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B-88974 November 10, 1949

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The Honorable The Secretary of Agriculture

My dear Mr. Secretary:

Reference is made to your letter dated August 31, 1949, and enclosures, requesting a decision as to whether there may be included in contracts entered into by the Soil Conservation Service for repair and storage of automotive equipment, a provision which would automatically renew the contracts from year to year unless sooner terminated by the Government or the contractor.

It is stated in your letter that in the interest of reducing administrative costs and simplifying contract procedure pertaining to the annual advertising, analyzing, and awarding of approximately 3,000 contracts for repair and storage of automotive equipment, the Soil Conservation Service has entered into a few contracts on an experimental basis; that the significant features of such contracts, as contracted with those generally used, are that they include (a) an automatic renewal provision and (b) a contingent liability clause with regard to the annual appropriation of funds; that the use of this form of contract is confined to small communities and localities where, as a rule, there is a single source of supply and seldom more than two or three local suppliers; that after the first year, administrative compliance with the advertising for bids requirement of section 3709, Revised Statutes, as amended is had by making what is commonly referred to as an annual pre-renewal canvass or price inquiry of local sources of supply prior to the end of each 12-month contract period to ensure the Government of the lowest cost for its repair and storage needs; and that when a lower price can be secured, a termination right reserved to the Government in the contract is exercised.

There were forwarded with your letter, a copy of the form proposed to be used in the contracting for such services. This form provides that the contract may be terminated by either the contractor or the Government at the end of any yearly contract period by notice in writing 30 days in advance of the end of the yearly contract period; that the Government's liability after June 30 of any current fiscal year is contingent upon the authorization by the Congress of a sufficient appropriation with which to make payment in accordance with the contract; that no deliveries or services which obligate ensuing fiscal year funds are to be made unless and until the appropriation act providing the necessary funds has been enacted into law; and that the contract "shall be for the period beginning and ending and shall be automatically renewed from year to year thereafter, without notification by the Government, until ."

You request to be advised as to whether this Office would be required to object to the proposed automatic renewal clause and if, in order to validate the contract for each subsequent year it is considered necessary for the contracting officer to notify the contractor of renewal, this requirement could be accomplished by inserting a clause therein to the effect that the contracting officer would notify the contractor when the appropriation had been approved.

The renewal provision as proposed does not appear to be an optional one, but one which apparently is intended to place the Government under obligation for the period described therein, subject to the making of adequate appropriations for the payment of the services and the Government's right to terminate upon 30 days' written notice. As stated in the decision to which you refer, b-84262, April 1, 1949, 28 Comp. Gen. 553, the mere reservation of a right in the Government to terminate a contract does not provide any basis for distinguishing the contract-- as a matter of substance-- from a contract which purports to bind the Government unconditionally for an indefinite period in the future. Furthermore, the suggested contract form requires no affirmative act on the part of an authorized contracting officer to continue the contract beyond the current fiscal year. And, as stated by the Supreme court of the United States in Leiter v. United States, 271 U.S. 204, 207--

"*** it is plain that, to make it [the lease here involved] binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect by the adoption of the original lease, make a new lease under the authority of such appropriation for the subsequent year. ***"

In the circumstances, it necessarily follows that a contract containing the proposed renewal provision, made under annual appropriations, would terminate by operation of law at the end of the fiscal year current in which made unless affirmatively renewed for a further period under available appropriations. A formal cancellation of such contracts at the end of the first fiscal year of the term--although advisable--if they are not to be extended is not required, but an affirmative renewal is required if they contain an option therefore and are to be extended beyond the end of that fiscal year. Furthermore, an notification to the contractor by the contracting officer that an appropriation for the services recovered by the contract has been made, as suggested in your letter, would not appear to be an affirmative renewal as legally required.

The pertinent provisions of the contract form submitted with our letter should be revised accordingly.

Sincerely yours,

(Signed) Lindsay C. Warren Comptroller General of the United States