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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Maritime Administration—Disposition of Funds Recovered from Private Party for Damage to Government Building

File: B-287738

Date: May 16, 2002

DIGEST

The Maritime Administration may not retain amounts recovered from a private party representing liability for damage to a government building and equipment for credit to its own appropriation or deposit into an escrow account for use by the agency in effecting repairs and replacements. The Maritime Administration must deposit the amounts recovered into the general fund of the Treasury as miscellaneous receipts in accordance with 31 U.S.C. § 3302(b).

DECISION

The Acting Chief Counsel of the Maritime Administration (MARAD) requests our opinion whether MARAD may properly use escrow accounts to hold funds received from private parties (or their insurers) to settle claims by the agency for damages to agency buildings and equipment caused by the private parties. While the question arises out of a claim made by MARAD against a contractor, the claim has since been settled. MARAD has asked us to address its escrow concept, nevertheless. As discussed below, we see no reason to depart from the plain meaning of the miscellaneous receipts statute, which requires that the money be deposited in the general fund of the Treasury.

Background

In 1996, MARAD awarded a contract for the replacement of garage doors on a building at the U.S. Merchant Marine Academy (Academy). Under the contract, the contractor was required to maintain insurance in the amount of $2 million. According to MARAD, the contractor negligently caused a fire resulting in substantial damage to the building and destroying expensive equipment in the building. The total damages amounted to $1,080,147.84, of which the contractor's insurance company initially paid $166,000, leaving a deficit of $914,147.84. MARAD

made a claim against the contractor for the balance under the Contract Disputes Act, and the contractor appealed the contracting officer's adverse final decision to the United States Court of Federal Claims. The Department of Justice (Justice) represented MARAD in the litigation.

During the litigation, the Academy expressed concern that, even in the event of a favorable judgment for the government, it might not be reimbursed for the damages it incurred, because the miscellaneous receipts statute, 31 U.S.C. § 3302(b), requires that all monies received for the government from any source be deposited into the Treasury. To ensure that the Academy would be reimbursed for all damages, MARAD's counsel proposed that the Academy and the contractor could stipulate to dismiss the lawsuit with prejudice and jointly establish an escrow account to operate as an intermediary between the contractor and the Academy for the purpose of making necessary repairs and replacements. As the Academy incurred costs for replacing the damaged building and equipment, it would submit the charges to the escrow account agent. Alternatively, the contractor making the repairs/replacements would submit charges to the escrow account agent, who would then bill the contractor that had caused the damage originally.[1]

Justice attorneys recommended against a settlement involving an escrow account for several reasons. First, they concluded that such an arrangement would contravene the express language of the miscellaneous receipts statute since, on its face, the escrow account would appear to be established for the benefit of the Academy. Second, Justice attorneys believed it unlikely that the contractor's insurer would accept the proposal since doing so would virtually assure that the insurer would pay for the entire amount of the damages rather than settling at some lesser amount. Third, Justice attorneys believed that an escrow agreement would give the contractor no finality to the litigation and would cause the contractor additional costs above those of the damages, because the contractor would have to monitor the costs incurred by the Academy in making the repairs long after the parties agreed to the settlement. Moreover, Justice attorneys stated that the proposal would create additional costs for the government and might result in future litigation related to resolving disputes.

During the course of the litigation, the contractor's insurance company made several monetary offers to settle the lawsuit on the contractor's behalf. In due course, Justice and MARAD agreed to accept a cash payment of $730,000 from the contractor's insurer in settlement, and the money was deposited into the Treasury.

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[1] As we understand the situation, neither the contractor nor its insurance company was willing or able to make the repairs/replacements, to oversee the contractors that would make the repairs/replacements, or to manage the escrow account.

Issue

The Acting Chief Counsel requests our opinion concerning whether an escrow account similar to the one described above properly could be used by MARAD in any similar case in which a private party that has damaged MARAD buildings and/or equipment agrees to make restitution by paying to have the buildings and/or equipment repaired or replaced. If the party that caused the damage were to put the settlement money into an escrow account that is not controlled by MARAD, the Acting Chief Counsel believes the provisions of the miscellaneous receipts statute would not be applicable, because MARAD would not be receiving any money. The Acting Chief Counsel, therefore, concludes that MARAD would not have to deposit the settlement money into the general fund of the Treasury, but would be able to draw on the funds in the escrow account as needed to make repairs and/or replacements.

