available funds:

> If this paragraph [the funds available for payments clause] be made a part of the contract and it be specifically provided that the Government is not bound

for the payment of any sum in excess of that now available from the allotment by the Secretary of War nor liable in any manner for the failure of Congress from time to time to appropriate funds for so much of the work done in excess of available funds, or to appropriate funds to continue or complete the work, there would appear to be authority for entering into such contract under the authority of the act of September 22, 1922. *Id.* at 479.

The current "Funds Available for Payment" clause used for continuing contracts is similar to the original version proposed by the Corps in 1923 and contains the exculpatory language referred to in our 1923 decision. Pertinent excerpts from the current clause are as follows:

(a) Such work as may be done under this contract in excess of the amount for which funds are available for payment as herein set forth, will be continued with funds hereafter appropriated and allotted for this work.

(b) From funds heretofore appropriated by the Act of_____ (____ Stat. ____) for_____ the sum of $_____ is available for payments to the contractor for work performed under this contract.

* * * * * * *

(d) If the rate of progress of the work is such that it becomes apparent to the contracting officer that the balance of this allocation and any allocation for this and any subsequent fiscal years during the period of this contract is less than that required to meet all payments due and to become due the contractor because of work performed or to be performed under this contract, the contracting officer may provide additional funds for such payments if there be funds available for such purpose. The contractor will be notified in writing of any additional funds so made available. *However, it is distinctly understood and agreed that the amount of funds stated in (b) above is the maximum amount which it is certain will be available during the current fiscal year. The Government is in no case liable for payments to the contractor beyond this amount or such additional amount as may subsequently be made available by the contracting officer pursuant to this paragraph (d).*

(e) *It is expected that, during subsequent fiscal years over the period of this contract, Congress will make additional appropriations for expenditure on work under this contract.* The contracting officer will notify the contractor of any additional allocation of funds to this contract when such funds become available. *It is understood and agreed that the Government is in no case liable for damages in connection with this contract on account of delay in payments to the contractor due to lack of available funds.* Should it become apparent to the contracting officer that the available funds will be exhausted before additional funds can be made available, the contracting officer will give at least 30 days written notice to the contractor that the work may be suspended. If the contractor so elects, after receipt of such notice, he may continue work under the conditions and restrictions under the specifications, so long as there are funds for inspection and superintendence, *with the understanding, however, that no payment will be made for such work unless additional funds shall become available in sufficient amount.* When funds again become available, the contractor will be notified accordingly. Should work be thus suspended, additional time for completion will be allowed equal to the period during which work is necessarily so suspended, as determined by the dates specified in the above-mentioned notices.

* * * * * * *

(h) *Should Congress fail to provide additional funds the contract may be terminated and considered to be completed, at the option of the contractor, without prejudice to him or liability to the Government, at any time subsequent to 30 days after payments are discontinued, or at any time subsequent to 30 days after the passage of the Act which would have but did not carry an appropriation for continuing the work or after the adjournment of the Congress which failed to make the necessary appropriations.* However, if the funds cited in the contract are enough to extend the work beyond the end of the fiscal year and no new funds are allocated to this contract for the ensuing fiscal year, the contractor must first exhaust all the cited funds and thereafter he

may, at his option, exercise the rights provided in this paragraph any time after payments are discontinued. [Italic supplied.]

It appears that the basic nature of the Funds Available clause and the rationale for its inclusion in continuing contracts have remained essentially the same since 1923. Recently, however, the Corps has been experiencing problems in administering the Funds Available clause. The Corps submission to us points out that in *C. H. Leavell and Company* v. *United States*, 530 F. 2d 878 (1976), the Court of Claims allowed an equitable adjustment to a contractor under a continuing contract who had suspended work due to delays in the enactment of appropriations necessary to meet his contract payments. This equitable adjustment was permitted under the "Suspension of Work" clause notwithstanding the Corps' argument that the Funds Available clause, *supra*, precluded any Government liability caused by delay in obtaining appropriations.

