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B-230304

March 18, 1988

DIGEST

Federal Prison Industries, Inc., may spend its funds for the construction of industrial facilities to provide employment to prisoners and to construct secure camps to house prisoners engaged in public works, or public improvement, projects on behalf of other agencies. It may not use its funds to construct prison facilities generally which are neither industrial facilities nor associated with a federal public works project. 18 U.S.C. §§ 4125, 4126.

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March 18, 1988

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration of Justice
Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

This is in response to your letter of February 10, 1988. You advise that Federal Prison Industries, Inc. (FPI) recently constructed a prison camp in Marianna, Florida. You ask for our opinion as to whether FPI has the authority to construct a prison camp with its own funds. In light of your request for a quick response, we did not seek formal views from any of the agencies involved. We have based our response only upon the materials submitted with your inquiry and we made no effort to independently obtain or verify the facts.

Based upon our review, we conclude that the FPI is authorized to make expenditures from its revolving fund to build industrial facilities. It is also authorized to spend its funds for secure residential camps at sites selected by the Attorney General for the confinement of prisoners who are employed in public works or public improvement projects. To the extent that the Marianna, Florida, camp exceeds these limitations by providing prison-type facilities not associated with a federal public works project, the FPI fund was not available to pay for the construction of such facilities.

BACKGROUND

FPI recently constructed a federal prison camp in Marianna, Florida. We understand that this camp consists of a closely integrated industrial operation including three factories and an associated residence and security facility which adjoin a preexisting prison facility.

An August 19, 1985, memorandum from FPI's Assistant General Counsel indicates that it is FPI's position that a prison facility can be constructed entirely with FPI funds based upon either of two different approaches to interpreting its authority.

Under the first approach, FPI relies upon the authority of 18 U.S.C. § 4126^x(1982), which authorizes the FPI to employ its revolving fund and FPI earnings in performing the duties imposed on it, including the authority contained in 18 U.S.C. § 4125(b)^xto:

" . . . establish, equip, and maintain camps . . . for confinement of persons convicted of an offense against the laws of the United States."

Since the word "camp" is not defined, FPI interprets the term broadly and concludes it is authorized to spend its funds for constructing a prison (including industrial activities) under the authority of subsection 4125(b)^x.

Under the second approach, the FPI relies upon its authority in 18 U.S.C. § 4126^x, which provides that the FPI is authorized:

" . . . to employ the fund, and any earnings that may accrue to the corporation, as operating capital in performing the duties imposed by this chapter; in the repair, alteration, erection and maintenance of industrial buildings and equipment; . . ." (Emphasis supplied.)

The FPI interprets the language relating to operating capital to cover all expenditures, both for day-to-day operations and for construction. It also interprets the emphasized language in section 4126^x, quoted above, as not being limited by all of the clauses following it in that section including the clause, "in the repair, alteration, erection and maintenance of industrial buildings and equipment."

As additional support for this position, the FPI memorandum refers to Executive Order 6917, section 3, which authorizes the FPI "to do all things it is authorized to do by the said act of June 23, 1934, and all things incident to or necessary or proper in the exercise of its functions." Based upon this language, the memorandum argues that FPI is authorized to do all things necessary to carry out its functions, including the construction of any housing, food or recreational facilities located at an institution where industrial activities are conducted since they are a necessary support of these activities. The memorandum recognizes that the fund could not be used to construct a traditional institution where inmates are not employed by FPI industries.

We do not concur in the views expressed in the FPI memorandum for the following reasons: (1) they are contrary to the basic legislative structure established in Part III of title 18, United States Code, entitled "Prisons and Prisoners," which provides the primary authority for the construction of prisons in provisions other than those that provide for the establishment and operation of FPI; and (2) they are not supported by the legislative history of the relevant provisions of Part III, which provisions do deal specifically with FPI operations.

DISCUSSION

FPI is a government corporation^{1/} first established by executive order^{2/} in 1934 pursuant to authority set forth in the act of June 23, 1934, ch. 736, § 1, 48 Stat. 1211,^{3/} 18 U.S.C. § 744i^{4/}(1940) (1934 Act).^{3/}

The FPI is funded by means of a revolving fund which constitutes a permanent or continuing appropriation to carry out FPI activities.^{4/} Since this revolving fund is an appropriation it may be spent only for such purposes as are expressly authorized by law or for those purposes which are by implication necessary to the proper execution of an expressly authorized purpose.^{5/} We have taken the view that for an expenditure to be justified under the necessary expense theory, it must:

1/ See 18 U.S.C. § 4121^{5/}(1982). FPI is also defined as "wholly-owned government corporation" for the purpose of the application of the Government Corporation Control Act, now codified to 31 U.S.C. §§ 9101^{6/} et seq. See 31 U.S.C. § 9101(3)(D).^{7/}

2/ Executive Order 6917,^{8/} December 11, 1954, set out in the note to 18 U.S.C. § 7441^{9/}(1940).

