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[Comments on Whether USDA Implementation of Section of Food Security Act Violates Applicable Laws]

Number: B-223857

Date: 1987-02-27

B-223857, FEB 27, 1987

PROCUREMENT - PAYMENT/DISCHARGE - PAYMENT TIME PERIODS - GOVERNMENT DELAYS - INTEREST DIGEST: 1. IN ACCORDANCE WITH THE PROMPT PAYMENT ACT, 31 U.S.C. SEC. 3901 3906, THE COMMODITY CREDIT CORPORATION (CCC) WAS REQUIRED TO PAY INTEREST TO ANY CONTRACTOR WHO DID NOT RECEIVE TIMELY PAYMENT FOR THE MEAT IT DELIVERED TO CCC UNDER THE RED MEAT PURCHASING PROGRAM THE DEPARTMENT OF AGRICULTURE WAS AUTHORIZED TO CARRY OUT BY SECTION 104 OF THE FOOD SECURITY ACT OF 1985. AS SPECIFIED IN THE CONTRACTS, CCC WAS OBLIGATED TO PAY INTEREST TO CONTRACTORS UNDER THE PROMPT PAYMENT ACT WHEN PAYMENT WAS MADE MORE THAN 10 DAYS AFTER DELIVERY, EVEN THOUGH CCC WAS UNABLE TO MAKE PAYMENT WHEN DUE BECAUSE OF THE TEMPORARY DEPLETION OF ITS BORROWING AUTHORITY. APPROPRIATIONS/FINANCIAL MANAGEMENT - APPROPRIATION AVAILABILITY - AMOUNT AVAILABILITY - ANTIDEFICIENCY PROHIBITION - VIOLATION 2. ONCE THE BORROWING AUTHORITY OF THE COMMODITY CREDIT CORPORATION (CCC) WAS DEPLETED AND IT HAD NO FUNDS AVAILABLE TO PAY FOR THE MEAT IT HAD ORDERED UNDER THE RED MEAT PURCHASING PROGRAM AUTHORIZED BY SECTION 104 OF THE FOOD SECURITY ACT OF 1985, THE ANTIDEFICIENCY ACT REQUIRED CCC TO TAKE ACTION TO MITIGATE OR MINIMIZE THE MAGNITUDE OF A POSSIBLE ANTIDEFICIENCY ACT VIOLATION. TO THE EXTENT CCC ENTERED INTO NEW CONTRACTS WITH MEAT SUPPLIERS OR REQUIRED AND ACCEPTED DELIVERIES OF MEAT ON EXISTING CONTRACTS DURING THE PERIOD IN WHICH ITS BORROWING AUTHORITY WAS DEPLETED, CCC VIOLATED THE ANTIDEFICIENCY ACT.

THE HONORABLE GLENN ENGLISH:

THIS IS IN RESPONSE TO YOUR LETTER OF JULY 31, 1986, REQUESTING A LEGAL OPINION FROM OUR OFFICE AS TO WHETHER ACTIONS TAKEN BY THE UNITED STATES DEPARTMENT OF AGRICULTURE (USDA) IN IMPLEMENTING SECTION 104 OF THE FOOD SECURITY ACT OF 1985 (THE ACT), PUB.L NO. 99-198, 99 STAT.1354, 1366 (1985) VIOLATE THE PROMPT PAYMENT ACT OR ANY OTHER APPLICABLE LAWS.

UNDER SECTION 104 OF THE ACT, THE SECRETARY OF AGRICULTURE WAS AUTHORIZED TO PURCHASE A TOTAL OF 400 MILLION POUNDS OF RED MEAT TO MINIMIZE THE ADVERSE EFFECT OF THE MILK PRODUCTION TERMINATION PROGRAM ON BEEF, PORK AND LAMB PRODUCERS. USDA IMPLEMENTED THE MEAT PURCHASING PROGRAM THROUGH THE COMMODITY CREDIT CORPORATION (CCC), A WHOLLY OWNED GOVERNMENT CORPORATION WITHIN USDA.

