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B-167790, Dec 23, 1977

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FEDERAL DISASTER ASSISTANCE ADMINISTRATION (FDAA) ENTERED INTO AN AGREEMENT WITH THE CORPS OF ENGINEERS UNDER WHICH THE CORPS AGREED TO UNDERTAKE CERTAIN DISASTER RELIEF PROJECTS, THE EXPENSES - INCLUDING OVERHEAD - OF WHICH FDAA WOULD REIMBURSE THE CORPS. HOWEVER, AT THE TIME FDAA'S REGULATIONS PROHIBITED FROM PAYING OVERHEAD TO COOPERATING AGENCIES. ON THE OTHER HAND, BASED ON THAT AGREEMENT, THE CORPS DECIDED TO USE ITS CIVIL REVOLVING FUND TO FINANCE ITS DISASTER RELIEF FUNCTIONS. WORK PERFORMED FOR OTHER AGENCIES WHICH IS FINANCED FROM THE FUND MUST BE REIMBURSED AT RATES INCLUDING CHARGES FOR OVERHEAD, 33 U.S.C. SEC. 576. IN OUR VIEW, FDAA IS REQUIRED TO COMPLY WITH ITS AGREEMENTS WITH THE CORPS AND REIMBURSE THAT AGENCY FOR OVERHEAD COSTS INCURRED IN CARRYING OUT FDAA REQUESTED WORK.

REIMBURSEMENT OF CORPS OF ENGINEERS FOR DISASTER ASSISTANCE WORK:

THE CHIEF OF ENGINEERS, THE ARMY CORPS OF ENGINEERS (HIS REFERENCE DAEN- ECF-C), HAS REQUESTED OUR OPINION ON WHETHER THE FEDERAL DISASTER ASSISTANCE ADMINISTRATION (FDAA), FORMERLY THE OFFICE OF EMERGENCY PREPAREDNESS (OEP), DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, IS LEGALLY RESPONSIBLE FOR PAYMENT OF THE ARMY CORPS OF ENGINEERS (CORPS) GENERAL ADMINISTRATIVE COSTS (OVERHEAD) UNDER THE CIRCUMSTANCES SET FORTH BELOW.

THE COSTS INVOLVED WERE INCURRED AT CORPS DISTRICT AND OPERATING DIVISION OFFICES ON REIMBURSABLE DISASTER ASSISTANCE WORK ORDERS ISSUED BY FDDA TO CORPS DISTRICTS IN ACCORDANCE WITH PUB. L. NO. 91-606 APPROVED DECEMBER 31, 1970, 84 STAT. 1744, 42 U.S.C. SEC. 4401 ET SEQ. (970), KNOWN AS THE DISASTER RELIEF ACT OF 1970. THE CORPS AND FDAA HAVE, ACCORDING TO THE CHIEF OF ENGINEERS, REACHED AN IMPASSE ON PAYMENT OF THESE CORPS-INCURRED COSTS ON RENDERING REIMBURSABLE DISASTER ASSISTANCE TO FDAA.

THE DISASTER RELIEF ACT AUTHORIZED GOVERNMENT AGENCIES, INCLUDING THE CORPS, TO ASSIST IN DISASTER RELIEF FUNCTIONS. THE ACT THEN PROVIDES:

"(C) REIMBURSEMENT.

"FEDERAL AGENCIES MAY BE REIMBURSED FOR EXPENDITURES UNDER THIS CHAPTER FROM FUNDS APPROPRIATED FOR THE PURPOSES OF THIS CHAPTER. ANY FUNDS RECEIVED BY FEDERAL AGENCIES AS REIMBURSEMENT FOR SERVICES OR SUPPLIES FURNISHED UNDER THE AUTHORITY OF THIS SECTION SHALL BE DEPOSITED TO THE CREDIT OF THE APPROPRIATION OR APPROPRIATIONS CURRENTLY AVAILABLE FOR SUCH SERVICES OR SUPPLIES." 442 U.S.C. SEC. 4413(C) (1970)

