COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

MAY 8 -

B-130515(3)

MAY 8 1969

Dear Mr. Wampler:

Reference is made to your letter of January 31, 1969, concerning protests against the construction of a building on the site of the Blue Ridge Job Corps Center in Marion, Virginia.

You state that the property on which the building will be built is being leased by the Brunswick Corporation, which has a contract with the Office of Economic Opportunity (OEO) to train Job Corps participants in medical and health services. It appears that the question being posed is whether the Brunswick Corporation can legally construct the proposed building under the terms of its contract with OEO. You advise that the protesting group took the matter up with the Town Council which upheld the Corporation's position that the proposed building is in accordance with the town ordinances and building regulations.

You request that we review the contract to see if Federal funds are set aside for this kind of improvement and to ascertain if the Corporation has taken an improper action.

Pertinent facts and circumstances concerning the matter, as disclosed by a report furnished us by OEO, are set forth below.

The Center is located in Marion, Virginia on what was once the campus of Marion College. The property consists of 3 1/2 acres of land on the town's main street, in a residential area. The facilities, at present, consist primarily of a building containing 47,500 square feet of floor space which was constructed in 1912 and has been added to subsequently. Before it was leased for the Job Corps Center the assessed value of the property was $225,000. The property is owned by the trustees of Marion College, a nonprofit corporation. It was leased from them by the Brunswick Corporation at $1,500 per month. The basic term of the lease was from July 1, 1967, to September 30, 1968, with options to extend for ten consecutive one-year periods under the same terms and conditions. The Office of Economic Opportunity has a right to assume the role of lessee if the Brunswick Corporation wishes to terminate its interest.

The Brunswick Corporation has agreed that in the event of the termination of the contract between OEO and Brunswick, Brunswick will make the United States Government the assignee of the lease, if desired. Thus, the United States has the optional right to use this property, including the new construction, until at least September 30,1978.

The subject structure will contain 8,000 square feet of floor space, in two stories, the upper to be of prefabricated steel construction. The contractor for the building is the BurWil Construction Co., Inc., of Bristol, Virginia and the contract price is $102,236. The intended use of the new building will be for recreation facilities, infirmary facilities, library and reading room, and additional classroom space.

The request by Brunswick to expand the Blue Ridge Center was originally made in April 1968. It was felt that there was a greater need, and demand, for the training they were giving at the Center than could be met by the existing capacity. A new building, enabling an expansion of living quarters, for training and for service facilities (e.g., library, infirmary), was required. It was determined that moving the entire Center (which would mean abandoning existing improvements) or purchasing fee title to the land were not alternatives available to the Job Corps. Nor were other suitable buildings available near the Center.

Various other means of acquiring a building were explored. The contractor and OEO attempted to have the lessor (Marian College) erect the building. Then OEO invited Brunswick Corporation to construct the building and to charge it appropriate rental and financing (interest) costs. Both of these avenues were ultimately rejected. Finally, OEO decided to have Brunswick put up the building at Federal expense.

OEO advises that the contract made by it with Brunswick enables the contractor to incur reasonable expenses (with a ceiling) in operating the Center; but that it requires Brunswick in major procurements to secure prior approval from OEO's contracting officer. Brunswick sought, and did obtain, the requisite approval for the construction of the new building in question.

Inasmuch as the contract involved permits major procurements (within the contract monetary ceiling) by Brunswick, provided Brunswick secures prior approval from OEO, and since such approval was obtained in the instant case, the construction of the building would not be in violation of the contract.