AS A RESULT OF THE DEPLETION OF ITS BORROWING AUTHORITY, CCC WAS UNABLE TO MAKE PAYMENT WHEN DUE ON SOME OF THE CONTRACTS IT HAD ENTERED INTO WITH MEAT SUPPLIERS. IN OUR VIEW, CCC'S SUBSEQUENT REFUSAL TO PAY ANY INTEREST TO CONTRACTORS AFTER FUNDS BECAME AVAILABLE AND PAYMENT WAS MADE VIOLATED THE PROMPT PAYMENT ACT, 31 U.S.C. SEC. 3901-3906. /1/ MOREOVER, TO THE EXTENT THAT

CCC ENTERED INTO ANY NEW CONTRACTS WITH SUPPLIERS OR REQUIRED AND ACCEPTED DELIVERIES ON EXISTING CONTRACTS DURING THE PERIOD IN WHICH ITS BORROWING AUTHORITY WAS DEPLETED AND NO OTHER FUNDS WERE AVAILABLE TO PAY THE CONTRACTORS, WE THINK IT ALSO VIOLATED THE ANTIDEFICIENCY ACT.

BACKGROUND

SECTION 104 OF THE FOOD SECURITY ACT OF 1985 PROVIDES AS FOLLOWS:

"TO MINIMIZE THE ADVERSE EFFECT OF THE MILK PRODUCTION TERMINATION PROGRAM ON BEEF, PORK AND LAMB PRODUCERS IN THE UNITED STATES DURING THE 18-MONTH PERIOD FOR WHICH SUCH PROGRAM IS IN EFFECT UNDER SECTION 201(D) OF THE AGRICULTURE ACT OF 1949 (7 U.S.C. SEC. 1446(D)), IN SUCH PERIOD--

"(1) THE SECRETARY OF AGRICULTURE SHALL USE FUNDS AVAILABLE FOR THE PURPOSES OF CLAUSE (2) OF SECTION 32 OF THE ACT *** (7 U.S.C. SEC. 612C), APPROVED AUGUST 14, 1935, INCLUDING THE CONTINGENCY FUNDS APPROPRIATED UNDER SUCH SECTION 32, AND OTHER FUNDS AVAILABLE TO THE SECRETARY UNDER THE COMMODITY DISTRIBUTION AND OTHER NUTRITION PROGRAMS OF THE DEPARTMENT OF AGRICULTURE AND INCLUDING FUNDS AVAILABLE THROUGH THE COMMODITY CREDIT CORPORATION, TO PURCHASE AND DISTRIBUTE 200,000,000 POUNDS OF RED MEAT IN ADDITION TO THOSE QUANTITIES NORMALLY PURCHASED AND DISTRIBUTED BY THE SECRETARY. SUCH PURCHASES BY THE SECRETARY SHALL NOT REDUCE PURCHASES OF ANY OTHER AGRICULTURAL COMMODITIES UNDER SECTION 32.

"(2) THE SECRETARY OF AGRICULTURE SHALL USE FUNDS AVAILABLE THROUGH THE COMMODITY CREDIT CORPORATION TO PURCHASE 200,000,000 POUNDS OF RED MEAT, IN ADDITION TO THOSE QUANTITIES NORMALLY PURCHASED AND DISTRIBUTED BY THE SECRETARY, AND TO MAKE SUCH MEAT AVAILABLE--

"(A) TO THE SECRETARY OF DEFENSE ***; OR

"(B) FOR ***."

AS THE CONFERENCE REPORT ON THIS LEGISLATION EXPLAINS, SECTION 104 PROVIDES THAT THE SECRETARY "SHALL USE FUNDS AVAILABLE TO PURCHASE 400 MILLION POUNDS OF RED MEAT IN ADDITION TO THE QUANTITIES NORMALLY PURCHASED AND DISTRIBUTED BY THE SECRETARY," WITH 200 MILLION POUNDS TO BE DISTRIBUTED DOMESTICALLY AND THE OTHER 200 MILLION POUNDS TO BE MADE AVAILABLE FOR MILITARY CONSUMPTION OR FOR EXPORT PURPOSES. SEE H.R. REP. NO. 447, 99TH CONG., 1ST SESS., 333 (1982). WHILE FUNDS AVAILABLE THROUGH THE CCC WERE ONLY ONE OF SEVERAL SOURCES OF FUNDS THE SECRETARY OF AGRICULTURE WAS DIRECTED TO USE TO PURCHASE THE FIRST 200 MILLION POUNDS OF RED MEAT SPECIFIED IN SECTION 104 OF THE ACT, THE SECRETARY OF AGRICULTURE APPARENTLY DETERMINED TO PURCHASE THE ENTIRE 400 MILLION POUNDS OF MEAT USING CCC FUNDS. /2/

