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B-158487, Apr. 4, 1966

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TO THE HONORABLE LAWSON B. KNOTT, JR., ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION:

YOUR LETTER OF FEBRUARY 7, 1966, REQUESTS A DECISION APPROVING THE GENERAL SERVICES ADMINISTRATION (GSA) PROCEDURE OF PAYING DIRECT DELIVERY VOUCHERS PRIOR TO RECEIVING REPORTS FROM THE CONSIGNEE, SO AS TO TAKE ADVANTAGE OF THE DISCOUNTS FOR PROMPT PAYMENT. YOU STATE THAT WE HAVE QUESTIONED WHETHER THE PROCEDURE PRESENTLY BEING USED BY GSA AND CERTAIN OTHER GOVERNMENT AGENCIES IS NOT IN CONTRAVENTION OF SECTION 3648, REVISED STATUTES, AS AMENDED, 31 U.S.C. 529, WHICH PROHIBITS ADVANCE PAYMENTS.

THE FACTS, CIRCUMSTANCES AND BACKGROUND ON THE DEVELOPMENT OF THE GSA PROCEDURE, AS DISCLOSED BY YOUR LETTER, ARE SET FORTH BELOW.

GSA FOUND SEVERAL YEARS AGO THAT ONE OF THE MAJOR PROBLEMS IN PROCESSING PAYMENTS WAS THE TIME INVOLVED IN SECURING RECEIVING REPORTS FROM CUSTOMER AGENCIES. FOLLOW-UP FORM LETTERS WERE USED BY ALL GSA REGIONS AND, DEPENDING UPON WHETHER DISCOUNTS WERE INVOLVED, PHONE, TELEGRAPH, AND PERSONAL VISITS WERE EMPLOYED TO OBTAIN THE RECEIVING INFORMATION. DISCOUNTS LOST IN FISCAL YEAR 1962 AMOUNTED TO $121.828.

IN EARLY 1963, THE ADMINISTRATOR OF GENERAL SERVICES DIRECTED AN ACTION PROGRAM TO CUT DOWN ON THE LOSS OF DISCOUNTS TO THE GOVERNMENT. ONE OF THE ACTIONS TAKEN, BASED ON GSA'S EXPERIENCE THAT IT WAS THE RECEIVING REPORT THAT IT WAS FIGHTING TO OBTAIN, WHEN IN FACT EXPERIENCE HAD PROVEN THAT DELIVERY HAD ACTUALLY BEEN MADE, WAS TO ELIMINATE THE REQUIREMENT FOR A SIGNED RECEIVING REPORT PRIOR TO PAYMENT OF THE INVOICE. THE PRACTICE WAS ADOPTED IN ALL TEN GSA REGIONS, AND EACH REGION WAS REQUIRED TO INSTALL DETAILED PROCEDURES THAT WOULD INCLUDE:

1. PAYMENT WITHOUT A RECEIVING REPORT WHEN DEALING WITH A REPUTABLE VENDOR AND PARTICULARLY WHERE THE INVOICE EVIDENCES NOTICE OF SHIPMENT.

2. TELEPHONE CONTACT WITH COMMANDERS OF MILITARY INSTALLATIONS WHEN NORMAL FOLLOW-UP HAD FAILED.

3. ADVICE TO THE FEDERAL SUPPLY SERVICE OF GSA (FSS), OF THEIR FUNCTIONAL RESPONSIBILITY TO MAKE EVERY EFFORT TO PROMPTLY PROCESS WAREHOUSE RECEIVING INFORMATION TO THE GSA OFFICE OF DATA AND FINANCIAL MANAGEMENT.

4. VISITS TO CUSTOMER INSTALLATIONS BY GSA OFFICIALS TO IMPRESS THE IMPORTANCE

OF QUICK PROCESSING OF RECEIVING REPORTS.