Analysis

The general rule concerning the crediting of collections to appropriation and fund accounts is based on the requirements of the miscellaneous receipts statute, 31 U.S.C § 3302(b), which provides:

> "Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."

The requirement that money received from any source be deposited into the Treasury was enacted to effectuate the Appropriations Clause of the United States Constitution, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, cl. 7. The requirement safeguards the separation-of-powers principle embedded in the Appropriations Clause that is fundamental to our constitutional structure. By requiring government officials to deposit government monies into the Treasury, Congress has precluded the executive branch from using such monies for unappropriated purposes. See Scheduled Airlines Traffic Offices v. Department of Defense, 87 F.3d 1356, 1361 (D.C. Cir. 1996).

Consistent with the statute, we have long held that when a contractor negligently damages government property and the contractor (or its insurance company) agrees or is compelled to make restitution by means of cash payments to the government, the amount recovered cannot be credited to the agency's appropriations, but must be deposited into the Treasury as a miscellaneous receipt. 67 Comp. Gen. 129 (1987); 28 Comp. Gen. 476 (1949). Because agency operating appropriations are presumptively available to make necessary repairs, to credit such recoveries to the agency operating account would constitute an unlawful augmentation of the

agency's appropriation. Where the Congress has found it desirable to permit agency retention of money recovered from a private party or insurer representing liability for damage to government property, the Congress has provided the necessary authority by statute. 64 Comp. Gen. 431, 433 (1985); 22 Comp. Gen. 1133 (1943).

An exception to the rule that recoveries for damages must be deposited into the Treasury occurs when the party that is liable for negligently damaging government property (or its insurer) agrees or is compelled to make restitution by either replacing the damaged property "in kind" or arranging and making direct payment for its repair or replacement to the government's satisfaction. In such instances, there are no funds received for the use of the government that are required to be promptly deposited into the Treasury. 67 Comp. Gen. 510 (1988); see also B-87636, Aug. 4, 1949, and 14 Comp. Dec. 310 (1907).

In view of the plain language of the statute and the importance of its underlying purpose (i.e., to preserve congressional control of the appropriation power), the courts have broadly interpreted the term "money for the Government from any source" in determining whether money falls within the scope of the miscellaneous receipts statute. For example, in Scheduled Airlines Traffic Offices v. Department of Defense, supra, the United States Court of Appeals for the District of Columbia Circuit held that a Defense Construction Supply Center solicitation requirement that the contractor pay part of its monthly concession fees into a "Morale, Welfare, and Recreation" fund (a nonappropriated fund instrumentality) violated the miscellaneous receipts statute. The court concluded that concession fees were "money for the Government" within the plain meaning of the statute. The court noted that the proposed design would divert revenues from the Treasury to the morale fund and would create incentives for government officials to reduce the amount of funds that would be deposited into the Treasury.

Similarly, in Motor Coach Industries, Inc. v. Dole, 725 F.2d 958 (4th Cir. 1984) the court affirmed a district court's ruling that a trust comprised solely of fees contributed by private airlines and established at the urging of the Federal Aviation Administration (FAA) to purchase airport transport buses for Dulles airport was created with public funds. Finding that the FAA had engaged in an "end-run around normal appropriation channels" in order to divert funds from the United States Treasury and effectively to supplement its budget without congressional action, the court also affirmed the district court's order directing the FAA to deposit the trust's money into the Treasury. Id. at 967.