The Corps' submission outlines its problems with the current Funds Available clause—resulting from the *Leavell* decision and other considerations—and its proposed contract changes as follows:

> The *Leavell* decision recognizes that a payment delay due to exhaustion of funds does not breach a "continuing contract." However, the decision holds the Government liable for extra costs to the contractor arising from the contractor's own decision to suspend work after progress payments were stopped. A significant factor in this decision was the risk to the contractor that, even if he had been able and decided to finance the work himself, he may never have been paid for the work or even for the interest on money borrowed to continue the work.
>
> As a result of the *Leavell* decision, the Corps proposes a substantial revision of the "Funds Available for Payments" clause. The principal changes are: (1) to pay interest on delayed payments, (2) to allow contractors to treat a contract as terminated for the convenience of the Government if payments are delayed for an inordinate period, (3) to assure contractors of eventual payment for all contract earnings, and (4) to bar claims for costs of suspension or delay of work due to delayed payments.
>
> The proposed new approach will not affect the way the work has generally been done in the past. It seeks to assure equitable treatment and to clarify the lack of actual risk that has generally prevailed. The Corps has always ultimately made all payments earned under these continuing contracts, and nearly always has made these payments as soon as they were earned. The new approach is expected to result in lower bids and contract costs. It is also expected to result in more efficient construction operations and earlier availability of project benefits.*

Since the submission did not include the actual language of the proposed contract changes, our analysis is necessarily limited to the purposes of the changes as stated. Of the proposed contract changes listed above, item (3) is the most significant, and it is the key to the other proposed changes. Proposed change (3) would "assure con-

*We note that the *Leavell* decision did not question the validity of the Funds Available clause but merely held that this clause was not intended to preempt an equitable adjustment under the Suspension of Work clause, even where the suspension is caused by a lack of funds. Since the decision thus rests solely on matters of contract interpretation, it could be overcome by amending the exculpatory language of the Funds Available clause to expressly preclude remedies under the Suspension of Work clause. However, as indicated in the above-quoted excerpt from the submission, the Corps seems to have practical problems with the current Funds Available clause which transcend the holding in *Leavell*.

tractors of eventual payment for all contract earnings." Obviously the Corps cannot "assure" in an absolute sense any payments beyond the amount of appropriations available at the time the contract is made. Instead, it appears that the basic effect of this proposed change would be to treat the full contract price as a legal obligation, recordable under 31 U.S.C. § 200(a)(1) (1970), even though appropriations sufficient to liquidate the full obligation are not available at that time. While it is conceivable in theory that Congress might still refuse to appropriate for the liquidation of such obligations, failure to appropriate would under the revised contract provisions leave the contractor with legal rights to recover for his contract earnings. See, *e.g.*, *New York Airways, Inc.* v. *United States*, 369 F.2d 743 (Ct. Cl. 1966); *Gibney* v. *United States*, 114 Ct. Cl. 38, 50–52 (1949); *Seatrain Lines, Inc.* v. *United States*, 99 Ct. Cl. 272, 316 (1943).

This is in contrast to the current Funds Available clause which purports (subject to the exception recognized in *Leavell*) to limit the Government's legal obligation and the contractor's right of recovery to amounts actually appropriated from time to time. In other words, proposed change (3) would alter the Government's obligation under a continuing contract from one limited by appropriations actually made to one based on the contract as written independent of the existence of liquidating appropriations. This dichotomy in the theories of Government obligations was explained as follows in *Shipman* v. *United States*, 18 Ct. Cl. 138, 146–147 (1883):

