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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-194562

JUL 11 1979

Mr. William W. Thybony
Assistant Administrator
for Regulations
Office of Federal Procurement
Policy
Office of Management and Budget
Executive Office of the President

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Dear Mr. Thybony:

By letter dated April 6, 1979, you requested our comments on proposed Federal Acquisition Regulation (FAR) subparts 32.7 - Contract Funding and 42.11- Production Surveillance and Reporting. Our comments follow:

Subpart 32.7 - Contract Funding

FAR 32.702-2(a) - Fiscal year contracts. "The contracting officer may award a contract properly chargeable to funds of the new fiscal year, before these funds are available, if the contract includes the clause at 52.232-42. This authority may be used only for operation, maintenance, and continuing services (e.g., rentals, utilities, and supply items not financed by stock funds) that are necessary for normal operations and for which Congress consistently appropriates funds."

Both the courts and our Office have held that under 41 U.S.C. 11 (1976) a contract entered into prior to enactment of the applicable appropriation, in the absence of specific legislative authority is void regardless of the presence of an "Availability of Funds" clause such as the one proposed at FAR 52.232-42. See Leiter v. United States, 271 U.S. 204 (1926), 42 Comp. Gen. 272 (1962). Therefore after the word "available" in the first sentence of section 32.702-2(a) the phrase "provided that the appropriation has been enacted" should be added. The same qualification should be added to the "Availability of Funds" clause at FAR 52.232-42.



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Contract Funding and
Production Surveillance and Reporting]

FAR 32.702-2(b) - Contracts crossing fiscal years.
"A one-year indefinite-quantity or requirements contract for services funded by annual appropriations may extend beyond the fiscal year in which it began, provided that any specified minimum quantities are certain to be ordered in that fiscal year (see 37. XXX). In this case, the contract shall include the clause at 52.232-43."

While we recognize that this proposed section is basically a revision of DAR 1-318(b), it is our view that the section is contrary to the prohibitions contained in 31 U.S.C. 665, 712(a) and 529 (1976). Our Office and the courts have held that the mere presence of an "Availability of Funds" clause does not lend validity to a contract funded with an annual appropriation which crosses fiscal year lines. Leiter v. United States, supra; Burroughs Corporation, 56 Comp. Gen. 142, 153 (1976), 76-2 CPD 472; 42 Comp. Gen. 272, supra. It is necessary to provide an affirmative duty for the agency to extend the contract into the next fiscal year. In the absence of such a duty the contract must be considered terminated at the end of the initial fiscal year. Accordingly, we recommend that the section be revised to indicate that, in the absence of specific legislative authority, no contract for goods or services funded with annual appropriations may cross fiscal year lines. Similarly we recommend that the "Availability of Funds for Next Fiscal Year" clause at FAR 52.232.43 be deleted.

FAR 32.703(a)(4) - "The Government is considering whether to allocate additional funds or increase the estimated cost, that the contractor is entitled by the contract terms to stop work when the funding or cost limit is reached, and that any work beyond the funding or cost limit is at the contractor's own risk."

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The proposed clause may not provide sufficient protection as written. If a contractor is willing to assume the risk of continuing to work after being notified that he has reached the funding limit, the agency must exercise caution that it does not appear to tacitly encourage continued performance, creating an obligation which is not intended. 55 Comp. Gen. 768 (1976).

We have no further comment to offer on this draft segment.

Sincerely yours,

MILTON SOCOLAR

Hilton J. Socolar
General Counsel