THE CCC IS A WHOLLY OWNED GOVERNMENT CORPORATION WITHIN USDA THAT IS "SUBJECT TO THE GENERAL SUPERVISION AND DIRECTION OF THE SECRETARY OF AGRICULTURE." 15 U.S.C. SEC. 714. UNDER SECTION 4 OF THE COMMODITY CREDIT CORPORATION CHARTER ACT (CHARTER ACT), 15 U.S.C. SEC. 714B(I), THE CCC IS AUTHORIZED TO BORROW FUNDS, NOT TO EXCEED A TOTAL OF $25 BILLION OUTSTANDING AT ANY ONE TIME, FOR THE PURPOSE OF CARRYING OUT ITS ACTIVITIES. SEE ALSO 15 U.S.C. SEC. 713A-4. SECTION 2 OF THE CHARTER ACT, 15 U.S.C. SEC. 713A-11, AUTHORIZES AN APPROPRIATION FOR EACH FISCAL YEAR OF "AN AMOUNT SUFFICIENT TO REIMBURSE THE COMMODITY CREDIT CORPORATION FOR ITS NET REALIZED LOSSES INCURRED DURING SUCH FISCAL YEAR

AS THE PROCURING AGENCY FOR ALL OF THE RED MEAT PURCHASED BY USDA UNDER SECTION 104 OF THE ACT, CCC ENTERED INTO CONTRACTS WITH MEAT SUPPLIERS. ALL OF THESE CONTRACTS CONTAINED A PARAGRAPH STATING THAT CCC WOULD PAY INTEREST IN ACCORDANCE WITH THE PROVISIONS OF THE PROMPT PAYMENT ACT IF PAYMENT WAS NOT MADE WHEN DUE.

BY NOTICE DATED JUNE 25, 1986, USDA ADVISED CCC'S RED MEAT CONTRACTORS THAT BECAUSE CCC'S BORROWING AUTHORITY HAD BEEN DEPLETED, INVOICES FOR PAYMENT COULD NOT BE PAID UNTIL SUPPLEMENTAL FUNDING AUTHORITY, THEN PENDING IN CONGRESS, WAS APPROVED.

IN THAT NOTICE, USDA ALSO ADVISED CONTRACTORS THAT THEY WERE "OBLIGED TO CONTINUE PERFORMANCE ON EXISTING CONTRACTS" AND THAT CCC WOULD CONTINUE TO RECEIVE BIDS AND AWARD CONTRACTS, NOTWITHSTANDING THE DEPLETION OF ITS BORROWING AUTHORITY AND INABILITY TO PAY FOR THE MEAT. THE NOTICE FURTHER ADVISED BIDDERS AND CONTRACTORS THAT THE CCC WAS NOT REQUIRED TO PAY INTEREST IF ANY PAYMENTS WERE NOT MADE ON TIME BECAUSE THE PROMPT PAYMENT ACT WAS "APPLICABLE TO AN AGENCY'S ADMINISTRATIVE FAILURE TO MAKE TIMELY PAYMENTS ON PURCHASES, BUT DOES NOT EXTEND TO SITUATIONS WHERE AN AGENCY'S INABILITY TO MAKE PAYMENT IS DUE TO CIRCUMSTANCES BEYOND THE CONTRACTING AGENCY'S CONTROL SUCH AS OCCURRED WITH RESPECT TO DEPLETION OF CCC'S BORROWING AUTHORITY."

THE URGENT SUPPLEMENTAL APPROPRIATION ACT, 1986, PUB.L. NO. 99-349, 100 STAT. 210, 712, WHICH WAS APPROVED ON JULY 2, 1986, PROVIDED CCC WITH $5.3 BILLION "FOR CAPITAL RESTORATION" (TO REIMBURSE IT FOR NET REALIZED LOSSES). INCLUDED IN THIS AMOUNT WERE FUNDS INTENDED TO ALLOW THE CCC TO FULFILL ITS OBLIGATIONS UNDER THE MEAT PURCHASE PROGRAM. SEE H.R. REP. NO. 301, 99TH CONG., 2D SESS. 16-17 (1986). AS EXPLAINED IN THE LETTER WE RECEIVED FROM USDA DATED SEPTEMBER 10, 1986, THE AMOUNTS APPROPRIATED "WERE CREDITED TO CCC'S ACCOUNT THEREBY PERMITTING CCC TO AGAIN USE ITS BORROWING AUTHORITY TO OBTAIN FUNDS TO MAKE SUCH PAYMENTS." HOWEVER, IN ACCORDANCE WITH USDA'S POSITION, AS SET FORTH IN THE JUNE 25 NOTICE TO CONTRACTORS AND ITS LETTER TO OUR OFFICE, THE CCC REFUSED TO PAY ANY INTEREST TO CONTRACTORS, CLAIMING THAT THE PROMPT PAYMENT ACT WAS NOT APPLICABLE.