> The liability in this case rests wholly upon the appropriation, and is different from those cases which frequently arise wherein Congress passes an act authorizing officers to construct a building or do other specified work, without restriction as to cost, and then makes an appropriation inadequate to do the whole of it or makes none at all.
>
> In such cases the authority to cause the work to be done and to make contracts therefor is complete and unrestricted. All work, therefore, done under the direction of the officers thus charged with the execution of the law creates a liability on the part of the government to pay for it, and if a written contract be made and work be done in excess of the contract specifications, or entirely outside of or in addition to the written contract, and such work inures to the benefit of the United States, in the execution of the law, or is accepted by the proper public officers, a promise to pay its reasonable value is implied and enforced.
>
> We have frequently held that where there is a liability on the part of the Government, it is not avoided by the omission on the part of Congress to provide the money with which to discharge it. (*Collins's Case*, 15 C. Cls. R., 35.)
>
> But where an alleged liability rests wholly upon the authority of an appropriation they must stand and fall together, so that when the latter is exhausted the former is at an end, to be revived, if at all, only by subsequent legislation by Congress. (*McCullom* v. *United States*, 17 C. Cls. R., 103; *Trenton Co.* v. *United States*, 12 *ibid.* 157.)

Similarly proposed contract changes (1) and (2), above, would afford contractors remedies which do not now exist, premised on the theory that the contractor has a legal entitlement based on his full contract earnings. Proposed change (4) would eliminate the contractor's right to an equitable adjustment under the Suspension of Work clause, which the *Leavell* decision recognized. This is pre-

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sumably based on the theory that in view of the other changes, a contractor would have no occasion to suspend work.

The question presented by the Corps is whether the foregoing proposed contract changes would contravene the Antideficiency Act or our decision in 2 Comp. Gen. 477.

The Antideficiency Act, *supra*, provides in subsection (a), 31 U.S.C. § 665(a) (1970):

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 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.* [Italic supplied.]

Since the very purpose of the Corps' proposed contract changes is to create contractual obligations in excess of existing appropriations, the basic issue is whether the continuing contract authority of 33 U.S.C. § 621 satisfies the "unless * * * authorized by law" exception to the prohibitions of the Antideficiency Act.

As noted previously, even prior to the enactment of 33 U.S.C. § 621 in 1922, Congress had authorized certain projects to be undertaken on a "continuing contract" basis, and it was recognized that this authority represented an exception to the Antideficiency Act. The legislative history of section 10 of the River and Harbor Act of 1922, which enacted 33 U.S.C. § 621, indicates that the purpose of this section was to provide a general statutory authorization for the same type of "continuing contracts."

The proposal for general continuing contract authority was explored in some detail in the Hearings before the House Committee on Rivers and Harbors on H.R. 10766, 67th Cong., 2d Sess. (1922). General Harry Taylor, Assistant Chief of Engineers, explained the proposal as follows:

* * * The idea is to give us authority to enter into contracts for completion. That is, for exceeding the amount of money that has been appropriated. That would be exceedingly advantageous in a project, for instance, like this lock and dam project on the Ohio River, or the East River, covering a long term. A lock and dam on the Ohio River, for instance, will take four years or more to complete, and we well know that we cannot spend $2,000,000 for its construction the first year, as that is the whole amount it would cost. But unless we have money or authorization for it we cannot make a contract for the completion of that dam.

If we have $500,000 and an authorization we can then make a contract for the entire dam, depending upon future appropriations to get the money; but if we do not have that authorization we must allot the full $2,000,000 to that dam and that remains unused from three to four years—the main part of it. That is one of the troubles we have had with our very large unexpended balances. Whenever we come to the Committee for further appropriations they say, "you have a large unexpended balance." It is true we did have a large unexpended balance but a large part of it was tied up in these contracts. *Id.* at 10.

At a later stage in the hearings, General Taylor stated:

I think it would be a very excellent scheme if we could get a continuing contract authorization for work on a number of projects * * *. In order to make a

contract, a suitable contract for the construction of a lock and dam, we have got to make a contract for the completion of the whole thing. In other words, you cannot make a contract for the construction of half a dam.

* * * * * * * * * If we do not have a continuing contract authorization we must have the full amount of money to meet the payments under a contract at the time the contract is made.