THIS METHOD OF PAYING THE VENDOR'S INVOICE, WITHOUT REFERENCE TO THE RECEIVING COPY OF THE DIRECT DELIVERY PURCHASE ORDER, IS PREDICATED ON THE FACT THAT GSA IS DOING BUSINESS WITH REPUTABLE AND FINANCIALLY RESPONSIBLE VENDORS AND THAT, WITH AT LEAST TWO CYCLE BILLINGS A MONTH, THE CONSIGNEE, USUALLY ANOTHER GOVERNMENT AGENCY, WILL BE INVOICED BY GSA WITHIN ONE MONTH OF PAYMENT BY GSA. IF, AT THE TIME OF RECEIPT OF THE BILLING, THE CUSTOMER AGENCY INDICATES NONRECEIPT OF THE SHIPMENT OR PARTIAL RECEIPT, THE AGENCY WILL ASK FOR AN ADJUSTMENT IN THE BILLING. IN THIS MANNER GSA WILL BE NOTIFIED TO TAKE ACTION AGAINST THE VENDOR OR CARRIER.

AFTER ADOPTION OF THE PROCEDURE, AND IN SPITE OF AN INCREASE IN WORKLOAD OF PRACTICALLY 30 PERCENT FROM 1962, THE DISCOUNTS LOST DROPPED FROM $121,828 IN FISCAL YEAR 1962 TO $24,105 IN FISCAL YEAR 1964 AND $48,401 IN FISCAL YEAR 1965. DISCOUNTS EARNED TOTALED $3,702,958 IN 1964 AND $4,749,066 IN 1965.

DURING THE PERIOD WHILE THIS PROCEDURE HAS BEEN IN EFFECT, THERE HAVE BEEN NO INSTANCES WHERE OVERPAYMENTS TO CONTRACTORS DUE TO NONDELIVERY OF MATERIAL HAVE BEEN BROUGHT TO THE ATTENTION OF GSA. IN ADDITION, YOUR PAST EXPERIENCE AND SPOT VERIFICATIONS HAVE ALL INDICATED RECEIPT OF THE MATERIAL IN ADVANCE OF PAYMENT TO THE CONTRACTOR. THE PROCEDURE IS BASED ON THE ASSUMPTION AND PRACTICE THAT CUSTOMER AGENCIES NEED THE MATERIAL ORDERED, AND THAT THEY WILL ADVISE GSA PROMPTLY WHEN SUCH MATERIAL HAS NOT BEEN RECEIVED WITHIN A REASONABLE TIME. THE PROCEDURE ALSO CARRIES AN ADDITIONAL CONTROL BECAUSE FSS REQUIRES CONTRACTORS TO NOTIFY GSA BY MEANS OF A "NOTICE OF SHIPMENT.' WHEN THIS NOTICE IS NOT RECEIVED, FOLLOW-UP REQUESTS ARE MADE TO THE CONTRACTOR, AND IN THOSE CASES WHERE GSA IS UNABLE TO OBTAIN SHIPPING INFORMATION FROM THE CONTRACTOR, PROVISION IS MADE TO REQUEST RECEIPT INFORMATION FROM THE CONSIGNEE. THIS IS A SEPARATE CONTROL PROCEDURE REQUIRED BY THE BUYING DIVISION OF FSS.

YOU NOTE THAT IN OUR LETTER OF DECEMBER 18, 1964, B-155253, TO THE SECRETARY OF DEFENSE, WE QUESTIONED THE LEGALITY OF A SOMEWHAT SIMILAR PROCEDURE OF THE DEFENSE SUPPLY AGENCY (DSA) CALLED THE "FAST PAY PROCEDURE FOR SMALL PURCHASES.' YOU STATE THAT IN THAT LETTER WE INDICATED THAT IN ADDITION TO THE DSA PROCEDURE BEING IN CONTRAVENTION OF 31 U.S.C. 529, IT IS CONTRARY TO VARIOUS DECISIONS OF OUR OFFICE DEALING WITH ADVANCE PAYMENTS (SUCH AS 20 COMP. GEN. 230 AND 917; 28 ID. 468; AND 34 ID. 659), SINCE THE DSA PROCEDURE PROVIDES FOR "PAYMENT IN FULL IN ADVANCE OF ACTUAL DELIVERY," RATHER THAN "PARTIAL PAYMENTS" FOR THE ORDINARY DAY TO DAY PURCHASE OF SUPPLIES AND MATERIALS. ALTHOUGH THE GSA PROCEDURE ALSO PROVIDES FOR PAYMENT IN FULL BEFORE ASCERTAINMENT THAT GOODS HAVE BEEN ACTUALLY DELIVERED, FOR THE REASONS SET FORTH BELOW, YOU DO NOT THINK IT IS CONTRARY TO 31 U.S.C. 529.