THE EXPENSES INCURRED BY THE CORPS FOR THE DISASTER RELIEF WORK IT PERFORMED FOR FDAA WERE FINANCED FROM ITS REVOLVING FUND ESTABLISHED BY THE ACT OF JULY 27, 1953, CH. 245, SECTION 101, 67 STAT. 199, 33 U.S.C. SEC. 576 (1970). THAT SECTION PROVIDES THAT THE MONIES IN THE REVOLVING FUND ARE AVAILABLE, AMONG OTHER THINGS, FOR THE FURNISHING OF FACILITIES AND SERVICES FOR GOVERNMENT AGENCIES AND PRIVATE PERSONS AS AUTHORIZED BY LAW. THE PROVISIONS OF 33 U.S.C. SEC. 576 THEN ADDS, IN PART:

"THE FUND SHALL BE CREDITED WITH REIMBURSEMENTS OR ADVANCES FOR THE COST OF EQUIPMENT, FACILITIES, AND SERVICES FURNISHED, AT RATES WHICH SHALL INCLUDE CHARGES FOR OVERHEAD AND RELATED EXPENSES, DEPRECIATION OF PLANT AND EQUIPMENT, AND ACCRUED LEAVE ***."

ON MAY 29, 1973, FDAA AND HUD ENTERED INTO A MEMORANDUM OF AGREEMENT, RETROACTIVE TO JANUARY 1, 1973, IN WHICH FDAA AGREED TO REIMBURSE THE CORPS FOR DISASTER RELIEF EXPENSES, INCLUDING ADMINISTRATIVE OVERHEAD EXPENSES SUCH AS THOSE IN DISPUTE. NOTWITHSTANDING THE AGREEMENT, AN FDAA REGULATION AT 32 C.F.R. SEC. 1709.3(A) (1973) (LATER CODIFIED AT 24 C.F.R. SEC. 2201.3(A) (1974)) LISTED ADMINISTRATIVE OVERHEAD COSTS AS BEING INELIGIBLE FOR REIMBURSEMENT. IN A MARCH 23, 1976 OPINION, THE GENERAL COUNSEL OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) ADVISED FDAA NOT TO REIMBURSE THE CORPS FOR ANY ADMINISTRATIVE OVERHEAD COSTS THEN PENDING OR INCURRED IN THE FUTURE ON THE BASIS OF THE AFOREMENTIONED REGULATION.

FDAA REPLACED ITS REGULATIONS AT 24 C.F.R. SEC. 2201 (1973), SUPRA, WITH NEW REGULATIONS IN 41 FED. REG. 32, 359 (1976), CODIFIED AT 24 C.F.R. SEC. 2205.80 ET SEQ. (1977). THE NEW REGULATION ABANDONED THE INELIGIBILITY OF ADMINISTRATIVE OVERHEAD COSTS AND PROVIDED FOR THE ELIGIBILITY OF "ALL COSTS INCURRED WHICH ARE PAID FROM TRUST, REVOLVING, OR OTHER FUNDS, THE FULL REIMBURSEMENT OF WHICH IS REQUIRED BY LAW." 24 C.F.R. SEC. 2205.82(B) (6). AS A RESULT OF THIS PROVISION, A NEW MEMORANDUM OF AGREEMENT BETWEEN THE AGENCIES WAS SIGNED ON DECEMBER 8, 1976, AND WAS MADE RETROACTIVVE TO AUGUST 3, 1976. THUS, THE ISSUE IS WHETHER, FOR THE PERIOD BETWEEN MAY 29, 1973, AND AUGUST 3, 1976, FDAA IS REQUIRED TO REIMBURSE THE CORPS FOR ITS OVERHEAD EXPENSES IN SPITE OF THE REGULATION THEN IN EFFECT, WHICH SPECIFICALLY STATED THAT FDAA WOULD NOT PAY OVERHEAD EXPENSES.

THERE IS NOTHING IN THE PROVISIONS OF THE DISASTER RELIEF ACT OF 1970, 42 U.S.C. SEC. 4413(C) (1970), WHICH SPECIFIES THOSE EXPENSES FOR WHICH "FEDERAL AGENCIES MAY BE REIMBURSED." PURSUANT TO THAT ACT FDAA WAS DELEGATED AUTHORITY TO ISSUE RULES AND REGULATIONS WHICH WOULD SET FORTH THE KIND OF REIMBURSEMENT IT WOULD PROVIDE AND TO ENTER INTO AGREEMENTS WITH OTHER FEDERAL AGENCIES BASED THEREON. FDAA'S REGULATIONS AT THE TIME IN QUESTION SPECIFICALLY PRECLUDED THE REIMBURSEMENT OF OVERHEAD.

