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B-125644, Nov. 21, 1955

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B-125644, NOV. 21, 1955

TO HONORABLE EDMUND F. MANSURE, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION:

THE ASSISTANT ADMINISTRATOR, BY LETTER OF SEPTEMBER 28, 1955, REQUESTS OUR DECISION AS TO THE PROPRIETY OF RECORDING OBLIGATIONS UNDER THE PROVISIONS OF SECTION 1311 OF THE SUPPLEMENTAL APPROPRIATION ACT, 1955, PUBLIC LAW 663, APPROVED AUGUST 26, 1954, 68 STAT. 830, BASED UPON CERTAIN STRATEGIC AND CRITICAL MATERIAL STOCKPILING CONTRACTS.

THE APPROXIMATELY 35 CONTRACTS UNDER QUESTION CONTAIN MINIMUM AND MAXIMUM QUANTITY CLAUSES, TWO OF WHICH CONTRACTS WERE ENCLOSED AS BEING REPRESENTATIVE OF ALL. UNDER THE CONTRACTS THE CONTRACTOR IS REQUIRED TO DELIVER A MINIMUM QUANTITY AND HAS THE OPTION TO DELIVER ADDITIONAL QUANTITIES UP TO A STATED MAXIMUM, AND THE GOVERNMENT IS REQUIRED TO ACCEPT THE TOTAL QUANTITY DELIVERED UP TO THE STATED MAXIMUM. THE ASSISTANT ADMINISTRATOR STATES THAT, SINCE THE GOVERNMENT ORDINARILY OBTAINED THE PRODUCTION IN EXCESS OF THE MINIMUM QUANTITY ONLY WHEN THE MARKET HAD FALLEN AND THE COMMODITY WAS AVAILABLE TO THE GOVERNMENT AT MORE FAVORABLE PRICES, THE GENERAL SERVICES ADMINISTRATION IS NOT CURRENTLY MAKING THIS TYPE OF CONTRACT IN THE ABSENCE OF A COMPELLING NEED FOR THE COMMODITY THAT CANNOT OTHERWISE BE MET.

DURING AND PRIOR TO THE FISCAL YEAR 1954 AND TOTAL MAXIMUM AMOUNT OF LIABILITY UNDER THESE CONTRACTS WERE RECORDED AS OBLIGATIONS. SINCE THERE WAS NO EVIDENCE AS OF JUNE 30, 1955, THAT THE MAXIMUM QUANTITIES SPECIFIED IN THESE CONTRACTS WERE TO BE DELIVERED, AND SINCE THERE WAS NOT COMPLETE MUTUALITY OF OBLIGATIONS AS TO THE DIFFERENCE BETWEEN THE MINIMUM AND THE MAXIMUM AMOUNT, WE STATED IN OUR REPORTS TO THE CHAIRMEN OF THE COMMITTEES ON APPROPRIATIONS OF THE CONGRESS, B 114876, APRIL 11, 1955, THAT THE OBLIGATIONS RECORDED AS OF JUNE 30, 1954, IN THE AMOUNT OF THIS DIFFERENCE, $134,274,155, DID NOT MEET THE REQUIREMENTS OF SECTION 1311. YOU NOW PROPOSE, HOWEVER, TO OBLIGATE ONLY SUFFICIENT FUNDS TO PAY FOR THE MAXIMUM QUANTITY EXPECTED TO BE TENDERED IN THE LIGHT OF MARKET CONDITIONS AND THE CONTRACTOR'S PERFORMANCE RECORD AND TO ADJUST THIS AMOUNT PERIODICALLY.

AS STATED IN THE ASSISTANT ADMINISTRATOR'S LETTER, THERE IS A BINDING AGREEMENT IN WRITING BETWEEN THE PARTIES AS TO THE MINIMUM AMOUNT, BUT THERE IS NOT COMPLETE MUTUALITY OF OBLIGATION AS TO THE DIFFERENCE BETWEEN THE MAXIMUM AND THE MINIMUM. HOWEVER, SUFFICIENT CONSIDERATION TO SUPPORT THE MAXIMUM QUANTITY HAS BEEN HELD TO EXIST IN CONTRACTS TO FURNISH A QUANTITY RANGING FROM A STATED MINIMUM TO A STATED MAXIMUM. SEE WHEELER V. NEW BRUNSWICK AND CANADA RAILROAD COMPANY, 115 U.S. 29; FULLER V. PRESNELL, 233 S.W. 502; FEUCHTWANGER V. MANITOWOC MALTING CO., 187 F. 713; AND WAKEM AND MCLAUGHLIN V. CULVER, 28 F.2D