SECTION 3648, REVISED STATUTES, AS AMENDED (31 U.S.C. 529) PROVIDES IN PERTINENT PART:

"NO ADVANCE OF PUBLIC MONEY SHALL BE MADE IN ANY CASE UNLESS AUTHORIZED BY THE APPROPRIATION CONCERNED OR OTHER LAW. AND IN ALL CASES OF CONTRACTS FOR THE PERFORMANCE OF ANY SERVICE, OR THE DELIVERY OF ARTICLES OF ANY DESCRIPTION, FOR THE USE OF THE UNITED STATES, PAYMENT SHALL NOT EXCEED THE VALUE OF THE SERVICE RENDERED, OR OF THE ARTICLES DELIVERED PREVIOUSLY TO SUCH PAYMENT. * * *"

THIS SECTION WAS ORIGINALLY ENACTED INTO LAW ON JANUARY 31, 1823, BUT THE FIRST SENTENCE WAS AMENDED BY THE ACT OF AUGUST 2, 1946, 60 STAT. 806, 809, TO READ AS

QUOTED ABOVE. PRIOR TO THE 1946 AMENDMENT, THE FIRST SENTENCE OF THE SECTION MERELY READ "NO ADVANCE OF PUBLIC MONEY SHALL BE MADE IN ANY CASE WHATEVER.' THE "UNLESS AUTHORIZED BY THE APPROPRIATION CONCERNED OR OTHER LAW" WAS ADDED IN 1946.

YOU POINT OUT THAT SINCE THE 1946 AMENDMENT OF 31 U.S.C. 529, AS SET OUT ABOVE, THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949 (PROPERTY ACT) 63 STAT. 377, WAS PASSED IN JUNE OF 1949, AND PROVIDES THE "OTHER LAW" AUTHORIZING ADVANCE PAYMENTS IN 31 U.S.C. 529. SECTION 305 OF THE PROPERTY ACT, AS AMENDED, 41 U.S.C. 255, SPECIFICALLY GIVES GSA AND OTHER AGENCIES THE STATUTORY AUTHORITY TO MAKE ADVANCE PAYMENTS UNDER CONTRACTS FOR PROPERTY OR SERVICES. THIS SECTION PROVIDES IN PERTINENT PART:

"/A) ANY EXECUTIVE AGENCY MAY---

"/1) MAKE ADVANCE, PARTIAL, PROGRESS OR OTHER PAYMENTS UNDER CONTRACTS FOR PROPERTY OR SERVICES MADE BY THE AGENCY; AND

"/B) PAYMENTS MADE UNDER SUBSECTION (A) OF THIS SECTION MAY NOT EXCEED THE UNPAID CONTRACT PRICE.

"/C) ADVANCE PAYMENTS UNDER SUBSECTION (A) OF THIS SECTION MAY BE MADE ONLY UPON ADEQUATE SECURITY AND A DETERMINATION BY THE AGENCY HEAD THAT TO DO SO WOULD BE IN THE PUBLIC INTEREST. SUCH SECURITY MAY BE IN THE FORM OF A LIEN IN FAVOR OF THE GOVERNMENT ON THE PROPERTY CONTRACTED FOR, ON THE BALANCE IN AN ACCOUNT IN WHICH SUCH PAYMENTS ARE DEPOSITED, AND ON SUCH OF THE PROPERTY ACQUIRED FOR PERFORMANCE OF THE CONTRACT AS THE PARTIES MAY AGREE. THIS LIEN SHALL BE PARAMOUNT TO ALL OTHER LIENS.'

