



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: American Battle Monuments Commission—Contracting with Donated Funds for World War II Armed Forces Memorial

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DIGEST

Pub. L. No. 103-32 establishes a special fund in the Treasury to be available to the American Battle Monuments Commission for establishing World War II Memorial. The law also authorizes the Commission to accept private donations for the memorial and requires that the donations, along with other funds available for the memorial, be deposited in and invested by the Treasury. All such funds are considered appropriated funds. In contracting with these funds, including the donated funds, the Commission is required to follow the procedures prescribed by the Federal Property and Administrative Procedures Act and the Federal Acquisition Regulation otherwise applicable to federal contracting since neither Pub. L. No. 103-32 nor its legislative history indicate an intention that the Commission be exempt from such requirements. 68 Comp. Gen. 237 (1989), and B-211149, Dec. 12, 1985, distinguished.

DECISION

This responds to a request from the Secretary of the American Battle Monuments Commission asking whether the Commission must comply with the Federal Property and Administrative Services Act (FPASA) and the regulations implementing that statute when using donated funds to support contracts for the construction of a World War II Memorial pursuant to Pub. L. No. 103-32, 107 Stat. 90 (1993). As explained below, the Commission is required to comply with the FPASA and the implementing Federal Acquisition Regulation (FAR) in contracting for the memorial with donated funds.

Background

Sections 1(b) and (c) of Pub. L. No. 103-32 require the Commission to establish the World War II Memorial in compliance with 40 U.S.C. §§ 1001–1010, establishing standards for commemorative works in the District of Columbia, and to provide for accessibility by and accommodation for the physically handicapped. Section 3 of Pub. L. No. 103-32 authorizes the Commission to solicit and accept private

contributions for the memorial. This law does not refer to the FPASA or otherwise state the requirements applicable to Commission contracts for the memorial.

The Commission recognizes that when a federal entity expends both appropriated and donated funds to accomplish a statutory purpose, the expenditures from both sources ordinarily are viewed as appropriated fund expenditures subject to the statutes and regulations applicable to such expenditures, such as the FPASA. 68 Comp. Gen. 237, 238 (1989). The Commission points out, however, that in 68 Comp. Gen. 237, concerning the Christopher Columbus Quincentenary Jubilee Commission, and B-211149, Dec. 12, 1985, concerning the Holocaust Memorial Council, we concluded that the Columbus Commission and the Holocaust Council did not have to follow the FPASA and the FAR when financing their contracts with donated funds. The Commission asks whether it must comply with the FPASA and the FAR when contracting with funds donated under Pub. L. No. 103-32.

Analysis

The American Battle Monuments Commission, originally established in 1923, has various responsibilities related to the design, construction, and maintenance of military cemeteries and memorials, primarily outside the continental United States.¹ The Commission's request concerns the additional responsibilities Congress more recently assigned the Commission under Pub. L. No. 103-32 to establish a World War II Memorial in the District of Columbia or its environs. Section 3 of Pub. L. No. 103-32 provides that the Commission shall solicit and accept private contributions for the memorial. Section 4 creates a fund in the Treasury available to the Commission for the expenses of establishing the memorial. The private contributions, as well as surcharges paid to the Commission for the memorial under the World War II 50th Anniversary Commemorative Coins Act, are required to be deposited in the fund. In addition, section 4 requires the Secretary of the Treasury to invest any portion of the fund not required to meet current expenses in interest bearing obligations of the United States or obligations whose principal and interest are guaranteed by the United States, and to credit to the fund the interest on, and proceeds from the sale or redemption of such obligations.²

¹Act of March 3, 1923, ch. 283, 42 Stat. 1509, the current provisions of which are now codified in 36 U.S.C. ch. 8.

²Section 2 of Pub. L. No. 103-32 establishes an advisory board to assist the Commission with promoting the memorial, encouraging private donations, and advising on the site and design of the memorial. The advisory board has no control over expenditure of the funds.

The World War II 50th Anniversary Commemorative Coins Act, Pub. L. No. 102-414, 106 Stat. 2106 (1992), authorizes the Secretary of the Treasury to mint and issue commemorative coins, and sell such coins at prices intended to recover the costs of issuing the coins plus a surcharge. The Act directs that all amounts received from the sale of the commemorative coins be deposited in the Treasury's Coinage Profit Fund, 31 U.S.C. § 5111(b), and that the Secretary of the Treasury shall pay from that fund a specified portion of the surcharges derived from the sales of the coins to the American Battle Monuments Commission, to be used for the expenses of the World War II Memorial. Funds payable from the Coinage Profits Fund are considered appropriated funds. See 68 Comp. Gen. 583 (1989). See also, 57 Comp. Gen. 311 (1978), to the same effect concerning commissary sales surcharges.

