Memorandum

RELEASED

Date: October 30, 1987

To: Group Director, GGD/Claims

From: Associate General Counsel - Rollee H. Efros

Subject: Reimbursements to Permanent Judgment Appropriation under Contract Disputes Act - B-217990.25-O.M.

This is in response to your memorandum of June 2, 1987, requesting guidance as to GAO's responsibilities under the reimbursement provision of the Contract Disputes Act, 41 U.S.C. § 612(c) (1982). Your specific question is what can, should, or must GAO do in cases where the contracting agency fails or refuses to make the required reimbursement. As we will discuss in more detail below, there is little GAO or anyone else can do except report the matter to the Congress.

STATUTE AND LEGISLATIVE HISTORY

Prior to 1978, court judgments against the United States in contract matters were generally paid from the permanent, indefinite appropriation for judgments (31 U.S.C. § 1304) on the same basis as other judgments. See, e.g., B-160261-O.M., June 12, 1972. There was no requirement that the judgment appropriation be reimbursed. Awards by agency boards of contract appeals, however, were paid directly by the contracting agency from agency funds, with no GAO involvement.

The Contract Disputes Act of 1978 (CDA), Pub. L. No. 95-563, changed the payment mechanism for both court judgments and board awards in contract cases. One of the recommendations in the 1972 report of the Commission on Government Procurement had been that court judgments on contract claims be paid from agency appropriations. In developing the legislation that became the CDA, Congress on the one hand wanted to implement this recommendation. On the other hand, however, Congress wanted to avoid subjecting successful claimants to the lengthy delays in payment that could result if the contracting agency lacked sufficient funds at the time of the award or judgment and thus had to seek additional appropriations from the Congress. The resulting provision, reflecting a balance of these competing considerations, was

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section 13 of Pub. L. No. 95-563, 41 U.S.C. § 612, which provides in relevant part as follows:

> "(a) Judgments.
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> Any judgment against the United States on a claim under [the CDA] shall be paid promptly in accordance with the procedures provided by section [1304] of Title 31.
>
> "(b) Monetary awards.
>
> Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.
>
> "(c) Reimbursement.
>
> Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section [1304] of Title 31, by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes."

Subsection (a) merely restated existing law. Subsection (b), which made board awards payable from the judgment appropriation in the first instance, was intended to assure prompt payment to the successful claimant. Subsection (c) implemented the Procurement Commission's recommendation. The Senate Committee on Governmental Affairs discussed the reimbursement requirement as follows:

> "Section 13(c) provides that all such payments will be backcharged to the procuring agency involved.
>
> "There may be an incentive in certain cases on the part of the procuring agency to avoid settlements and prolong litigation in order to have the final judgment against the agency occur in court, thus avoiding payment out of agency funds. Second, the practice may tend to hide from Congress the true economic costs of some procurements by not requiring the agencies to seek additional appropriations to pay the judgment.
>
> "In order to promote settlements and to assure the total economic cost of procurement is charged to those programs, all judgments awarded on contract claims are to be paid from the

> defendant agency's appropriations. If the agency does not have the funds to make the payment the agency is to request additional appropriations from Congress." S. Rep. No. 95-1118, 95th Cong., 2d Sess. 33 (1978).

Neither the statute nor the legislative history offers guidance as to what action is to be taken, or by whom, in the event an agency fails or refuses to reimburse the judgment appropriation.

THE REIMBURSEMENT REQUIREMENT: AN OVERVIEW

Before addressing your specific question, it may be helpful to lay a foundation by discussing 41 U.S.C. § 612(c) in more general terms.

The first point to note is that reimbursement is mandatory. This is clear from the statutory language ("shall be reimbursed") as well as the legislative history. An agency which fails or refuses to reimburse the judgment appropriation violates the statute. The violation results in an unauthorized augmentation of the agency's appropriations.

Having said this, however, it is much more difficult to determine precisely when the violation can be said to occur. The statute does not require that reimbursement occur within any specified time. A 1984 decision, 63 Comp. Gen. 308, held that CDA reimbursements are chargeable to appropriations current as of the date of the award, but this was in the context of whether the expenditure should be charged to the current fiscal year or to some prior fiscal year. If the question is whether the reimbursement must be made promptly or deferred, the agency has a measure of discretion.