* * * * * * * * * Now if we had a continuing contract authorization, all the money that we would allot to that would be the money to meet the payments of the first year. We would not have that big balance on hand. Then the next year we could come to Congress and say, "We have a contract for this dam, and this contract obligation next year will be $300,000," or $400,000, which ever it may be, and get the money to meet those obligations as they come due * * * *Id.* at 93.

Finally, the hearings disclose the following colloquy:

The Chairman. * * * the [contractor] would know that he had that work ahead, and he would bid lower on that piece of work than he would on a small piece of work?

Gen. Taylor. There is much more active competition for the large work: Yes, sir.

The Chairman. * * * you do not tie up any funds at all; you simply, from year to year, report to Congress the sums needed for continuing contracts?

Gen. Taylor. Yes, sir.

* * * * * * * * *

The Chairman. Now if you had a continuous contract there you would not have any money tied up: you would simply, from year to year, come to Congress and say: "Here is our contract for which so much money is needed. We are going to use this year $200,000 or $300,000 on this section." And, so, you would report your aggregate cost on the entire Ohio River, and that is all you would use and you would only use it as you needed it, and as the work was done, and as the amounts became due under the contracts.

Mr. McDuffie: But, Mr. Chairman, what do you think about passing a bill or presenting a bill to Congress authorizing these continuing contracts?

The Chairman. I do not think there is any question but what it ought to be done. *Id.* at 94.

While the House bill did not include a continuing contract authorization, such a provision was added to the Senate version of the bill. The Senate report explained the provision as follows:

Another amendment seeks to authorize continuing contracts in particular cases where it is shown to be economical and wise. This will tend to the more expeditious and economical prosecution of adopted projects for which appropriations are made. S. Rept. No. 813, 67th Cong., 2d Sess., 7 (1922).

The conferees adopted the Senate language, with an amendment making the continuing contract authority applicable generally to future projects, and this provision was enacted as section 10 of the 1922 Act.

In view of its language and legislative history, we are satisfied that 33 U.S.C. § 621 permits the full contract price for continuing contracts to be obligated at the outset in a manner that would otherwise be prohibited by the Antideficiency Act. This being the case, our decision at 2 Comp. Gen. 477, *supra*, is overruled insofar as it holds that such contracts must contain a funds available clause which limits the Government's obligation to amounts appropriated from time to time. In

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fact, our Office has implicitly recognized, subsequent to the decision at 2 Comp. Gen. 477, that the funds available clause is not required as a matter of law. Thus in a letter to former Senator Len B. Jordan dated December 3, 1969, B–163310, commenting on proposals to eliminate the funds available clause, we stated:

> As to whether in the future the Army should, as a matter of policy, omit from its contracts the "Funds Available for Payments" clause and specifically provide in the contract that in case of lack of funds the Army would order the suspension of work or termination of the contract at its own expense or would reimburse the contractor for interest if—in such case—he continues the project with his own funds, is a matter for administrative determination by the Department of the Army. It would be our view, however, that before adopting such a policy in connection with continuing contracts, the Department of the Army should bring the matter to the attention of the appropriate committees of Congress, advising the committees of the possible results thereof insofar as costs to the Government are concerned, since this apparently would be a departure from a policy long followed by the Corps.

It follows that we have no legal objection, in principle, to the contract changes here proposed by the Corps.

However, the foregoing conclusions as to the Corps' continuing contract authority under 33 U.S.C. § 621 raise additional issues concerning the proper budgetary treatment of this authority.

The Congressional Budget and Impoundment Control Act of 1974, Public Law 93–344 (July 12, 1974), 88 Stat. 297, established a comprehensive system to govern the budgetary process in which the concept of "budget authority" is a central element. For example, both the President's budget and the first concurrent resolution on the budget for each fiscal year must include new budget authority in total and by each major functional category. See 31 U.S.C. §§ 1322(a)(1)–(2), 11(d) (Supp. V, 1975). Section 3(a)(2) of Public Law 93–344, 31 U.S.C. § 1302(a)(2) (Supp. V, 1975), defines "budget authority" to mean:

> * * * authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds, except that such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government.