3/ Section 1 of the 1934 Act provides: ". . . the President is hereby authorized and empowered, in his discretion, to create a body corporate of the District of Columbia to be known as 'Federal Prison Industries,' which shall be a governmental body."

4/ 18 U.S.C. § 4126^{10/} See 60 Comp. Gen. 323^{11/}(1981).

5/ 31 U.S.C. § 1301(a)^{12/} See 6 Comp. Gen. 619^{13/}(1927).

- bear a logical relationship to the appropriation sought to be charged,
- not be prohibited by law, and,
- not be otherwise provided for, that is, an item that falls within the scope of some other appropriation.^{6/}

In our opinion, the position expressed in the FPI memorandum ignores the procedure established by the Congress in chapter 301 of title 18, United States Code (Sections 4001-4012),^{6/} for the Attorney General either to construct prison facilities costing less than \$100,000 using appropriations made for the "Support of United States Prisoners" or to obtain congressional authorization to do so when costing in excess of \$100,000. See, specifically, 18 U.S.C. §§ 4003,^{6/} 4009^{6/} and 4010.^{6/} These provisions provide express limitations on the authority of the Attorney General to construct prison facilities without express congressional approval and are intended to permit the Congress to perform its oversight responsibilities. Furthermore, each year the Congress expressly provides the Justice Department with appropriations for "Buildings and Facilities" to fund prison construction. See, e.g., H.J. Res. 395, reprinted in 44 Cong. Rec. H12805, H12809 (daily ed., Dec. 22, 1987).

Sections 4125^{6/} and 4126^{6/} provide limited authority for construction of industrial facilities and camps in connection with the employment of prisoners by FPI. However, it is our view that this limited authority should not be construed to override the limitations and authorizing procedures set out elsewhere in Part III^{6/}.

Furthermore, nothing in the legislative history of these provisions supports the contention that the Congress by enactment of chapter 307^{6/} was authorizing an exception to the chapter 301^{6/} requirements. Thus, in our view, the law must expressly authorize FPI to construct a prison-type facility in order for it to use its funds for such construction.

Effect of 1948 Codification

Subsection 4125(a)^{6/} provides the Attorney General with authority to provide other departments with prisoners at agreed-to rates for constructing or repairing public works

^{6/} See GAO Principles of Federal Appropriations Law at 3-13 through 3-14 (1982).

financed by funds appropriated by the Congress, such as road construction or reforestation. In conjunction with the authority to provide labor for public works projects, subsection 4125(b)^x provides the Attorney General with authority to:

" . . . establish, equip, and maintain camps upon sites selected by him . . . and designate such camps as places for confinement of persons convicted of an offense against the laws of the United States."

Section 4126^x establishes the Prison Industries Fund as a revolving fund and authorizes its use for:

" . . . the repair, alteration, erection and maintenance of industrial buildings and equipment; in the vocational training of inmates . . . in paying . . . compensation to inmates . . . and compensation to inmates or their dependents for [related] injuries. . ."

These provisions were included in the 1948 codification of title 18, United States Code, "Crimes and Criminal Procedure," and are based on language contained in prior acts which were revised and consolidated into the codification.^{7/} Since the language of the codification is different than that appearing in the prior acts, it is necessary to review the prior acts in order to understand correctly their meaning.^{8/} As can be seen from the following discussion, this prior history reflects a more precise meaning for the term "camp" and the intended coverage of the term "operating expenses" than given them in the FPI memorandum.

Authority Conferred by 18 U.S.C. § 4125^{x9/}

Contrary to the position taken in the FPI memorandum, the legislative history of 18 U.S.C. § 4125^x demonstrates that

^{7/} Act of June 25, 1948, ch. 645, 62 Stat. 683.^x

^{8/} See Muniz v. Hoffman, 422 U.S. 454,^x at 467-474 (1975).

^{9/} 18 U.S.C. § 4125^x is based upon language contained in the act of February 26, 1929, ch. 336, §§ 1, 3, 4, 5, 45 Stat. 1318,^x 18 U.S.C. §§ 851,^x 853, 854, 855 (1940) and the act of May 27, 1930, ch. 340, § 2, 46 Stat. 391,^x 18 U.S.C. § 744b^x (1940).

the Congress had a clear conception as to what kind of facility would be covered by the term "camp."

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The act of May 27, 1930, ch. 340, § 2, 46 Stat. 391,^x 18 U.S.C. § 744b^x(1940) (1930 Act), which authorized the Attorney General to provide convict labor to other departments for the purpose of working on public works projects such as reforestation or highway construction, also stated:

" . . . To carry out the purpose of this section the Attorney General may establish, equip, and maintain camps upon sites selected by him and designate such camps as a place for confinement of persons convicted of an offense against the laws of the United States. . . . The expenses of transferring and maintaining prisoners at such camps shall be paid from the appropriation 'Support of United States [P]risoners,' and said appropriation may, in the discretion of the Attorney General, be reimbursed for such expenses."