The statute provides merely that the agency must reimburse, out of available funds or by obtaining additional appropriations. Congress did not define "available funds" in this context. It is clear that Congress wanted the ultimate accountability to fall on the procuring agency, but we do not think the statute requires the agency to disrupt ongoing programs or activities in order to find the money. If this were not the case, Congress could just as easily have directed the agencies to pay the judgments and awards directly. Clearly, an agency does not violate the statute if it does not make the reimbursement in the same fiscal year that the award is paid. Similarly, an agency may not be in a position to reimburse in the following fiscal year without disrupting other activities, since the agency's budget for that fiscal year is set well in advance. In our opinion, the earliest time an agency can be said to be in

violation of 41 U.S.C. § 612(c) is the beginning of the second fiscal year following the fiscal year in which the award is paid.

With this in mind, it becomes apparent that disbursements and reimbursements will rarely, if ever, "match" in any given fiscal year, because many reimbursements will relate to payments made in prior years.

ALLOCATION OF RESPONSIBILITIES

At this point, it is important to be precise as to what we mean when we talk about pursuing collection action or ensuring that reimbursements are made. A claim against another federal agency is different from a claim against a private party. The tools available to collect a debt from the private party are not available when the debtor is another federal agency, either as a matter of law or as a practical matter. We cannot sue the other agency; we cannot hire a private debt collector; we cannot charge interest; we cannot offset the claim against the agency's present or future appropriations. Indeed, the Federal Claims Collection Standards state explicitly that they do not apply to claims between federal agencies. 4 C.F.R. § 101.3(c). Thus, regardless of who is viewed as having the responsibility, the range of potential actions is extremely limited. Short of the Congress itself, neither GAO nor the Treasury Department, nor any other federal entity, has the power to "enforce" the reimbursement requirement. (The federal courts presumably have the power as a matter of law, but it difficult to see how the issue could arise before a court.)

As we understand current procedures, we attempt to obtain an agency billing address as part of the submission for payment. Payment and reimbursement are two different things, however, and we would still be required to certify payment even if the agency refused to supply a billing address. Problems over reimbursement do not affect the claimant's right to prompt payment. In any event, a billing address is supplied in the great majority of cases. When the Treasury Department issues the check based on our certification, it "bills" the procuring agency by sending a Standard Form 1081 to the billing address provided. If reimbursement is not forthcoming, Treasury makes follow-up inquiries at unspecified intervals. At some point, also unspecified, if Treasury's efforts do not succeed, Treasury refers the matter to us.

Given the collection limitations noted above, it is difficult to see what else Treasury could do. It is also difficult to criticize Treasury for referring uncollectible

cases to GAO. The provision of the Federal Claims Collection Standards referred to above, 4 C.F.R. § 101.3(c), goes on to state:

> "Federal agencies should attempt to resolve interagency claims by negotiation. If the claim cannot be resolved by the agencies involved, it should be referred to the General Accounting Office."

As pointed out in the Supplementary Information statement accompanying the final regulations, this provision, although new to the regulations, merely restated existing practice. 49 Fed. Reg. 8890 (March 9, 1984).

Of course, we are also limited as to what further collection actions we could take. We are in essentially the same position as Treasury in terms of lack of enforcement authority. The one thing we can do -- and probably should do -- is report to the Congress. Clearly it is appropriate for GAO to report on the implementation of the statute and the extent to which it is or is not fulfilling its intended purpose. Reports could be issued periodically, at whatever intervals we deem appropriate or useful, and sent to the appropriations committees, government operations committees, and the oversight committees of the agencies involved. We could also consider making recommendations to the heads of the recalcitrant agencies under 31 U.S.C. § 720, and the agencies would be required to respond in writing to the appropriate congressional committees.

Prior to including a given case in a report, we should send the agency a letter (we would not suggest more than a single letter) reasserting the claim and requesting that the agency either make the reimbursement or provide a statement of its plans for doing so or its reasons for not doing so. We would think that an appropriate form letter could be developed with little difficulty. The letter would serve several purposes. First of all, it would satisfy any responsibility we might arguably have to "settle" the claim upon Treasury's referral. Also, our letters could generate further reimbursements, or at least help to identify and resolve outstanding problems. In preparing this response, we reviewed a random selection of non-reimbursement cases which we have synopsized in Appendix I. In some cases, we could identify a reason for the delay in reimbursement; in others we could not. Treasury referred these cases back to us in May 1986, which in a few instances was less than a year after the original payment. Especially in these cases, delay could be attributable to such factors as lack of agency procedures or inefficiency rather than a conscious refusal to comply with the statute.