ISSUES AND ANALYSIS

PROMPT PAYMENT ACT

THE PRIMARY ISSUE YOU ASK US TO ADDRESS IS WHETHER CCC'S REFUSAL TO PAY INTEREST TO CONTRACTORS IN THESE CIRCUMSTANCES IS PERMISSIBLE UNDER THE PROMPT PAYMENT ACT.

THE PROMPT PAYMENT ACT, 31 U.S.C. SECS. 3901-3906, REQUIRES FEDERAL AGENCIES TO PAY AN INTEREST PENALTY ON THE AMOUNT OWED TO CONTRACTORS FOR THE ACQUISITION OF PROPERTY OR SERVICES WHEN THE AGENCY FAILS TO MAKE TIMELY PAYMENT. SEE 62 COMP.GEN. 673 (1983). THE CONTRACTS INVOLVED HERE CONTAIN A GENERAL PROVISION THAT "INTEREST SHALL BE PAID IN ACCORDANCE WITH THE PROVISIONS OF THE PROMPT PAYMENT ACT IF PAYMENT IS MADE BEYOND THE 10TH DAY (7 DAYS PLUS 3 DAYS GRACE PERIOD) AFTER THE DATE OF DELIVERY." WHILE USDA'S LETTER TO US STATES THAT IT IS "QUESTIONABLE WHETHER THE PROMPT PAYMENT ACT WOULD HAVE BEEN APPLICABLE TO THESE CCC CONTRACTS" IF SUCH A PROVISION HAD NOT BEEN INCLUDED THEREIN, THERE IS NO QUESTION IN OUR VIEW THAT THE TERM "AGENCY," AS DEFINED IN THE PROMPT PAYMENT ACT, 31 U.S.C. SEC. 3901(A)(1), INCLUDES THE CCC. MOREOVER, EVEN IF THE PROMPT PAYMENT ACT WAS NOT OTHERWISE APPLICABLE TO THE CCC, THE CONTRACTUAL PROVISION

IN QUESTION WOULD REQUIRE CCC TO COMPLY WITH THE TERMS OF THAT ACT.

IN ITS LETTER TO US, USDA MAINTAINS THAT SINCE CCC'S DELAY IN MAKING PAYMENT ON THESE CONTRACTS WHEN DUE WAS NOT CAUSED BY ANY "FAULT OR OMISSION OF CCC" BUT RESULTED FROM "THE DEPLETION OF CCC'S BORROWING AUTHORITY AND LACK OF CONGRESSIONAL ACTION TO RESTORE THIS AUTHORITY," THE PROVISIONS OF THE PROMPT PAYMENT ACT ARE NOT APPLICABLE. IN SUPPORT OF ITS POSITION, USDA CITES OUR DECISION IN FOUR SQUARE CONSTRUCTION COMPANY, 84-2 CPD 480, 64 COMP.GEN. 32 (1984), AS AN EXAMPLE OF A SIMILAR SITUATION IN WHICH WE HELD THAT INTEREST DID NOT HAVE TO BE PAID BECAUSE THE GOVERNMENT AGENCY WAS NOT AT FAULT FOR FAILING TO MAKE TIMELY PAYMENT TO A CONTRACTOR. WE DISAGREE WITH USDA'S INTERPRETATION OF THE PROMPT PAYMENT ACT AS BEING APPLICABLE ONLY TO A FAILURE TO MAKE TIMELY PAYMENT CAUSED BY AN AGENCY'S OWN "FAULT OR OMISSION." WE ALSO THINK THAT ITS RELIANCE ON OUR HOLDING IN THE CITED CASE IS MISPLACED.

IN FOUR SQUARE CONSTRUCTION COMPANY, OUR OFFICE CONSIDERED A SITUATION IN WHICH THE CONTRACTING AGENCY (USDA'S FOREST SERVICE) ISSUED A CHECK REPRESENTING PAYMENT IN FULL TO THE CONTRACTOR SEVERAL DAYS AFTER RECEIVING THE INVOICE. HOWEVER, FOR UNSPECIFIED REASONS, THE CONTRACTOR NEVER RECEIVED THAT CHECK. AFTER THE CONTRACTOR ADVISED THE FOREST SERVICE THAT IT HAD NOT RECEIVED PAYMENT, THE TREASURY DEPARTMENT ISSUED A SUBSTITUTE CHECK APPROXIMATELY 3 MONTHS LATER. OUR OFFICE CONCLUDED THAT THE CONTRACTOR WAS NOT ENTITLED TO INTEREST UNDER THE PROMPT PAYMENT ACT BECAUSE UNDER THE ACT, THE DATE ON THE ORIGINAL CHECK IS DEEMED TO BE THE DATE OF PAYMENT AND THEREFORE THE INVOICE WAS PAID ON TIME.