Thus, this provision clearly contemplates the establishment of "camps" for confining prisoners otherwise engaged in public works projects on behalf of other departments of government on a reimbursable basis, including compensation to the prisoners. (See S. Rep. No. 529, 71st Cong., 2nd Sess. 3-4 (1930) accompanying the 1930 Act.) Furthermore, the 1930 Act did not expressly make the working capital fund available for this purpose. Instead, construction of the camps was carried out by direct appropriation and the prisoners were maintained in the camps by charging the appropriation made to the Justice Department for the "Support of United States Prisoners." The Attorney General was authorized to reimburse this appropriation out of the fees charged other departments on whose behalf the prisoners were employed in public works type projects. It was not until 1934 that the revolving fund was expressly made available for this purpose. It is clear that the authority for such camps is directly linked to the associated public works project on which the prisoners are employed.^{10/}

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10/ Similar but more limited authority was conferred under the act of February 20, 1929, ch. 336, 45 Stat. 1318,^X 18 U.S.C. §§ 851, 853, 854, 855^x(1940), which also was codified into section 4125. Thus, nothing in this act serves to change the scope of the authority conferred by 18 U.S.C. § 4125.

Authority Conferred by 18 U.S.C. § 4126^{11/}

The FBI attempt to read the limiting language out of 18 U.S.C. § 4126^{11/} is also not consistent with the history of that section.

The 1930 Act, 18 U.S.C. § 744a-744h^{11/} (1940), made the Attorney General responsible for providing employment for federal prisoners through the establishing and operating of prison industries whose operations were to be financed out of the consolidated prison industries working capital fund. Section 4 of the 1930 Act, 18 U.S.C. § 744d^{11/} (1940), which created the working capital fund, generally made it available for:

" . . . carrying on industrial enterprises at any of the several Federal penal and correctional institutions heretofore or hereafter established."

However, no mention is made of using the working capital fund for activities, including construction, unrelated to the carrying on of industrial enterprises.

Section 6 of the 1930 Act, 18 U.S.C. § 744f^{11/} (1940), made the working capital fund expressly available to the Attorney General for:

" . . . the purchase, repair, or replacement of industrial machinery or equipment; for the purchase of raw materials; for compensation to inmates employed in any industry under rules and regulations promulgated from time to time by the Attorney General; for the employment of necessary civilian officers and employees engaged in any industrial enterprise at any of the Federal penal and correctional institutions and in the District of Columbia; for the repair, alteration, erection, and maintenance of industrial buildings and equipment; and for travel and any other expenses incident to or connected with the establishment, operation, or maintenance of such prison industries as are now established or may hereafter be established by the Attorney General at the several penal and correctional institutions." (Emphasis supplied.)

^{11/} 18 U.S.C. § 4126^{11/} is based upon language contained in the act of May 27, 1930, ch. 340, §§ 4-6, 46 Stat. 391, 392, 18 U.S.C. §§ 744d; 744e, 744f^{11/} (1940) and the act of June 23, 1934, ch. 736, § 4, 48 Stat. 1211, 18 U.S.C. § 7441^{11/} (1940).

The express focus of this provision is the Attorney General's authorized conduct of prison industry activities. The only express authorization of construction set forth in this section is that which involves the repair, alteration, erection, and maintenance of industrial buildings and equipment at the several penal and correctional institutions. No mention is made of using these funds to repair, alter, erect or maintain the penal or correctional institutions themselves. Since the Congress expressly chose different language--that is, "industrial buildings" versus "penal and correctional institutions"--in the same provision and other provisions of the same act, we may assume that the Congress intended to convey a different meaning by using these terms absent a clear expression of legislative intent to the contrary. Furthermore, nothing in the act or its legislative history supports the conclusion that these terms were not intended to have a different meaning. Thus, the authority to build industrial facilities does not include authority to construct penal or correctional institutions.

Thereafter, when the FPI was created by the President pursuant to the authority set forth in the 1934 Act, section 4 of the Act directed that the Secretary of the Treasury "transfer to a fund to be known as the Prison Industries Fund all balances then standing to the credit of the prison industries working capital fund" and further authorized the FPI to employ this fund and any earnings that may hereafter accrue to the FPI "as operating capital for the purposes enumerated in the [1930 Act]." 18 U.S.C. § 7441^{12/} (1940).^{12/} (Emphasis supplied.) Thus, under the 1934 Act, a corporation created by the President could only be vested with the powers vested in the Attorney General by the 1930 Act, as well as any additional powers conferred in him by the 1934 Act. The only material additional power granted was unrelated to construction.^{13/} Accordingly, use of the

^{12/} The primary purpose of the 1934 Act was to authorize the President to transfer the powers exercised by the Attorney General under the 1930 Act to a government corporation managed by an independent board of directors who would operate the corporation using sound business practices within the limits of the authority conferred by the Congress.