Coordination with the Office of Management and Budget (OMB) might also be useful since OMB is in a position to influence the reimbursement process by assuring that funds are included in the agency's next budget request, or perhaps through the apportionment process. You may therefore wish to consult with OMB to discuss the feasibility of an appropriate reporting mechanism.

DUPLICATE PAYMENTS

We understand that occasionally a CDA award is paid both by us and by the procuring agency, resulting in a duplicate payment to the contractor. In a few of these cases, the agency has refused to reimburse the judgment appropriation. This situation presents a different problem.

If one were to read 41 U.S.C. § 612 literally, all CDA payments resulting from court judgments or monetary board awards are required to be paid in the first instance from the judgment appropriation, regardless of the adequacy of the procuring agency's appropriations. We have been aware since enactment of the CDA that agencies have continued to pay many board awards directly. (Disbursements from account 20X1743 were zero for fiscal years 1979 and 1980.) We had informally decided long ago not to pursue this because (1) the two-step process seemed to serve little useful purpose where the procuring agency had adequate funding and was willing to use it, and (2) on the basis of some preliminary audit work a few years ago, we could detect no significant difference in the timeliness of payments to contractors. For these reasons, we are reluctant to discourage agencies from paying directly where they wish to do so, although this would be the only way to prevent the occasional duplicate payment.

In duplicate payment cases, it seems that the question is not so much one of reimbursement as one of recovery from the contractor. We would argue that the responsibility to collect the debt lies with the procuring agency. By electing to pay directly, the agency should be held to have assumed the risk of a duplicate payment. Surely we would have had no way of detecting or preventing it. We can also understand that the agency may be reluctant to accept responsibility for pursuing recovery since it will have to turn the money over to the Treasury. This, however, is no different than many other debt situations.

We should consider requiring, as part of the agency's certificate of finality, a statement to the effect that the award has not been paid and will not be paid by the agency.

This will not guarantee anything, but might serve to alert the agency to the potential problem.

Appendix II synopsizes three duplicate payment cases that have come to our attention. In at least the first two cases (Z-2872168 and Z-2857355), the problem seems to have resulted from lack of coordination within the contracting agency, perhaps in conjunction with a lack of understanding of the statutory payment procedure.

It is encouraging that the contracting agency in two of the cases has expressed a willingness to pursue recovery of the overpayment. This is especially pertinent since duplicate payment cases raise the additional question of certifying officer liability. In those cases where the statutory payment procedure has already been initiated, direct payment by the agency would appear to constitute an erroneous payment for purposes of certifying officer liability and relief, and the agency has a duty to attempt recovery from the recipient.

As a final note, there will be the occasional case that will never be reimbursed, for a variety of legitimate reasons. For example, in a 1981 case (Appeal of Jack Austin & Associates, ASBCA No. 25475), we included interest without knowing that the parties had stipulated to no interest. In the event that the overpayment could not be recovered from the contractor, the agency (Air Force in that case) could not reasonably be expected to reimburse the interest overpayment. In a 1986 case (IBM Corporation, Z-207(333)), the Defense Logistics Agency had acted on behalf of numerous other agencies. While most of the payment could be attributed to the various client agencies, the case raised the possibility that trying to attribute 100 percent of the award for reimbursement purposes would not be worth the administrative burden.

We trust you will find this discussion of some use, and are available to provide any further guidance or assistance that may be needed.

APPENDIX I
CASES REPORTED BY TREASURY AS UNREIMBURSED

1. Z-2853587: Boatmen's Bank & Trust Co. of Kansas City

This was a Claims Court judgment in the amount of $43,318.37 plus interest. We certified payment in the total amount of $52,928.82 on January 9, 1984. Both the judgment and the Justice Department's payment request clearly identified the matter as a CDA case, and identified the Department of the Army as the contracting agency for reimbursement purposes. There is no indication in the file as to why reimbursement was not made.

2. Z-2872341: Fred Pickford, d/b/a Arrowhead Aluminum Engineering

This was also a Claims Court judgment. The amount, which we certified for payment on September 5, 1985, was $80,000 inclusive of interest. The contracting agency was the Department of the Army. As with Z-2853587, both the judgment and the Justice Department's payment request identified the matter as a CDA case and identified the agency for reimbursement purposes. Again, the file does not suggest any reason for the failure to reimburse.

3. Z-2872019: Ardmore Construction Company

This was an award by the Veterans Administration Board of Contract Appeals. We certified payment in the total amount of $10,868.18 on July 19, 1985. The payment request was submitted by the Director, VA Office of Budget and Finance (Controller), and included an agency address for reimbursement purposes. No reason for non-reimbursement appears in the file.

