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The Honorable Alan Cranston Chairman, Committee on Veterans' Affairs United States Senate

Dear Mr. Chairman:

This is in response to your letter dated April 17, 1990, and co-signed by Senator Murkowski, Chairman Montgomery, and Representative Stump, asking whether the Office of Management and Budget's (OMB) new policy regarding "scoring" of lease-purchase agreements precludes the Department of Veterans Affairs (DVA) from issuing invitations for offers for VA regional office collocations as required by section 603 of the Veterans' Benefits Amendments of 1989, Public Law 101-237, 103 Stat. 2095 (1989) (codified at 38 U.S.C. Sec. 230). As explained below, we conclude that OMB's scoring policy does not preclude DVA from issuing invitations for offers for collocation lease-purchase agreements. In our opinion, VA has the authority, albeit limited, to enter into lease-purchase agreements subject to the enactment of appropriations.

BACKGROUND

As you know section 603 of the Veterans' Benefits Amendments of 1989, 38 U.S.C. Sec. 230(c), requires the Secretary of Veterans Affairs to provide for the collocation of at least three regional offices with DVA medical centers. The law authorizes the Secretary to lease land under the DVA's jurisdiction to a third party which in turn will construct a facility for regional offices and lease it back to the DVA. 38 U.S.C. Sec. 230(c)(2)(A). The law further authorizes the Secretary to enter into a lease of no more than 35 years for such facility, at the end of which time ownership of the facility shall vest in the United States. 38 U.S.C. Sec. 230(c)(3). The law directs that the lease-purchase agreement contain a provision that "the obligation of the United States to make payments under the agreement is subject to the availability of appropriations for that purpose". Id. The Secretary must issue invitations for offers with respect to the three collocations within 120 days of the enactment of the law (the law was enacted on December 18, 1989). 38 U.S.C. Sec. 230(c)(6). The statute contains a nearly identical mandate for the Secretary to acquire medical facilities by lease-purchase. 38 U.S.C. Sec. 5003(d).

According to your letter, a new OMB policy requires that agencies "score" lease-purchase agreements in the same manner as outright government purchases. Under the new policy, agencies may enter into lease-purchase agreements only if they have sufficient appropriations to cover the full estimated cost of the lease-purchase project. Since DVA does not currently have sufficient

appropriations to cover the full costs of the lease-purchase agreements for collocations, you state that the OMB policy effectively precludes DVA from issuing invitations for bids for the three collocations.

By letter dated July 11, 1990, OMB informed us that the new policy is designed to fully disclose the true costs of acquiring buildings, as capital assets, by lease-purchase. /1/ OMB states that the Antideficiency Act prohibits government officers from entering into obligations for leases and multiyear contracts in excess of appropriations or funds available "unless such contract is authorized by law". Such authority is typically provided as contract or borrowing authority. It is OMB's view that the DVA statute does not create "contract authority" because it specifically states that the obligation of the United States to make payments under the lease-purchase agreements shall be "subject to the availability of appropriations for that purpose". The DVA statute does not authorize an unconditional obligation nor does it provide budgetary resources. Thus, OMB argues that DVA can not obligate the government until moneys are appropriated. In sum, it is OMB's position that the lack of budgetary resources, rather than the new policy, prevents DVA from entering into the collocation agreements.

BUDGET SCORING

We have defined scorekeeping as the process of tracking the status and fiscal impact of congressional budgetary actions. Examples of scorekeeping information include such data as up-to-date tabulations and reports on congressional actions affecting budget authority, receipts, outlays, surplus, or deficit and the public debt limit, as well as outlay and receipt estimates and reestimates. GAO, A Glossary of the Terms Used in Federal Budget Process 76 (March 1981). Scorekeeping is significant not simply for the information it provides on the budgetary consequences of congressional actions, but also because of its impact on the budgetary decisionmaking of the Congress under the procedures set forth in the Congressional Budget Act of 1974, as amended, 2 U.S.C.