On at least two previous occasions our Office reviewed agency proposals that were similar but not identical to the plan proposed by MARAD here. The element that was common to each of the proposals was that money received from a private source would go directly to some entity other than the federal agency for use in a particular project. In each case, the agency asserted that the agency itself would never receive the money. Both agencies asked whether using money for a particular project rather than depositing the money into the Treasury would violate the express provisions of

the miscellaneous receipts statute. In the first case, the Commodity Futures Trading Commission wanted us to approve a plan that would allow the agency to settle litigation concerning violations of the Commodity Exchange Act by accepting the alleged violators' promises to make donations directly to educational institutions. In spite of the fact that the Commission argued that the donations were voluntary in nature and the government would not receive the money, we held that the Commission lacked authority to enact the plan, stating:

> "Penalties imposed under [the act] are collected by the Government and paid into the Treasury as miscellaneous receipts in accordance with 31 U.S.C. § 3302. The Commission may not circumvent the receipt of a penalty to accomplish a separate objective."

B-210210, Sept. 14, 1983.

In the second case, the Nuclear Regulatory Commission (NRC) proposed a similar plan that would permit licensees that had violated agency requirements to make contributions directly to universities or other nonprofit institutions to fund nuclear safety research projects in lieu of paying civil penalties to the agency. We held that the Commission was lacking authority to implement its alternative penalty arrangement, stating:

> "From an appropriations law perspective, such an interpretation [of the agency's enforcement authority under the Atomic Energy Act] would require us to infer that the Congress intended to allow the NRC to circumvent 31 U.S.C. § 3302 and the general rule against augmentation of appropriations. Section 3302(b) requires the NRC to deposit into the Treasury as miscellaneous receipts moneys collected under [the act]. . . . The purpose of section 3302(b) is to ensure that the Congress retains control of the public purse, and to effectuate Congress' constitutional authority to appropriate moneys."

70 Comp. Gen. 17, 19 (1990). We also stated our belief that the proposed arrangement would result in augmentation of the NRC's appropriations, allowing the NRC, in varying degrees, to circumvent the congressional appropriations process. Id.

Additionally, we once reviewed a Department of Commerce plan for collecting money from private parties that had damaged agency property that was similar to MARAD's proposal. Under the Commerce plan, money paid in restitution for damages would be held in special deposit accounts and would be paid to contractors making the necessary repair/replacements upon receipt of vouchers from them. We held that such collections would have to be deposited into the Treasury as miscellaneous receipts, and advised the agency that it would have to submit the matter to the Congress for specific authority if it desired to use money collected as proposed. A-24076, June 2, 1931.

As we understand the facts, neither the contractor nor its insurer was willing or able to make the necessary repairs/replacements in kind, or to contract directly with any other contractor(s) to make them, or to administer the MARAD-proposed escrow account. The contractor and its insurance company agreed to make a monetary payment to MARAD, and nothing more, to settle the litigation. We also understand that MARAD would like to deposit any money received in the future as restitution for damages into an escrow account from which contractors could be paid as they effect the repairs or replacements so as to avoid using its own appropriations to repair the damage. In such circumstances, the in-kind replacement exception to the general rule mandated by the miscellaneous receipts statute would not be applicable.

In essence, MARAD requests our endorsement of a plan whereby a contractor or its insurer could make restitution for damages by paying the agreed upon amount directly to a third-party who would hold the money in an escrow account. However, an agency cannot legally avoid the constraints imposed by the miscellaneous receipts statute by using an escrow account to hold money designated for repairs to buildings and replacement of equipment damaged by a contractor. In our view, because MARAD would effectively control the use and disposition of amounts held in the escrow account, the money so deposited would clearly be "money for the Government" within the plain meaning of the miscellaneous receipts statute in spite of the fact that MARAD would not receive the money directly. The proposed plan would divert revenues from the Treasury to the escrow account for MARAD's benefit and effectively allow MARAD improperly to supplement its budget without congressional action. See Scheduled Airlines Traffic Offices v. Department of Defense, supra; Motor Coach Industries, Inc. v. Dole, supra. If MARAD finds that it needs additional money to make necessary repairs, it must request the funds of the Congress as part of its budget request. Moreover, if MARAD still desires to implement the proposed escrow plan for holding collections pending repair/replacement work, MARAD should submit the plan to Congress for specific authority to do so. A-24076, supra.

Accordingly, consistent with the statute and the cases cited above, we conclude that MARAD must deposit any money it might receive from a contractor or its insurer as restitution for damages into the general fund of the Treasury.

Anthony H. Gamboa
General Counsel