4. Z-1632672(4): Federal Electric Corporation

This was an award by the Armed Services Board of Contract Appeals, affirmed on appeal by the U.S. Court of Appeals for the Federal Circuit. We certified payment on September 16, 1983. The amount was $21,529,139.21. The payment submission included a Certificate of Finality signed by the Chief Trial Attorney, Department of the Army, identifying the Defense Security Assistance Agency for reimbursement purposes.

A letter from DSAA dated January 18, 1984, to the Treasury Department explained that the judgment arose from a foreign military sales transaction with Spain under the Arms Export Control Act. The letter further advised that DSAA's attempt

to secure additional funds from Spain was currently under international mediation, and that DSAA expected that the Spanish government would provide the requisite funding for reimbursement. There is no further information in the file, but the documents do not indicate any dispute over the basic reimbursement requirement.

5. Z-2852057: Hamilton Enterprises, Inc.

This was also an ASBCA award affirmed on appeal by the Court of Appeals for the Federal Circuit. We certified payment on September 19, 1983, in the amount of $92,703.40. The payment request was submitted by the ASBCA Recorder and identified Navy as the contracting agency.

The payment request specified July 31, 1979 as the date the claim was filed. We of course based our interest computation on this date. Upon receiving Treasury's bill for reimbursement, Navy argued that interest should have been computed only from October 30, 1979, which Navy determined to be the date of the contractor's certification of the claim (41 U.S.C. § 605(c)(1)). In a letter dated August 15, 1986, Navy indicated a willingness to reimburse in the amount of $91,159.76.

It is not clear why the filing date was supplied by the ASBCA rather than by the contracting agency as is normally the case. Closer coordination between Navy and the ASBCA might have resolved the issue. Again, however, Navy does not dispute the basic reimbursement requirement, and is willing to reimburse all except for approximately $1,500.

APPENDIX II
DUPLICATE PAYMENT CASES

1. Z-2872168: Don Cherry, Inc.

This was an award by the ASBCA which we certified for payment on August 7, 1985 ($1,349.84). The contracting agency was the Department of the Air Force. The payment request, submitted by the ASBCA Recorder, included a Certificate of Finality signed by Contracting Officer Carol J. Allison specifying the agency address for reimbursement purposes. On September 19, 1985, Treasury billed Air Force for the reimbursement. Contracting Officer Allison responded by letter dated September 27 that the Air Force made payment to Cherry on September 13.

2. Z-2857355: El Greco Painting Company

This was a VABCA award which we certified for payment on September 7, 1984 ($1,859.24). The payment request was submitted by the Director, VA Office of Budget and Finance (Controller). It included a Certificate of Finality signed by the VA's trial attorney, giving the agency address for reimbursement purposes. The award was dated May 3, 1984, and the payment request was dated August 7. Meanwhile, on July 5, 1984, the VA facility initiated payment and issued a check to El Greco on September 17. (The Treasury check issued on GAO's certification had been dated September 14.) Informal notes in the file indicate that VA has agreed to initiate collection action to recover the overpayment.

3. Z-2874321: G & S Construction, Inc,

This was an ASBCA award rendered on January 16, 1986. The agency is the Corps of Engineers, Department of the Army. The payment request was submitted by the ASBCA Recorder, and included a Certificate of Finality signed by the contracting officer and specifying the agency address for reimbursement purposes. We certified payment on April 29, 1986 ($20,400.69). When Treasury billed the Corps for reimbursement, the Corps responded that it had paid G & S over a year and a half earlier, on September 11, 1984. The precise stage of the claim proceeding at that time is not clear from the file. Why the contracting officer did not know that the claim had already been paid (wholly apart from the contractor's silence) is not clear, although there may

have been some confusion on the part of the contracting officer since the amount indicated on the Certificate of Finality differs from the amount of the award. In any event, the Corps has indicated its willingness to pursue the contractor to recover the overpayment.

1. APPROPRIATIONS/FINANCIAL MANAGEMENT
   Judgment Payments
   Permanent/indefinite appropriation
   Reimbursement

2. APPROPRIATIONS/FINANCIAL MANAGEMENT
   Appropriation Availability
   Amount availability
   Augmentation
   Lump-sum appropriation

APPROPRIATIONS/FINANCIAL MANAGEMENT
Judgment Payments
Permanent/indefinite appropriation
Reimbursement