IN REACHING THIS CONCLUSION, OUR DECISION DID CONTAIN CERTAIN LANGUAGE THAT USDA RELIES ON TO SUPPORT ITS POSITION IN THE INSTANT CASE. SAID:

"*** THE FACT THAT FOUR SQUARE DID NOT RECEIVE THE ORIGINAL PAYMENT WAS NOT THE FAULT OF THE CONTRACTING AGENCY. WE DO NOT THINK THE PROMPT PAYMENT ACT CONTEMPLATED THE PAYMENT OF INTEREST WHERE THE CONTRACTOR'S DELAY IN RECEIVING PAYMENT WAS OUTSIDE THE CONTRACTING AGENCY'S CONTROL."

HOWEVER, AS THE COMPLETE TEXT OF THE DECISION DEMONSTRATES, THE REASON WE HELD THAT THE CONTRACTOR WAS NOT ENTITLED TO INTEREST WAS BECAUSE THE GOVERNMENT HAD PAID THE CONTRACTOR WITHIN THE TIME LIMITS PRESCRIBED BY THE PROMPT PAYMENT ACT. THUS, THE QUOTED LANGUAGE FROM THAT DECISION IS NOT RELEVANT TO THE COMPLETELY DIFFERENT SETS OF FACTS INVOLVED HERE.

FURTHER, IN 64 COMP.GEN. 835 (1981), WE HELD THAT UNDER THE PROMPT PAYMENT ACT AN AGENCY WAS REQUIRED TO PAY INTEREST FOR THE PERIOD DURING WHICH OUR OFFICE HAD BEEN CONSIDERING THE CERTIFYING OFFICER'S REQUEST FOR AN ADVANCE DECISION. OUR DECISION RELIED HEAVILY ON THE FACT THAT THE PROMPT PAYMENT ACT IS "WRITTEN IN MANDATORY TERMS," AS IS CIRCULAR A-125, AUGUST 19, 1982, WHICH WAS ISSUED BY THE OFFICE OF MANAGEMENT AND BUDGET (OMB) TO IMPLEMENT THE STATUTE. SEE ALSO 62 COMP.GEN.673 (1983). SIMILARLY, IN THE PRESENT CASE, WE KNOW OF NO EXCEPTIONS THAT SUPPORT USDA'S POSITION THAT COMPLIANCE WITH THE MANDATORY REQUIREMENTS OF THE PROMPT PAYMENT ACT IS NOT NECESSARY IF IT IS DIFFICULT OR IMPOSSIBLE FOR AN AGENCY TO COMPLY.

FINALLY, OUR DECISION IN 63 COMP.GEN. 517 (1984), IS ALSO RELEVANT. THAT CASE WE CONSIDERED WHETHER THE CONTRACT PAYMENT TERMS SPECIFIED IN A PUBLIC UTILITY'S TARIFF OR THE SOMEWHAT MORE LIBERAL PAYMENT TERMS IN THE PROMPT PAYMENT ACT WERE CONTROLLING FOR THE PURPOSE OF DETERMINING WHEN PAYMENT WAS DUE. WHILE WE

RECOGNIZED IN OUR DECISION THAT IT WAS "EXTREMELY DIFFICULT" FOR THE SOCIAL SECURITY ADMINISTRATION (SSA) TO COMPLY WITH THE TARIFF PAYMENT PROVISIONS BECAUSE OF THE PROCESSING TIME REQUIRED TO HAVE THE INVOICES CERTIFIED, WE HELD THAT "BOTH THE PROMPT PAYMENT ACT AND OUR CASES REQUIRE THAT SSA COMPLY WITH THE CONTRACT TERMS FOR REMITTANCE."

IN THE INSTANT CASE, AN EVEN STRONGER ARGUMENT CAN BE MADE THAT CCC SHOULD PAY INTEREST SINCE THERE WAS NO CONFLICT BETWEEN THE CONTRACT (WHICH WAS DRAFTED BY THE AGENCY) AND THE PROMPT PAYMENT ACT. THE CONTRACT SPECIFIED THAT INTEREST WOULD BE PAID IN ACCORDANCE WITH THE PROVISIONS OF THE PROMPT PAYMENT ACT IF PAYMENT WAS MADE MORE THAN 10 DAYS AFTER DELIVERY. THUS, IT IS OUR VIEW THAT UNDER THE PROVISIONS OF THE PROMPT PAYMENT ACT, CCC SHOULD HAVE PAID INTEREST TO ANY CONTRACTOR THAT DID NOT RECEIVE TIMELY PAYMENT AS SPECIFIED IN THE CONTRACT.