UNTIL IT ENTERED INTO THE AGREEMENT OF MAY 29, 1973, WITH FDAA, THE CORPS USED FUNDS APPROPRIATED PURSUANT TO PUB. L. NO. 84-99 TO FINANCE FDAA REQUESTED OPERATIONS. AFTER ENTERING INTO THE AGREEMENT, THE CHIEF OF ENGINEERS TESTIFIED THAT HIS AGENCY WOULD NO LONGER NEED TO REQUEST APPROPRIATIONS TO FINANCE ACTIVITIES UNDERTAKEN AT FDAA'S REQUEST, SINCE FDAA HAD AGREED TO REIMBURSE THE CORPS FOR ITS OVERHEAD EXPENSES AND THEREFORE IT COULD USE ITS CIVIL REVOLVING FUND WHICH "WOULD BE FULLY REIMBURSED FOR ALL WORK PERFORMED AT THE REQUEST OF FDAA (OEP) FOR DISASTERS OCCURRING ON AND AFTER JANUARY 1, 1973." HOUSE HEARINGS ON SUPPLEMENTAL APPROPRIATION BILL, 1974, BEFORE THE HOUSE APPROPRIATIONS COMMITTEE, PART I, PAGES 358-359.

IN ORDER TO USE ITS CIVIL REVOLVING FUND, THE CORPS WAS REQUIRED BY STATUTE TO COLLECT ITS OVERHEAD EXPENSES. THE MEMORANDUM OF AGREEMENT BETWEEN FDAA AND THE CORPS PROVIDED THAT AMONG THE ITEMS FOR WHICH THE CORPS WOULD BE REIMBURSED WOULD BE:

"*** OVERHEAD CHARGES NORMALLY APPLIED TO CORPS DIRECT LABOR AND DISTRIBUTED TO THE PROJECTS ON WHICH THE INDIVIDUAL WORKED."

THIS AGREEMENT WAS IN ACCORDANCE WITH THE STATUTORY REQUIREMENTS INVOLVING THE USE OF THE CORPS' CIVIL REVOLVING FUND TO PERFORM DISASTER RELIEF WORK AT FDAA'S REQUEST. AFTER REACHING THIS AGREEMENT, THE CORPS EXPLAINED TO THE HOUSE APPROPRIATIONS COMMITTEE THAT IT WOULD NO LONGER NEED SEPARATE APPROPRIATIONS TO CARRY OUT THIS WORK ON THE BASIS OF THIS NEW AGREEMENT AND THAT THE CIVIL REVOLVING FUND WOULD NOT BE REDUCED SINCE ALL RELATED COSTS WOULD BE RECOVERED FROM FDAA.

IT IS NOT CLEAR FROM THE RECORD BEFORE US IF FDAA WAS AWARE THAT THE CORPS WAS PLANNING TO USE THE CIVIL REVOLVING FUND. HOWEVER, IT IS CLEAR THAT FDAA WAS NOT PRECLUDED BY STATUTE FROM ENTERING INTO AN AGREEMENT TO REIMBURSE COOPERATING AGENCIES FOR THIER OVERHEAD EXPENSES. FDAA IS PRIMARILY RESPONSIBLE FOR KNOWING ITS OWN REGULATIONS AND, IN OUR VIEW, SHOULD BEAR THE BRUNT OF THE RESPONSIBILITY FOR ENTERING INTO AN AGREEMENT CONTRARY TO ITS REGULATIONS.

ACCORDINGLY, WE BELIEVE THAT FDAA SHOULD REIMBURSE THE CORPS' CIVIL REVOLVING FUND FOR THE OVERHEAD EXPENSES INCURRED BY THE CORPS DURING THE PERIOD IN QUESTION. THIS, IT SEEMS TO US, IS MORE EQUITABLE THAN HAVING THE CORPS PAY, IN EFFECT, FOR FDAA'S ERROR.