Sec. 631. /2/ However, once authorization or appropriation legislation is enacted, the statute, rather than budget scoring, controls agency actions. In our opinion, OMB's scoring policy does not affect the authority otherwise granted to DVA by the Congress. Thus, we think the issue is more properly focused on the nature of the transaction Congress authorized the DVA to execute under section 603 of the 1989 Veterans' Amendments, not on how OMB and CBO propose to score the transaction.

DVA AUTHORITY TO LEASE-PURCHASE

The collocation statute provides that:

"(3)(A) The Secretary may enter into a lease [for the collocated regional facility] . . . for not more than 35 years under such terms and conditions as may be in the best interests of the Department . . . .

(B) Each agreement to lease a facility . . . shall include a provision that

(i) the obligation of the United States to make payments under the agreement is subject to the availability of appropriations for that purpose; and

(ii) the ownership of such facility shall vest in the United States at the end

of such lease."

38 U.S.C. Sec. 230(c).

Under the Antideficiency Act, an officer of the United States is prohibited from making expenditures or incurring obligations in excess of or in advance of available appropriations. 31 U.S.C. Sec. 1341(a). This general prohibition does not apply if the expenditure or obligation is otherwise "authorized by law". 31 U.S.C. Sec. 1341(a). Such authority is typically granted in the form of "contract authority," which is the authority to contractually obligate the United States to future payments even though no appropriations are available to pay the obligations at the time the contract is made. See 62 Comp.Gen. 361, 365 (1983); 28 Comp. Gen. 163 (1948).

However, we agree with OMB that section 603 does not grant DVA this kind of contract authority. Paragraph (3)(B) specifies that any obligation of the United States under the collocation agreement must be "subject to the availability of appropriations for that purpose." This provision, in our view, clearly indicates that the Congress does not intend to authorize the Secretary to obligate the United States to future payments under the agreements prior to the enactment of appropriations to pay for them.

At the same time, it is clear from the statute that the Congress intended the DVA to enter into collocation agreements. The statutory language is mandatory rather than permissive. It states that the Secretary (1) "shall provide for the collocation of at least three regional offices with medical centers," (39 U.S.C. Sec. 230(c)(1)), (2) "shall, within 120 days of the enactment of this subsection, issue an invitation for offers with respect to three collocations to be carried out under this subsection," (39 U.S.C. Sec. 230(c)(6)(A)), and (3) "shall" enter into an agreement to carry out one of the collocations within one year of issuing the invitation and agreements to carry out two other collocations within 180 days of the first agreement, (38 U.S.C. Sec. 230(c)(6)(B)). There is also considerable legislative history indicating that the Congress intended the collocations to begin as rapidly as possible. See H.R. Rep. No. 262, 101st Cong., 1st Sess. 12-18 (1989).

We have recognized that in certain instances an agency may enter into a contract that is binding on the United States only to the extent of future appropriations to cover it. See 39 Comp.Gen. 340, 342 (1959). Such a contract specifically provides that the government's liability is contingent on the availability of appropriations, and obligations under it do not arise until appropriations are enacted. Id. In our opinion this is the type of contract that the collocation provision authorizes. Specifically, the law authorizes the DVA to enter into 35 year agreements under which the United States will be obligated to make payments only when, and to the extent that, appropriations are enacted for this purpose. Since these agreements will obligate the United States only to the extent appropriations are enacted, the DVA does not need budget authority sufficient to cover the full 35 year cost of the agreement before inviting offers and awarding the contract.

In our opinion this conclusion is not inconsistent with the Supreme Court decision in Leiter v. United States, 271 U.S. 204 (1925). In Leiter, the Court decided that an agency that entered into a multi-year space lease providing that payment for periods beyond the first year was contingent on the availability of future appropriations violated the Antideficiency Act because the lease was not

specifically authorized by statute. 271 U.$. at 207. Leiter is not applicable in this case because DVA does have specific statutory authority to enter into 35 year agreements contingent on the future availability of appropriations.