Funds available to agencies are considered appropriated funds, regardless of their source, if they are made available for collection and expenditure pursuant to specific statutory authority. As discussed, the fund available for constructing the memorial consists not just of donated funds, but also consists of the surcharges from the coin sales transferred from the Coinage Profits Fund, and interest on and proceeds from the obligations in which the Secretary of the Treasury has invested funds not needed for current expenses. In a case similar to this one, where (1) the agency had statutory authority to accept donations for a specific purpose, (2) the donations were required to be deposited in a special trust fund account in the Treasury, and (3) the funds from that account were then available to be disbursed for the designated purpose, the funds were considered to be appropriated funds. The Liberty Consortium, B-215042, Apr. 12, 1985. In addition, as we recognized in the Columbus Commission and Holocaust Memorial decisions cited by the Commission, when a federal entity expends both appropriated and donated funds to accomplish a statutory purpose, the expenditures from both sources generally are viewed as appropriated fund expenditures subject to all statutes and regulations governing such expenditures. 68 Comp. Gen. 237, supra; and B-211149, Dec. 12, 1985, supra.

The procurement provisions of FPASA were established to "facilitate the procurement of property and services." 41 U.S.C. § 251. Section 252 of Title 41 provides that "Executive agencies shall make purchases and contracts for property and services in accordance with the provisions" of subchapter IV and the implementing regulations.³ In implementing the procurement provisions of FPASA,

³An "executive agency" for purposes of FPASA is "any executive department or independent establishment in the executive branch of the Government" 40 U.S.C. § 472. Section 252(a) of Title 41 excludes from the application of subchapter IV, (1) the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or (2) "when this subchapter is made inapplicable

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the FAR applies to all "acquisitions," except where expressly excluded, and it defines acquisitions as "the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease" 48 C.F.R. §§ 1.104 and 12.101.

The Commission cites no specific provision of law as excluding it from complying with the FPASA provisions in contracting for the World War II Memorial. Rather, the Commission asks whether it may be exempt for contracts funded by donated funds as was the Christopher Columbus Quincentenary Jubilee Commission and the Holocaust Memorial Council. As explained below, we believe that these two cases involved factors that clearly distinguish them from this case.

With respect to the Columbus Quincentenary Jubilee Commission, the act establishing the Columbus Commission explicitly provided that "Subject to such rules and regulations as may be adopted by the Commission, the Commission may . . . procure supplies, services, and property; make contracts; expend in furtherance of this act funds appropriated, donated or received in pursuance of contracts hereunder." We found nothing in the act nor its legislative history indicating that Congress intended for the Columbus Commission's separate and independent statutory authority to issue procurement rules and regulations to be constrained by the requirements of the FPASA or the FAR. 68 Comp. Gen. 237, 239. The legislation governing establishment of the World War II Memorial has no such provision.

In the case of the Holocaust Memorial Council, we considered the nature and purpose of the Council to be unique. Specifically, the Council's governing statute provided for the Council to pay all expenses related to constructing the Holocaust Museum with donated funds and explicitly provided that the donated funds were not appropriated funds. Further, the background and legislative history associated with the act establishing the Council convinced us Congress intended for the Council to be an entity significantly analogous to the Smithsonian Institution. Consistent with that intent, we concluded that, as in the case of the Smithsonian, the Council could expend its donated funds in accordance with the directives of its governing board, free of the strictures generally applicable to government funds, including the procurement requirements in the FPASA and the implementing FAR. B-211149, Dec. 12, 1985. In contrast, neither Pub. L. No. 103-32 nor its legislative history indicates that the Commission was to use donated funds for contracting

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pursuant to section 474 of Title 40 or any other law. . . ." The Commission falls within the definition of "executive agency" and is not among the agencies statutorily excluded.

under rules and regulations different from those applicable to federal agencies using appropriated funds.

The statute governing establishment of the World War II Memorial differs from those governing the Columbus Commission and the Holocaust Council in other important respects. The statutes establishing the Columbus Commission and the Council did not require that their donated funds be deposited in the Treasury, and the two entities were free to invest their donated funds in non-Treasury, interest-bearing accounts. This is not the case here. Pub. L. No. 103-32 requires that both donated funds and other funds available to the Commission for establishing the World War II Memorial be deposited in the special fund in the Treasury created for this purpose.

In summary, the legislation governing the Commission's establishing of the World War II Memorial does not contain the provisions found in the legislation governing the Columbus Commission that authorized adoption of procurement rules unconstrained by the FPASA and FAR. Also, unlike the legislation and legislative history applicable to the Holocaust Memorial Council, Pub. L. No. 103-32 and its legislative history does not establish that the Commission was to be analogous to the Smithsonian or otherwise have broad authority to expend its donated funds free of the strictures generally applicable a federal agency's use of government funds. In contrast, the specific statutory provisions requiring that the donated and other funds available to the Commission for the World War II Memorial be deposited in and invested by the Treasury support the conclusion that Congress did not intend that the Commission have the unconstrained authority available to the Columbus Commission and the Holocaust Memorial Council.

Accordingly, under the current statutory provisions, the Commission should comply with the requirements of the FPASA and its implementing regulations in the FAR when contracting with either donated or other funds available for the establishment of the World War II Memorial pursuant to Pub. L. No. 103-32.

/s/Robert P. Murphy
for Comptroller General
of the United States