



United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Architect of the Capitol—Contract Ratification

File: B-306353

Date: October 26, 2005

DIGEST

The Architect of the Capitol may use appropriated funds to pay a contractor for services rendered pursuant to an unauthorized commitment. The Architect of the Capitol's actions subsequent to learning of the unauthorized commitment constitutes a valid ratification. *See generally* B-259926, Mar. 31, 1995; B-251728.2, June 9, 1993.

DECISION

The Architect of the Capitol (AOC) has requested an advance decision under 31 U.S.C. § 3529 on whether it may use appropriated funds to pay a contractor for construction performed pursuant to directives issued without authority by an AOC employee. Because AOC validly ratified the unauthorized directives, it may use appropriated funds to pay the costs of the construction performed under those directives. *See generally* B-259926, Mar. 31, 1995; B-251728.2, June 9, 1993.

BACKGROUND

AOC is responsible for the maintenance and improvement of the U.S. Capitol Grounds. 40 U.S.C. § 5102. Pursuant to this responsibility, AOC is expanding the West Refrigeration Plant near the Capitol. The general contractor for this project is Hitt Contracting, Inc. (Hitt). Letter from Alan M. Hantman, Architect of the Capitol, to David Walker, Comptroller General of the United States, Sept. 19, 2005 (Hantman Letter). An AOC employee issued three directive letters to Hitt (directives) on March 30, 2004, January 25, 2005, and February 14, 2005, instructing Hitt to undertake work on the refrigeration plant project. The employee who issued the directives lacked the authority to do so. *Id.*

Hitt, believing the directive letters to be authorized, began the requested work. Telephone interview with Cynthia Bennett, Director of Procurement, AOC, Oct. 4, 2005 (Bennett Interview 1). Upon learning that the directives were unauthorized,

AOC suspended the work. *Id.* Subsequently, the senior project manager for the refrigeration plant project and the AOC Director of Procurement determined that the work begun under the unauthorized directives was necessary for the project and that funds were available for the work. Hantman Letter, Attachment 1. As a result, the Director of Procurement signed Contract Modification 36, which authorized the work begun under the directives to continue. *Id.* Hitt then resumed the work. Bennett Interview 1. On August 5, 2005, Hitt submitted an invoice for the work to AOC. Hantman Letter, Attachment 2.

AOC asks whether it may properly use appropriated funds to pay for the work performed by Hitt pursuant to the directives.

ANALYSIS

It is axiomatic that the United States cannot be bound beyond the actual authority conferred upon its agents by statute or regulation. B-212968, Apr. 10, 1984. Where, as here, a government agent purports to commit the government to a transaction he has no authority to enter, the government is not legally obligated to honor the transaction. B-209132, Oct. 3, 1983. Thus, the directives alone did not obligate AOC, because the individual who signed them lacked authority to bind the government. Bennett Interview 1.

Nevertheless, it has long been recognized that an authorized government official possessing knowledge of the facts may give effect to an unauthorized act of another government official by subsequently ratifying the action. *United States v. Beebe*, 180 U.S. 343 (1901). Traditionally, when an agency official, authorized to bind the agency in contract, knows of the relevant facts surrounding an unauthorized commitment and affirms that act, the agency then becomes bound as if the individual who made the original contract was authorized to do so. *Id.* at 354. *See also* 22 Comp. Gen. 1083 (1943); B-226248, May 13, 1987.

This traditional ratification rule has been modified in the federal arena by statute and regulation. The majority of government procurement actions are governed by title 48 of the Code of Federal Regulations, the Federal Acquisition Regulation (FAR). However, as a legislative branch agency, AOC is not subject to these rules. *See* 48 C.F.R. §§ 1.101 and 2.101 (2004); B-289867, Apr. 26, 2002; Bennett Interview 1. Nonetheless, AOC models its contracting and procurement practices after those in the FAR. Bennett Interview 1. Under both the traditional ratification rule and the FAR, which imposes more stringent ratification criteria than the traditional rule, AOC's actions constitute a ratification.¹

¹ In the past we have looked to the FAR for instruction regarding a ratification undertaken by a judicial branch agency, which likewise was not subject to the FAR. B-251728.2, June 9, 1993.

When AOC discovered the unauthorized commitments made by its employee, it quickly suspended the work being done by Hitt in order to ascertain the underlying facts. Bennett Interview 1. Having determined the scope of the work ordered by the directives² and the approximate cost involved, AOC's Director of Procurement, vested with contract authority, executed Contract Modification 36.³ *Id.* This modification served as a ratification of the directives under the traditional rule, because an authorized agent, knowing of the facts surrounding the unauthorized act, affirmed the unauthorized transaction.

Contract Modification 36 was also a valid ratification under the FAR. The FAR's requirements for ratification are found at 48 C.F.R. § 1.602-3(c). The FAR provides that an agency may ratify an unauthorized commitment when:

- (1) supplies or services have been provided to and accepted by the government or the government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;
- (2) the ratifying official could have granted authority to enter or could have entered into a contractual commitment at the time it was made and still has authority to do so;
- (3) the resulting contract would otherwise have been proper if made by an appropriate contracting officer;
- (4) the contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable;
- (5) the contracting officer recommends payment and legal counsel concurs in the recommendation, unless agency procedures expressly do not require such concurrence;
- (6) funds are available and were available at the time the unauthorized commitment was made; and
- (7) the ratification is in accordance with any other limitations prescribed under agency procedures.

² The work ordered by the directives was within the scope of the original contract. Hantman Letter, Attachment 1.

³ When AOC ordered Hitt to stop work, it told Hitt not to resume until a contract modification was signed authorizing resumption. Telephone interview with Cynthia Bennett, Director of Procurement, AOC, Oct. 5, 2005 (Bennett Interview 2). Thus, Contract Modification 36 was meant to serve the practical function of restarting work pursuant to prior instructions, as well as to act as a vehicle for ratification. *Id.*

AOC's actions subsequent to learning of the directives meet these criteria. *See generally* B-259926, Mar. 31, 1995; B-251728.2, June 9, 1993. First, by the time the unauthorized nature of the directives came to light, Hitt had made significant progress on the work requested by the directives. AOC's Director of Procurement later determined that such work was necessary and should be completed. Hantman Letter, Attachment 1. This constitutes acceptance by the government of the services provided under the directives. Second, the Director of Procurement at AOC, who signed Contract Modification 36, has authority to enter into the commitments contemplated by the directives. Bennett Interview 1. Third, but for the signatory's lack of authority, the directives would have been proper. *Id.* Fourth, the Director of Procurement determined the price to be fair and reasonable. *Id.* Fifth, the Director of Procurement recommended payment through execution of Contract Modification 36, and the AOC's General Counsel concurred. Hantman Letter, Attachment 1. Sixth, funds to pay for the work were available at the time the commitment was made. Bennett Interview 1. Finally, no other agency limitations exist to preclude ratification in these circumstances. Thus, AOC's actions subsequent to learning of the unauthorized nature of the directives constitute a ratification under the FAR as well.

CONCLUSION

AOC may use appropriated funds to pay the costs incurred under the directive letters, because Contract Modification 36 represents a valid ratification of the unauthorized commitments.

/signed/

Anthony H. Gamboa
General Counsel