^{13/} Section 4 of the 1934 Act, 18 U.S.C. § 7441^x (1940), granted this new power, as follows:

" . . . in accordance with the laws generally
(continued...)

revolving fund as "operating capital" was limited to the types of construction authorized by the 1930 Act.

However, when section 6 of the 1930 Act and section 4 of the 1934 Act were codified into 18 U.S.C. § 4126, the fact that "operating expenses" as used in section 4 of the 1934 Act referred to the specific purposes for which funds could be expended under section 6 of the 1930 Act was distorted. A review of the reviser's notes to section 4126 does not indicate that this distortion was a conscious attempt to change the scope of the availability of the revolving fund. Thus, there is nothing relevant upon which to base a conclusion that the Congress intended to change the substance of the prior law through the codification of section 4126.

Consequently, the term "operating expenses" in 18 U.S.C. § 4126 is limited to construction involving "the repair, alteration, erection and maintenance of industrial buildings and equipment" and does not provide an independent authority to use FPI funds to engage in construction of penal or correctional facilities.

Authority Conferred by Executive Order 6917

Executive Order 6917, December 11, 1934, which created the FPI under authority of section 1 of the 1934 Act, could not, and did not, expand FPI authority. Section 3 of the 1934 Act, 18 U.S.C. § 744k (1940), provided that upon the creation of the FPI:

"The President shall transfer to said corporation the duty of determining in what manner and to what extent industrial operations shall be carried on in Federal penal and correctional institutions and may transfer to said corporation any part or all of the other powers and duties now vested in the Attorney General or any other officer or employee of the United States by . . . [the 1930 Act]. . . ." (Emphasis supplied.)

13/(...continued)

applicable to the expenditures of the several departments and establishments of the government, and also for payment of compensation in such amounts as the Attorney General may authorize to inmates of penal institutions or their dependents for injuries suffered in any industry; Provided, that in no event shall compensation be paid in a greater amount than that provided in the Federal Employee Compensation Act of September 7, 1916, as amended. . . ."

These transfers of authority were accomplished under section 3 of the executive order.^{14/} However, notwithstanding the language used in the executive order to transfer authority from the Attorney General to the FPI, it is clear that under Section 3 of 1934 Act, the Attorney General could only vest in the FPI such authority as was given the Attorney General under the 1930 and 1934 Acts, and this, as we have previously described, did not include the general authority to construct prisons.

CONCLUSION

Based on our analysis of FPI's authorities, we see no reason to adopt either legal theory contained in the FPI memorandum. As mentioned earlier, there is specific authority elsewhere in Part III~~X~~ for construction of penal and correctional facilities of the type usually associated with the housing and confinement of prisoners; that is, to pay for prisoners as prisoners. Further, such construction is customarily provided for in annual appropriations acts. The FPI revolving fund, on the other hand, is available to pay for the costs of industrial activities of prisoners, such as the factories where they work, equipment, and compensation; that is, to pay for prisoners as workers. Where, in association with the employment of prisoners on public works projects they must be housed away from established prison facilities, these costs can be considered to be associated with the prisoners as workers as well and borne as a cost of work rather than a cost of imprisonment. However, this authority does not extend beyond its stated purpose.

Accordingly, we conclude that while the FPI had authority to construct industrial facilities associated with the Marianna

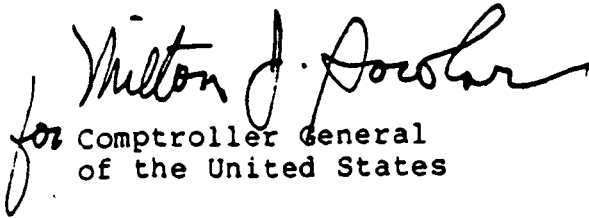
^{14/} Section 3 of Executive Order 6917 provided that:

"The said corporation shall have power to determine in what manner and to what extent industrial operations shall be carried on in the several penal and correctional institutions of the United States . . . It shall also have power to do all things it is authorized to do by . . . [the 1934 Act], and all things incident to or necessary or proper in the exercise of its functions."
18 U.S.C. § 744~~1~~ note~~X~~(1940).

camp under the explanation offered, it did not have authority to construct a secure, residential portion of the camp that represents the equivalent of a penal facility or place of confinement.

Unless released by your office earlier, this opinion will be made publicly available 30 days from today.

Sincerely yours,


for Comptroller General
of the United States

APPROPRIATIONS/FINANCIAL MANAGEMENT
Appropriation Availability
Purpose availability
Appropriation restrictions
Government corporations