Closely related to the concept of budget authority are the following provisions concerning "new spending authority" in section 401 of Public Law 93–344, 31 U.S.C. § 1351 (Supp. V, 1975):

> (a) LEGISLATION PROVIDING CONTRACT OR BORROWING AUTHORITY—It shall not be in order in either the House of Representatives or the Senate to consider any bill or resolution which provides new spending authority described in subsection (c)(2)(A) or (B) (or any amendment which provides such new spending authority), unless that bill, resolution, or amendment also provides that such new spending authority is to be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.
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> * * * * * * *
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> (c) DEFINITIONS.—
> (1) For purposes of this section, the term "new spending authority" means spending authority not provided by law on the effective date of this section, in-

cluding any increase in or addition to spending authority provided by law on such date.

(2) For purposes of paragraph (1), the term "spending authority" means authority (whether temporary or permanent)—

(A) to enter into contracts under which the United States is obligated to make outlays, the budget authority for which is not provided in advance by appropriation Acts * * *.

Under the current budgetary practices applicable to the Corps' continuing contracts, budget authority for such contracts derives from a two-stage congressional authorization and appropriation process. The continuing contract authority of 33 U.S.C. § 621 does not of itself provide budget authority since it is expressly limited to projects "adopted by Congress * * * ." Such public works projects are subject to specific statutory authorization on a project-by-project basis. See, *e.g.*, section 2 of the Water Resources Development Act of 1974, Public Law 93–251 (March 7, 1974), 88 Stat. 14; section 101 of the River and Harbor Act of 1970, Public Law 91–611 (December 31, 1970), 84 Stat. 1818.* The language of such statutory authorizations is illustrated in section 101 of the River and Harbor Act of 1970, *supra*, as follows:

The following works of improvement of rivers and harbors and other waterways for navigation, flood control, and other purposes are hereby adopted and authorized to be prosecuted by the Secretary of the Army, acting through the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated. * * *

Section 101 goes on to list the projects authorized, together with the Corps report and the estimated cost of each project.

Even after authorization, a project is not undertaken until appropriations have been requested and enacted to provide funding for at least a portion of the total project cost. Such appropriations are made to the Corps on a lump-sum basis, and are available until expended, under the heading "Construction, General." See *e.g.*, the Public Works for Water and Power Development and Energy Research Appropriation Act, 1977, Public Law 94–355 (July 12, 1976), 90 Stat. 889, 891, which provides in part in the appropriation for Construction, General:

For the prosecution of river and harbor, flood control, shore protection, and related projects authorized by laws; * * * $1,436,745,000, to remain available until expended: *Provided*, That no part of this appropriation shall be used for projects not authorized by law or which are authorized by law limiting the amount to be appropriated therefore, except as may be within the limits of the amount now or hereafter authorized to be appropriated * * *.

The specific projects intended to be funded are listed in the accompanying committee reports. There may be a substantial time lag between congressional authorization of a project and the initial funding for

*Some projects may be undertaken by the Corps without individual congressional authorization. See 33 C.F.R. part 263 (1976) for a description of the applicable general statutory authorizations. However, these projects would not be prosecuted under continuing contracts.

the project. In fact, procedures have been enacted for the deauthorization of projects for which appropriations have not been made within 8 years. See 33 U.S.C. § 579 (Supp. V, 1975).

Authorizations and appropriations are enacted with reference to each project as a whole, rather than its constituent elements such as individual construction contracts within a project. Moreover, the project costs contemplated by the authorization and appropriation include items other than construction contracts. It is our understanding that the method of prosecuting construction for a project, *i.e.*, by continuing contract or otherwise, is not determined at the authorization stage. However, when and to the extent it is later determined that certain construction will be prosecuted by continuing contract, we understand that the Corps annually requests only such funding as is necessary to cover payments for each year's work under the contract.