942. WE THUS BELIEVE THAT THERE IS A SINGLE CONSIDERATION MOVING TO THE GOVERNMENT FOR THE ENTIRE CONTRACT SO THAT THE GOVERNMENT IS BOUND TO ACCEPT UP TO THE STATED MAXIMUM QUANTITY DELIVERED, IF THE TERMS OF THE CONTRACTS ARE OTHERWISE MET. HENCE, SUFFICIENT FUNDS MAY BE OBLIGATED TO COVER THE GOVERNMENT'S ESTIMATED TOTAL DISBURSEMENT UNDER EACH CONTRACT PROVIDED THAT THE AMOUNT OF FUNDS SO OBLIGATED BE REVIEWED AND ADJUSTED PERIODICALLY, AT LEAST ON JUNE 30 OF EACH FISCAL YEAR. RECORDS SHOULD BE MAINTAINED CLEARLY SUPPORTING THE AMOUNT OF FUNDS SO OBLIGATED IN THE LIGHT OF CURRENT MARKET CONDITIONS IN SUCH FORM AS TO FACILITATE AUDIT AND RECONCILIATION AS CONTEMPLATED BY SECTION 1311 (C) OF THE SUPPLEMENTAL APPROPRIATION ACT, 1955.

OUR DECISION IS ALSO REQUESTED AS TO WHETHER FUNDS MAY BE LEGALLY OBLIGATED TO COVER THE TOTAL QUANTITY AUTHORIZED TO BE PURCHASED UNDER THE PURCHASE PROGRAM FOR DOMESTIC CHROME ORE AND CONCENTRATES AT GRANTS PASS, OREGON, PUBLISHED IN THE FEDERAL REGISTER DATED AUGUST 28, 1951, 16 F.R. 8680, AS AMENDED, 44 C.F.R. 99, WHICH PROVIDES, IN PART, AS FOLLOWS:

"SEC. 99.103 PARTICIPATION UNDER THE PROGRAM. ANY PRODUCER MAY SELL TO THE GOVERNMENT CHROME ORE OR CONCENTRATES MEETING THE SPECIFICATIONS CONTAINED IN SEC. 99.106 AND TO WHICH HE HAS TITLE BY DELIVERING AND OFFERING SUCH MATERIAL TO THE GOVERNMENT AT ANY TIME PRIOR TO THE TERMINATION OF THE PROGRAM.

"SEC. 99.104 TERMINATION OF THE PROGRAM. THE PROGRAM SHALL TERMINATE AND BE OF NO FURTHER FORCE OR EFFECT AS OF THE CLOSE OF BUSINESS ON JUNE 30, 1957: PROVIDED, HOWEVER, THAT THE ADMINISTRATOR MAY TERMINATE THE PROGRAM AS OF THE DATE WHEN THE GOVERNMENT HAS RECEIVED AND ACCEPTED 200,000 TONS OF CHROME ORE AND/OR CONCENTRATES UNDER THE PROGRAM.

"SEC. 99.108 WEIGHING, SAMPLING, MOISTURE DETERMINATION, AND ANALYSIS. ALL MATERIAL WILL BE SUBJECT TO WEIGHING, SAMPLING, MOISTURE DETERMINATION AND ANALYSIS BY THE GOVERNMENT AT ITS OWN EXPENSE PRIOR TO ACCEPTANCE.

AS OF JUNE 30, 1954, 60,408 LONG TONS OF CHROME ORE AND CONCENTRATES HAD BEEN PURCHASED UNDER THIS PROGRAM BUT OBLIGATIONS WERE RECORDED FOR THE BALANCE OF THE 200,000 LONG TONS (139,592 LONG TONS) TO BE PURCHASED IN THE AMOUNT OF $16,053,119. WE STATED IN OUR REPORT OF APRIL 11, 1955, B- 114876, TO THE CHAIRMEN OF THE COMMITTEES ON APPROPRIATIONS THAT "SINCE NO FORMAL AGREEMENTS OR CONTRACTS ARE EXECUTED UNTIL TENDERS ARE MADE BY THE PRODUCERS, WE DO NOT CONSIDER THE INCLUSION OF THIS AMOUNT IN THE OBLIGATED BALANCE TO BE IN CONFORMANCE WITH THE PROVISIONS OF SECTION 1311, ALTHOUGH GSA CONSIDERED IT PROPER FOR INCLUSION.' WE STILL ADHERE TO THAT VIEW. THE PROGRAM AS PUBLISHED IN THE FEDERAL REGISTER IS A MERE OFFER TO PURCHASE UP TO 200,000 TONS OF CHROME ORE OR CONCENTRATES MEETING CERTAIN SPECIFICATIONS WITHIN A SPECIFIED PERIOD. MUTUAL ASSENT IS A REQUISITE TO A BINDING CONTRACT AND NO OBLIGATION ON THE PART OF THE GOVERNMENT CAN ARISE UNTIL THE OFFER IS ACCEPTED. IN OTHER WORDS, THERE IS NO "BINDING AGREEMENT IN WRITING BETWEEN THE PARTIES THERETO," AS REQUIRED BY SECTION 1311 (A) (1).