But it is also necessary to consider in connection with the matter the long-established rule that appropriated funds may not generally be used for the improvement of private property by an agency of the United States in the absence of express statutory authority therefor. This rule, however, is one of policy and not of positive law: consequently such improvements are not regarded to be prohibited in all cases. 40 U.S.C. 278a, which permits repairs, alterations, and improvements to rented property up to 25 percent of the first year's rent constitutes a limited exception to the rule. In addition we held in 42 Comp. Gen. 480, that (quoting from the syllabus):

> "The cost of permanent improvements to private property, an estimated 10 percent of the total sum to be expended under a Public Health Service cost-reimbursement contract for the experimental breeding of primates for cancer research by the National Institutes of Health, is a proper charge against appropriated fund, notwithstanding the general rule that in the absence of specific legislation appropriated funds may not be used for permanent improvement of private property, the rule being one of policy and not of positive law, and one which has not been applied where the improvements are incidental to and essential for the accomplishment of the purposes of the appropriations, the cost is reasonable, and the interests of the Government are fully protected: however, the facts and circumstances of each case must be considered, and in view of the fact that under the proposed contract the permanent improvements to the contractor's property are essential for the cancer research, the contractor is particularly well qualified to perform, and in a climate ideally suitable for the project, and the cost of the improvements is nominal in comparison with total costs, the contemplated improvements will not contravene the rule."

We are advised by OEO that it has long been aware of the above-cited rule, and that it has taken the position that notwithstanding section 602(h) of the Economic Opportunity Act, which gives OEO authority to repair, alter and improve buildings and space in buildings rented by OEO, without regard to any other provision of law, OEO has attempted to hew closely to the guidelines established in 40 U.S.C. 278a and the line of decisions of our Office concerning the making of Federally financed improvements on non-Federal real estate.

Accordingly, OEO's Procurement Division has been using the following formula in the case of leased property:

> "1. It first tries to ensure that improvement or rehabilitation on non-federal property is limited to 25 percent of the annual rental being paid for the property. See 40 USC, Section 278(a).
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> "2. Secondly, if improvements are being made which can be expected to inure to the benefit of the landlord, it seeks to reduce the cash rent by the amortized amount of the anticipated residual value of the improvements which will be left at the termination of the lease: or, alternatively, it seeks an arrangement wherein the landlord agrees to pay for that residual value upon termination of the lease.
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> "3. If the improvements are greater than the 25 percent annual rent, and the landlord refuses either to accept a reduction in cash rent or to agree to pay for residual value, we try to make sure that the expected value of the improvements, when amortized over the term of our use of the property and added to the cash rent, does not exceed 15 percent of the fair market value of the property. Cf., 21 Comp. Gen. 906. In short, we consider the amortization of the residual value of the improvement as 'constructive rent,' add it to cash rent, and attempt to come under the rental ceiling set out in 40 USC, Section 278(a).
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> "4. Finally, if none of the above conditions can be met, then it must be demonstrated that need for the facility is absolutely essential, and there is no other means of meeting that need."

According to OEO, in this particular case, it did its best to avoid incurring expense itself in acquiring the building, but was unsuccessful. It also sought from the landlord an agreement to reduce rent, or to pay for residual value, but again it was unsuccessful.

OEO's report continues:

"The assessed value of the property is $225,000. The cash rent is $18,000. The value of the building is roughly $100,000, and there is an additional $30,000 of other improvements being made on the land. We expect, through the use of options, to be able to use the land for ten years. A conservative estimated life of the improvement is 15 years. Thus, we anticipate leaving an estimated $50,000 in improvements to the landlord. This, amortized over a ten year period, means that we are giving the landlord an additional $5,000 'constructive rent' per year. That $5,000, when added to $18,000 is still well under 15% of fair market value (i.e., $225,000).

"In addition, you can see that the need for the additional facility was great and immediate. By putting it up, we increased the capacity of the Center from 130 to 170 girls, and our operating costs went up only marginally--from an estimated $1,021,870 to $1,124,870. This reduced the per enrollee unit cost substantially from $7,860 to $6,984."

OEO expresses the view that the construction of the building fell well within the scope of 42 Comp. Gen. 480.

In light of all the facts and circumstances, and particularly since OEO has the authority to repair, alter or improve buildings and space leased by it, without regard to any other provision of law, it is our view that in the instant case construction of the building in question need not be considered in contravention of the rule against the expenditure of appropriated funds for permanent improvements to private property.

Sincerely yours,

R. F. Keller

For the Comptroller General
of the United States

The Honorable William C. Wampler
House of Representatives