SECTION 305 OF THE PROPERTY ACT WAS AMENDED IN 1958 BY PUB.L. 85 800, 72 STAT. 966 TO READ AS QUOTED ABOVE. PRIOR TO THE 1958 AMENDMENT OF SECTION 305, EXECUTIVE AGENCIES WERE LIMITED IN MAKING ADVANCE PAYMENTS TO NEGOTIATED CONTRACTS. YOU STATE THAT THE 1958 AMENDMENT ENLARGED THE AUTHORITY TO INCLUDE BOTH NEGOTIATED AND ADVERTISED CONTRACTS, THUS IMPROVING THE PROCUREMENT PROCEDURE IN THIS AREA, AS A SUBSTANTIAL PORTION OF SUPPLIES AND MATERIALS PROCURED BY THE GOVERNMENT IS OBTAINED BY PUBLIC ADVERTISING. IT IS STATED IN THE SENATE REPORT ON THE 1958 AMENDMENT TO SECTION 305 OF THE PROPERTY ACT (SENATE REPORT NO. 2201, 85TH CONG., 2D SESS.) THAT THIS AMENDMENT WAS MADE TO COVER THE TREMENDOUS VOLUME OF GOVERNMENT PROCUREMENT WHICH OCCURS THROUGH ADVERTISED PROCEDURES. PAGE 4 OF THIS REPORT IT IS STATED THAT:

"* * * ADVANCE PAYMENTS HAVE BEEN VALUABLE IN ACHIEVING DIFFICULT PROCUREMENTS AND SHOULD BE AVAILABLE, UNDER SUITABLE ADMINISTRATIVE REGULATIONS, REGARDLESS OF WHETHER ADVERTISING OR NEGOTIATION PROCEDURE IS FOLLOWED IN LETTING THE CONTRACT.' ALSO ON PAGE 8 OF THE SENATE REPORT, IT IS STATED IN EXPLAINING THE LIBERALIZATION OF PROPOSED SUBSECTIONS 305 (B) AND (C) THAT:

"PROPOSED SECTION 305 (B) WOULD RESTRICT PAYMENTS UNDER A CONTRACT TO THE UNPAID CONTRACT PRICE. A FIRST PAYMENT MAY BE IN ANY SUM NOT EXCEEDING THE MAXIMUM AMOUNT OF THE CONTRACT PRICE. EACH FOLLOWING PAYMENT MAY NOT EXCEED THE THEN UNPAID BALANCE OF THE CONTRACT PRICE. * * *

"PROPOSED SECTION 305 (C) RESTATES IN SOMEWHAT CHANGED AND SIMPLIFIED FORM THE CONDITIONS SPECIFIED * * * FOR MAKING ADVANCE PAYMENTS. IT IS CONTEMPLATED THAT UNIFORM GOVERNMENT-WISE REGULATIONS WILL BE DEVELOPED TO GUIDE THE EXERCISE OF

THE PROPOSED ADVANCE PAYMENT * * * AUTHORITY. * * * APPROPRIATE STANDARDS WILL BE PRESCRIBED TO ASSURE THAT ADVANCE PAYMENTS * * * ARE MADE AVAILABLE ONLY TO THE PROPER EXTENT THAT THE PROCUREMENT PROGRAM MAY WARRANT.'

YOU ADVISE THAT PURSUANT TO THE DIRECTION SPELLED OUT IN THE SENATE REPORT, REGULATIONS ISSUED FOR THE GUIDANCE OF EXECUTIVE AGENCIES IN GOVERNMENT PROCUREMENT (PUBLISHED IN THE FEDERAL PROCUREMENT REGULATIONS, FPR 1-30.104, 41 CFR 1-30.104) DESCRIBE ADVANCE PAYMENTS AS:

"* * * ADVANCES OF MONEY, MADE BY THE GOVERNMENT TO A CONTRACTOR PRIOR TO, IN ANTICIPATION OF, AND FOR THE PURPOSE OF COMPLETE PERFORMANCE UNDER A CONTRACT OR CONTRACTS. ADVANCE PAYMENTS ARE MADE ONLY TO PRIME CONTRACTORS. THEY ARE EXPECTED TO BE LIQUIDATED FROM PAYMENTS DUE TO THE CONTRACTOR INCIDENT TO PERFORMANCE OF CONTRACTS. SINCE THEY ARE NOT MEASURED BY PERFORMANCE, THEY DIFFER FROM PARTIAL, PROGRESS, OR OTHER PAYMENTS MADE BECAUSE OF AND ON THE BASIS OF PERFORMANCE OR PART PERFORMANCE OF A CONTRACT. ADVANCE PAYMENTS MAY BE MADE TO PRIME CONTRACTORS FOR THE PURPOSE OF MAKING SUBADVANCES TO SUBCONTRACTORS.' YOU ALSO CALL OUR ATTENTION TO THE REGULATIONS OF GSA ON POLICIES AND PROCEDURES RELATING TO ADVANCE PAYMENTS CONTAINED IN 41 CFR 5-51.3.