THE ANTIDEFICIENCY ACT

THE OTHER ISSUE IN THIS CASE IS WHETHER CCC VIOLATED THE ANTIDEFICIENCY ACT IN THE PERIOD BETWEEN JUNE 4 AND JULY 2, 1986, WHEN IT ORDERED ITS SUPPLIERS WITH EXISTING CONTRACTS TO CONTINUE TO DELIVER MEAT, AND MAY HAVE ENTERED INTO NEW CONTRACTS TO PURCHASE ADDITIONAL MEAT /3/ EVEN THOUGH ITS BORROWING AUTHORITY WAS DEPLETED AND ALL DISBURSEMENTS OF CCC FUNDS WERE SUSPENDED.

THE RELEVANT PROVISIONS OF THE ANTIDEFICIENCY ACT ARE AS FOLLOWS:

"AN OFFICER OR EMPLOYEE OF THE UNITED STATES GOVERNMENT *** MAY NOT-

"(A) MAKE OR AUTHORIZE AN EXPENDITURE OR OBLIGATION EXCEEDING AN AMOUNT AVAILABLE IN AN APPROPRIATION OR FUND FOR THE EXPENDITURE OR OBLIGATION; OR

"(B) INVOLVE THE GOVERNMENT IN A CONTRACT OR OBLIGATION FOR THE PAYMENT OF MONEY BEFORE AN APPROPRIATION IS MADE UNLESS AUTHORIZED BY LAW." U.S.C. SEC. 1341(A)(1). IN ITS LETTER TO US OF SEPTEMBER 10, 1986, USDA MAINTAINS THAT THE ANTIDEFICIENCY ACT'S PROHIBITION AGAINST INCURRING OBLIGATIONS AND ENTERING INTO CONTRACTS IN EXCESS OF- OR IN ADVANCE OF-- AVAILABLE APPROPRIATIONS DOES NOT APPLY TO THE CCC FOR TWO REASONS. FIRST, IT ARGUES THAT "CCC'S FUNDS ARE NOT MADE AVAILABLE PROSPECTIVELY BY ANNUAL APPROPRIATIONS BUT BY THE USE OF ITS BORROWING AUTHORITY."

WHILE WE DO NOT DISAGREE WITH THE CCC'S DESCRIPTION OF THE PARTICULAR TYPE OF BUDGET AUTHORITY IT USES TO CARRY OUT ITS FUNCTIONS, THE ORIGIN OF ITS BUDGET AUTHORITY IS NOT RELEVANT IN DETERMINING THE APPLICABILITY OF THE ANTIDEFICIENCY ACT. OUR OFFICE HAS HELD THAT FUNDS BORROWED FROM THE TREASURY BY A WHOLLY OWNED GOVERNMENT CORPORATION ARE APPROPRIATED FUNDS. SEE B-192573, DECEMBER 19, 1979. THEREFORE, SINCE THE FUNDS BORROWED BY CCC TO FINANCE ITS OPERATIONS ARE APPROPRIATED FUNDS, "THEY ARE SUBJECT TO THE STATUTORY CONTROLS AND RESTRICTIONS APPLICABLE TO APPROPRIATED FUNDS." 63 COMP.GEN. 285, 287 (1984). THIS INCLUDES THE RESTRICTIONS IMPOSED BY THE ANTIDEFICIENCY ACT.

SECOND, USDA MAINTAINS THAT THE ANTIDEFICIENCY ACT DOES NOT APPLY TO THE CCC BECAUSE THE CCC POSSESSES CONTRACT AUTHORITY. CONTRACT AUTHORITY IS GENERALLY DEFINED AS STATUTORY AUTHORITY SOME AGENCIES HAVE THAT ENABLES THEM TO ENTER INTO CONTRACTS OR OTHER OBLIGATIONS PRIOR TO ENACTMENT OF THE APPLICABLE APPROPRIATION. SEE, E.G., 28 COMP.GEN. 163 (1948) AND B-164497(3), JUNE 6, 1979.

USDA'S LETTER OF SEPTEMBER 10, 1986, SETS FORTH THE BASIS FOR ITS CONTENTION

THAT CCC HAS CONTRACT AUTHORITY.