Thus, we conclude that DVA is presently authorized to issue invitations for offers and to enter into 35 year lease-purchase contracts that are binding upon the United States only to the extent that appropriations are made available for that purpose in the future. We reach a similar conclusion with respect to the acquisition of medical facilities authorized by 30 U.S.C. Sec. 5003(d).

Because payments under any lease-purchase agreement would be dependent upon the availability of appropriations for that purpose, it is useful to consider briefly whether any appropriation is currently available to pay for the collocation lease-purchases. DVA receives two appropriations that logically could be used to make collocation lease payments. One is the DVA's General Operating Expenses (GOE) appropriation account which, as you point out' has been used in the past to pay fair market value rents for General Services Administration controlled space on an annual basis. The other is the DVA's "Construction, Major Projects" appropriation.

Although the GOE appropriation is available for "necessary operating expenses" /3/ of the VA, we do not view that appropriation as presently available to pay the costs of the collocation lease-purchases. We view the collocation transactions not merely as leases, generally payable out of operating funds, but lease-purchases, the ultimate purpose of which is to finance the construction and acquisition of regional offices. The fact that the cost of construction and acquisition is covered through lease payments is not significant. In other words, the transactions are more akin to construction/ acquisition than a lease of a facility, the only difference being that a financing method other than direct appropriations from the Treasury is used.

Further, it appears to us that Congress views the major construction appropriation as the proper one to charge withlease-purchase construction costs. As we noted earlier, section 603(b) of the Veterans' Benefits Amendments of 1989, codified at 38 U.S.C. Sec. 5003, authorizes the same type of lease-purchase transactions for medical centers- as section 603(a) does for the collocation of regional offices with medical centers. The fiscal year 1990 appropriation for DVA appropriates construction funds out of the "Construction, Major Projects" account for any of the purposes set forth in 38 U.S.C. Sec. 5003, which would include the authority to develop medical centers through lease-purchase transactions. Similarly in the Senate version of the bill that provided for DVA appropriations for fiscal year 1990, the Senate proposed to fund several lease-purchase construction projects out of the DVA's "Construction, Major Projects" appropriation. /4/ See H.R. 2916 (101st Cong.), with Senate amendments, September 28, 1989. These congressional actions suggest that the Congress has to date viewed the "Construction, Major Projects" rather than the GOE appropriation account as the appropriate funding source for lease-purchases.

The 1990 DVA appropriation contains a provision that bars the use of major construction funds for "any project which has not been considered and approved by the Congress in the budgetary process . . .." Pub. L. No. 101-144, 103 Stat. 842 (1989) and H.R. 5158 (101st Cong.), June 26, 1991. The DVA collocation projects have not been through this process and thus amounts appropriated for major construction for fiscal year 1990 are not available for these projects.

Therefore, we conclude that no appropriation is currently available to charge collocation construction/lease-purchase costs. Whether any future appropriation is available for this purpose will, of course, depend upon the terms of that appropriation.

We trust that this opinion is responsive to your needs. As agreed by your staff, unless you announce its contents earlier, this opinion will be available to the public 5 days from today.

Sincerely yours,

Milton J. Socolar For Comptroller General of the United States

1. We understand that the Congressional Budget Office (CBO) agrees with OMB's new policy.

2. The Congressional Budget Act, 2 U.S.C. Sec. 639(b), requires CBO to produce periodic scorekeeping reports. Scoring, however, is not done pursuant to any statutory or written rules.

3. The GOE appropriation covers the administration of nonmedical veterans benefits through the Veterans Benefits Administration, operation and maintenance of 144 cemeterial activities by the National Cemetery System and for top management direction and support. H.R. Rep. No. 150, 101st Cong., 1st Sess. 10 (1989); S. Rep. No. 128, 101st Cong., 1st Sess. 19 (1989).

4. The lease-purchase language was deleted by the Conference Committee. H.R. Rep. No. 297, 101st Cong., 1st Sess. 9 (1989).