The current budgetary practices, as described above, are consistent with the theory of continuing contracts reflected in our 1923 decision and the Corps' use of the present Funds Available clause. Since the Government's legal obligation under this theory is limited to amounts appropriated, budget authority would come into being only as the appropriations are enacted from time to time. However, under the theory that the Corps may invoke 33 U.S.C. § 621 to obligate the full amount of continuing contracts in advance of appropriations, the requisite budget authority for purposes of Public Law 93–344 is complete as a matter of law once a project subject to 33 U.S.C. § 621 has been authorized by Congress.

In this regard, we have on several occasions expressed the view that the concept of budget authority should be liberally applied so as to effectuate the purposes of Public Law 93–344. Thus we observed in B–159687, March 16, 1976:

> * * * the fundamental objective of the Congressional Budget Act of 1974 was to establish a process through which the Congress could systematically consider the total Federal budget and determine priorities for the allocation of budget resources. We believe this process achieves its maximum effectiveness when the Budget represents as complete as possible a picture of the financial activities of Federal agencies. We further believe it is vital to maximizing the effectiveness of the process that Federal financial resources be measured as accurately as possible because priorities are actually established through decisions on the conferring of this authority. From this standpoint, therefore, the concept of "budget authority" should (a) encompass all actions which confer authority to spend money, (b) reflect as accurately as possible the amount of such authority which is conferred and (c) be recognized at the point at which control over the spending of money passes from the Congress to the administering agency.

Consistent with the last point noted above, we have emphasized that the benchmark of budget authority is the legal authority to incur obligations, even where administrative discretion exists concerning obligational levels or where the use of the authority is contingent upon administrative findings. See B–171630, August 14, 1975; B–114828, January 31, 1977.

Applying these considerations to the instant matter, we believe that the new theory of continuing contracts will require significant changes in the presentation of budget authority for projects subject to 33 U.S.C. § 621, although we recognize that a number of issues will arise concerning precisely how this should be done. Accordingly, we urge the Corps to take up these issues with the cognizant congressional committees. We will, of course, be pleased to provide any assistance that the committees or the Corps may desire.

[B–187489]

Contracts—Options—Not To Be Exercised—Requirements To Be Resolicited

Award in negotiated procurement to offeror whose offered price would become low price only upon agency's exercise of option is improper where solicitation did not provide for evaluation of option; consequently, it is recommended that option not be exercised and that any option requirements be resolicited.

Contracts—Negotiation—Offers or Proposals—Preparation—Costs

General Accounting Office (GAO) will consider question of protester's entitlement to proposal preparation costs, notwithstanding GAO recommendation that contract option not be exercised; prior decisions (55 Comp. Gen. 859 and B–186311, August 26, 1976) are overruled to extent they are inconsistent with this determination.

Contracts—Negotiation—Evaluation Factors—Method of Evaluation—Improper—Prejudicial to Low Offeror

Agencys' evaluation of proposals and award to higher priced offeror was without reasonable basis, was arbitrary and capricious as to low offeror, and constituted failure to give fair and honest consideration to low offeror's proposal, thus entitling low offeror to proposal preparation costs.

Claims—Evidence To Support—Claimant's Responsibility

Where claimant has not provided supporting documentation to establish quantum of compensation due for proposal preparation costs, GAO has no basis at this time to determine proper amount of compensation. Claimant should submit necessary documentation to agency in effort to reach agreement on quantum. If agreement is not reached, matter should be returned to GAO for further consideration.

In the matter of Amram Nowak Associates, Inc., March 29, 1977:

Amram Nowak Associates, Inc. (Nowak), protests the award of contract No. 68–01–4230 by the United States Environmental Protection Agency (EPA) to Richter McBride Productions, Inc. (McBride), for a documentary film and supplemental material concerning aviation noise, resulting from request for proposals (RFP) No. WA 76–E303.

The RFP, a total small business set-aside, was issued on June 15, 1976, and required that initial proposals be submitted by July 19, 1976. Enclosure III of the RFP stated that proposals would be evaluated on the following bases:

The evaluation process designed for this procurement will be of a two-phased nature. Initially, the offeror's technical proposals will be evaluated for tech-