"IN ACCORDANCE WITH THE AGRICULTURAL ACT OF 1949 AND OTHER LEGISLATION, CCC IS REQUIRED TO MAKE AVAILABLE LOANS AND PURCHASES TO SUPPORT THE PRICES OF AGRICULTURAL COMMODITIES AND TO CARRY OUT OTHER ACTIVITIES AS DIRECTED BY CONGRESS, WHETHER OR NOT CCC IS ABLE TO FINANCE SUCH ACTIVITIES THROUGH THE USE OF ITS BORROWING AUTHORITY.

"THE ENTERING INTO OF CONTRACTS FOR THE PURCHASE OF RED MEAT UNDER SECTION 104 OF THE 1985 ACT WAS SUCH AN ACTIVITY. ***

"*** BASED UPON CONGRESSIONAL ACCEPTANCE OVER MANY YEARS OF THIS BUDGETARY MECHANISM, AS EVIDENCED BY CONGRESSIONAL APPROPRIATIONS FOR NET REALIZED LOSSES INCURRED IN CCC'S EXERCISE OF THIS CONTRACT AUTHORITY, IT IS OUR POSITION THAT THE ENTERING INTO CONTRACTS BY CCC TO CARRY OUT ITS REQUIRED ACTIVITIES DURING THE PERIOD ITS BORROWING AUTHORITY WAS DEPLETED IS NOT CONTRARY TO LAW."

WE AGREE THAT THE ANTIDEFICIENCY ACT DOES NOT APPLY TO A SITUATION IN WHICH AN AGENCY IS EXERCISING STATUTORY CONTRACTING AUTHORITY. THE ANTIDEFICIENCY ACT SPECIFICALLY "PROVIDES AN EXCEPTION FOR OBLIGATIONS WHICH ARE AUTHORIZED BY LAW TO BE MADE IN EXCESS OF OR IN ADVANCE OF APPROPRIATIONS." B-196132, OCTOBER 11, 1974. SEE ALSO 65 COMP.GEN. 4, 9 (1985) AND 61 COMP.GEN. 586 (1982).

WHETHER OR NOT CCC MAY POSSESS CONTRACTING AUTHORITY WITH RESPECT TO SOME OF ITS ACTIVITIES AS IT CLAIMS, /4/ IT IS CLEAR IN OUR VIEW THAT CCC'S PURCHASE OF MEAT UNDER SECTION 104 OF THE ACT DOES NOT CONSTITUTE A LEGITIMATE EXERCISE OF CONTRACT AUTHORITY. THE SPECIFIC STATUTORY LANGUAGE IN SECTION 104 DIRECTS THE SECRETARY OF AGRICULTURE TO "USE FUNDS AVAILABLE" FROM SEVERAL PERMISSIBLE SOURCES OF FUNDING TO PURCHASE 400 MILLION POUNDS OF MEAT. THE SECRETARY CHOSE CCC TO FUND THESE PURCHASES USING ITS BORROWING AUTHORITY, WHICH IN TURN IS SUBJECT TO A STATUTORY MAXIMUM. IT IS OUR UNDERSTANDING THAT NO OTHER SOURCES OF FUNDING IDENTIFIED IN THE STATUTE WERE THEN AVAILABLE TO PAY FOR THIS MEAT. ONCE CCC DETERMINED THAT SUFFICIENT FUNDS WERE NOT AVAILABLE TO PAY FOR THE MEAT IT HAD ORDERED BECAUSE ITS BORROWING AUTHORITY HAD BEEN DEPLETED, UNTIL ITS AUTHORITY TO BORROW ADDITIONAL FUNDS WAS RESTORED, THE ANTIDEFICIENCY ACT REQUIRED CCC TO DO WHAT IT COULD TO MITIGATE OR MINIMIZE THE MAGNITUDE OF A POSSIBLE ANTIDEFICIENCY ACT VIOLATION. SEE 55 COMP.GEN. 768 (1976).