YOU STATE, THEREFORE, THAT TREATED AS AN ADVANCE PAYMENT PROCEDURE UNDER THE PROPERTY ACT, THE GSA PRACTICE OF PAYING DIRECT DELIVERY VOUCHERS PRIOR TO THE RECEIPT OF RECEIVING REPORTS FROM CONSIGNEES WOULD NOT BE IN CONFLICT WITH 31 U.S.C. 529, AS THE SPECIFIC GSA STATUTORY AUTHORITY TO MAKE SUCH PAYMENTS IN SECTION 305 AMOUNTS TO THE "OTHER LAW" SPELLED OUT IN 31 U.S.C. 529.

YOU EXPRESS THE VIEW THAT SINCE BY ITS TERMS 31 U.S.C. 529 DOES NOT REQUIRE A RECEIVING REPORT AS SUCH, OTHER REQUIREMENTS OF THIS SECTION OR OF THE PROPERTY ACT COULD BE ACCOMPLISHED BY REGULATORY PROCEDURES AUTHORIZED BY GSA. YOU POINT OUT THAT THIS COULD BE DONE BY AN AMENDMENT TO THE U.S. STANDARD FORM 32 (GENERAL PROVISIONS--- SUPPLY CONTRACT) TO PROVIDE FOR ALL THE NECESSARY STATUTORY SAFEGUARDS REQUIRED TO PROTECT THE INTEREST OF THE GOVERNMENT. THIS WOULD INCLUDE PROVIDING (IN THE REGULATIONS OR THE CONTRACT INVOLVED) FOR PASSAGE OF TITLE OR A LIEN IN FAVOR OF THE GOVERNMENT PRIOR TO COMPLETION OF THE CONTRACT, AND REQUIRING THE CONTRACTOR TO REPLACE, REPAIR OR CORRECT, SUPPLIES NOT RECEIVED, DAMAGED IN TRANSIT, OR NOT CONFORMING TO THE SPECIFICATIONS. IN ADDITION, YOU ADVISE THAT THE DETERMINATION REQUIRED BY SECTION 305 (C) OF THE PROPERTY ACT COULD BE A CLASS DETERMINATION MADE BY GSA SHOWING THAT THE ADVANCE PAYMENT PROCEDURE FOR DIRECT DELIVERIES WOULD BE IN THE BEST INTEREST OF THE GOVERNMENT AND WOULD BE ,ADVANTAGEOUS TO THE GOVERNMENT IN TERMS OF ECONOMY, EFFICIENCY, AND SERVICE.'

YOUR LETTER CONTINUES---

"IN VIEW OF THE ABOVE, WE CONCLUDE THAT GSA DOES HAVE THE AUTHORITY UNDER THE PROPERTY ACT TO MAKE ADVANCE PAYMENTS PRIOR TO RECEIPT OF THE RECEIVING REPORT, AND SUCH AUTHORITY IS NOT IN CONFLICT WITH 31 U.S.C. 529. ACCORDINGLY, SINCE IT IS PERFECTLY CLEAR UNDER THE PROPERTY ACT THAT WE CAN PAY FOR SUPPLIES AND MATERIALS IN ADVANCE OF PERFORMANCE OF THE CONTRACT, WE WOULD THEREFORE LIKE YOUR APPROVAL OF THE GSA ACCOUNTING PROCEDURE NOW BEING EMPLOYED WHICH PERMITS PAYMENT OF DIRECT DELIVERY VOUCHERS PRIOR TO RECEIPT OF THE RECEIVING REPORTS. THESE PROCEDURES CONTAIN ADEQUATE CONTROLS AND CHECKS TO PROTECT THE INTEREST OF THE GOVERNMENT.