THUS, FOR EXISTING CONTRACTS, CCC SHOULD HAVE DIRECTED CONTRACTORS TO SUSPEND FURTHER DELIVERIES AND, IF NECESSARY, COULD HAVE TERMINATED THE CONTRACTS FOR THE CONVENIENCE OF THE GOVERNMENT. SEE FEDERAL ACQUISITION REGULATION (FAR), 48 C.F.R. SECS. 12.5 AND 49 (1986). INSTEAD, IT INFORMED CONTRACTORS ABOUT THE FUNDING SHORTAGE BUT INSISTED THAT THEY CONTINUE TO MAKE DELIVERIES ANYWAY. MOREOVER, CCC CLEARLY HAD NO AUTHORITY TO AWARD NEW CONTRACTS DURING THE PERIOD IN WHICH ITS BORROWING AUTHORITY WAS DEPLETED AND IT HAD NO FUNDS THAT WERE THEN AVAILABLE TO PAY FOR THE MEAT IT WAS OBLIGATING ITSELF TO PURCHASE. SEE FAR, 48 C.F.R. SEC. 32.702.

ACCORDINGLY, IT IS OUR VIEW THAT ONCE CCC'S BORROWING AUTHORITY WAS DEPLETED, CCC VIOLATED SECTION 1342 OF THE ANTIDEFICIENCY ACT BY DIRECTING CONTRACTORS TO CONTINUE TO DELIVER MEAT THAT IT COLD NOT PAY FOR. TO THE EXTENT THAT ANY NEW CONTRACTS FOR THE PURCHASE OF ADDITIONAL MEAT WERE AWARDED DURING THIS PERIOD WHEN NO BUDGETARY RESOURCES WERE AVAILABLE, THE CCC ALSO VIOLATED SECTION 1341 OF THE ANTIDEFICIENCY ACT.

WE TRUST THAT THIS INFORMATION WILL BE HELPFUL TO YOU. IN ACCORDANCE WITH THE AGREEMENT REACHED WITH A MEMBER OF YOUR STAFF, WE WILL MAKE THIS OPINION GENERALLY AVAILABLE 5 DAYS FROM TODAY.

/1/ OUR OFFICE HAS NO AUTHORITY UNDER 15 U.S.C. SEC. 714B(K) TO ADJUST OR SETTLE CLAIMS BY OR AGAINST THE CCC SINCE THAT POWER HAS BEEN RESERVED CONCLUSIVELY FOR THE CCC, NOR CAN WE ACCEPT AN APPEAL FROM A CONTRACTOR DISSATISFIED WITH THE CCC'S FINAL SETTLEMENT.

/2/ SEE LETTER TO OUR OFFICE DATED SEPTEMBER 10, 1986, FROM ROSINA BULLINGTON, ASSISTANT GENERAL COUNSEL, FOREIGN AGRICULTURE AND COMMODITY STABILIZATION DIVISION. ALTHOUGH WE REQUESTED USDA TO PROVIDE US WITH DATA SHOWING "THE CURRENT STATUS OF AVAILABLE FUNDING FOR THE PROGRAM," USDA'S RESPONSE DID NOT INDICATE WHETHER ANY OF THE OTHER SOURCES OF FUNDING IDENTIFIED IN THE STATUTE, INCLUDING 7 U.S.C. SEC. 612C, WERE AVAILABLE TO PAY FOR THE MEAT BEING PURCHASED. HOWEVER, AS MENTIONED ABOVE, THE USDA INFORMED US THAT THE SECRETARY HAD DETERMINED THAT ONLY THE CCC BORROWING AUTHORITY WOULD BE USED TO PURCHASE THE ENTIRE QUANTITY OF MEAT. ALSO, WE NOTE THAT THE LAST SENTENCE OF SECTION 104(1) OF THE FOOD SECURITY ACT APPEARS TO RESTRICT THE ABILITY OF THE SECRETARY TO USE FUNDING AVAILABLE UNDER 7 U.S.C. SEC. 612C TO PURCHASE MEAT UNDER THIS PROGRAM. MOREOVER, CCC IS THE ONLY PERMISSIBLE SOURCE OF FUNDING FOR THE 200,000,000 POUNDS OF MEAT REFERRED TO IN SECTION 104(2).

/3/ WHILE USDA DID NOT FURNISH US WITH ANY INFORMATION AS TO HOW MANY NEW CONTRACTS, IF ANY, CCC ENTERED INTO DURING THE PERIOD IN WHICH ITS BORROWING AUTHORITY WAS DEPLETED, USDA'S LETTER TO US STATES UNEQUIVOCALLY THAT CCC HAD THE LEGAL RIGHT TO DO SO.

/4/ WE HAVE NOT ATTEMPTED TO RESOLVE THE QUESTION OF WHETHER CCC POSSESSES CONTRACT AUTHORITY WITH RESPECT TO ANY OF ITS OTHER STATUTORY RESPONSIBILITIES SINCE THE FACTS OF THIS CASE DO NOT REQUIRE US TO DO SO.