"TO RETURN TO THE OLD PRACTICE OF REQUIRING THE ADDITIONAL PAPER WORK WOULD

REQUIRE AN ADDITIONAL TWO TO THREE PEOPLE FOR EACH OF OUR FIVE GSA ACCOUNTING CENTERS, AND WOULD ACCOUNT FOR A RETURN TO THE LOST DISCOUNT PICTURE, WHICH UNDER PRESENT VOLUME OF PROCUREMENT COULD EASILY AMOUNT TO AN ADDITIONAL $260,000 PER ANNUM BEING SPENT BY THE GOVERNMENT.' THE LEGISLATIVE HISTORY OF SECTION 305 AS ORIGINALLY ENACTED INTO LAW IN THE PROPERTY ACT OF 1949 (I.E., PRIOR TO SECTION 305 BEING AMENDED BY PUBLIC LAW 85-800) DISCLOSED AN INTENT THAT CIVILIAN AGENCIES "BE VERY SPARING IN THE MAKING OF ADVANCE PAYMENTS IN NORMAL TIMES AND TO USE THE AUTHORITY, EVEN IN TIMES OF NATIONAL EMERGENCY, ONLY WHEN IT IS THOROUGHLY JUSTIFIED.' SEE PAGE 24, HOUSE REPORT NO. 670, 81ST CONGRESS, 1ST SESSION. MOREOVER, SECTION 305 AS ORIGINALLY ENACTED (I.E., PRIOR TO ITS AMENDMENT IN 1958) AUTHORIZED ADVANCE PAYMENTS ONLY WHERE "NECESSARY AND APPROPRIATE IN ORDER TO PROCURE REQUIRED SUPPLIES OR SERVICES UNDER THE CONTRACT.' HOWEVER, THIS LAST QUOTED LANGUAGE IS NOT CONTAINED IN SECTION 305 AS AMENDED BY PUBLIC LAW 85-800 IN 1958. FURTHER, AS INDICATED IN YOUR LETTER, THE LEGISLATIVE HISTORY OF PUBLIC LAW 85-800 DISCLOSES THAT THE CONGRESS CONTEMPLATED THAT "UNIFORM GOVERNMENT-WIDE REGULATIONS" WOULD BE DEVELOPED "TO GUIDE THE EXERCISE OF THE PROPOSED ADVANCE PAYMENT * * * AUTHORITY.' THUS, THE ENACTMENT OF PUBLIC LAW 85-800 HAD THE EFFECT OF LIBERALIZING THE ADVANCE PAYMENT AUTHORITY CONTAINED IN SECTION 305. HENCE, IT IS OUR VIEW THAT ADVANCE PAYMENTS MAY BE MADE BY GSA PURSUANT TO SECTION 305, PROVIDED THE REQUIREMENTS OF SUBSECTION (C) OF SECTION 305 AND IMPLEMENTING REGULATIONS ISSUED THEREUNDER ARE MET, PRIMARILY "ADEQUATE SECURITY," AND A DETERMINATION THAT TO DO SO WOULD BE IN THE PUBLIC INTEREST.

WE NOTE THAT SECTION 307 (A) OF THE PROPERTY ACT, AS AMENDED, 41 U.S.C. 257 (A), PROVIDES THAT THE DETERMINATIONS TO BE MADE BY GSA UNDER THE ACT "MAY BE MADE WITH RESPECT TO INDIVIDUAL PURCHASES AND CONTRACTS OR WITH RESPECT TO CLASSES OF PURCHASES OR CONTRACTS.'

IN LIGHT OF THE FOREGOING WE WILL NOT OBJECT TO THE GSA PROCEDURE OF PAYING DIRECT DELIVERY VOUCHERS PRIOR TO THE RECEIPT OF RECEIVING REPORTS FROM CONSIGNEES, SO AS TO TAKE ADVANTAGE OF THE DISCOUNTS FOR PROMPT PAYMENT, PROVIDED YOU DETERMINE THAT THE PROVISIONS YOU PROPOSE TO INCLUDE IN EACH SPECIFIC CONTRACT OR IN THE GENERAL PROVISIONS OF THE STANDARD FORM FOR SUPPLY CONTRACTS WILL PROVIDE "ADEQUATE SECURITY" TO SAFEGUARD THE INTERESTS OF THE UNITED STATES, AND ALSO DETERMINE THAT THE ADVANCE PAYMENT PROCEDURE FOR DIRECT DELIVERIES WOULD BE IN THE PUBLIC INTEREST.