

B-157512-o.m., Sept. 1, 1972

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The Comptroller General

Henry Eschwege

Director, RED - Henry Eschwege

Request for legal assistance regarding various matters questioned by Senator Proxmire in connection with a transportation exposition at Dulles Airport

By letter dated May 12, 1972, Senator William Proxmire requested our Office to examine and report to him on a number of matters, including the possible misuse of appropriated monies for certain activities associated with the United States International Transportation Exposition (TRANSPO) held at Dulles International Airport from May 27, 1972, through June 4, 1972.

In 1969, the Congress authorized appropriations of \$750,000 for an international aeronautical exposition (Military Construction Authorization Act, 1970; Public Law 91-142 approved December 5, 1969). The scope of the exposition later was expanded to include all modes of transportation, and direct Federal funding was increased to \$5 million (Military Construction Authorization Act, 1971; Public Law 91-511, approved October 26, 1970, and the act of March 17, 1972; Public Law 92-252).

The Department estimated that TRANSPO would cost \$10.1 million and that the funds would be available from appropriations of \$5 million, estimated revenues of \$3.6 million, and reimbursements from the Department's constituent agencies of \$1.5 million. The estimated cost of \$10.1 million did not include the cost of various TRANSPO administrative support services furnished by other Federal and non-Federal sources.

The Senator's request (attachment 1) questioned the propriety of the Department's actions in the following cases and raised the issue of possible violations of law. Your decisions as to whether there were violations of law in these cases would be appreciated.

EXPENSES OF MR. WILLIAM J. BIRD

Mr. William J. Bird, a Vice-President of Kaiser Industries, served without compensation as the Secretary's Special Assistant for TRANSCO Development. He was appointed to the position on September 10, 1971. His travel expenses were reimbursed under a blanket fiscal year 1972 travel order which authorized first class airfare when necessary for the conduct of the trip, and under which he was considered in travel status when he was in Washington, D.C., performing his assignment.

Mr. Bird's usual practice was to return to his residence in Hillsborough, California, each weekend after working in Washington. First class air transportation was normally procured for Mr. Bird by use of a Government Transportation Request. His travel vouchers covering the period from August 25, 1971, through March 2, 1972, showed that he was in a travel status for 79 days. Some weeks he was in Washington only two or three days. He was reimbursed for actual travel expenses up to \$40 per day for the period August 25, 1971, through October 1, 1971. Beginning on October 11, 1971, Mr. Bird was reimbursed for actual travel expenses, excluding lodging, up to \$27 per day. Also, the Department usually provided Mr. Bird with chauffeur-driven ground transportation in and around the Washington area and to and from Dulles Airport.

Effective October 11, 1971, at the same time Mr. Bird's allowable expenses were reduced from \$40 a day, the Department leased room 409 at the Watergate Hotel as a meeting and conference facility for TRANSCO at a cost of \$854 per month. Billings from the Watergate and statements made by Department officials indicate that the room was occupied by Mr. Bird. Department officials advised us that it kept no records of meetings or conferences held in the Watergate room.

See attachment 2 for copies of the contract for the lease of room 409 and for selected paid vouchers. See attachment 3 for copies of Mr. Bird's authorization for travel, details on his air travel to March 1972, selected paid travel vouchers, and details on chauffeur-driven ground transportation services.

The Senator questioned whether the use of the Watergate room as a meeting and conference facility was sufficient to justify the expenditure involved, and whether the reimbursements to Mr. Bird of \$27 a day for subsistence (primarily for meals) was an improper use of Federal funds. The Senator questioned, also, whether the expense for weekly first class flights to the west coast was proper.

With regard to the expenses paid to or for Mr. Bird for accommodations, subsistence, and transportation, we would like your views as to whether we would have any legal basis for questioning these payments. Also, if the Department had wished, could it have

legally leased the Watergate room for the private use of Mr. Bird, without a justification that it would be used for other business related activities?

HARRY J. KRUSZ CONTRACT

Harry J. Krusz, TRANSPO's "Consulting Executive Director," worked under a contract for studies to identify management and operational problems confronting TRANSPO and to recommend corrective actions. This contract, for \$40,000, covered personal services and related travel expenses for the period January 3, 1972, through June 15, 1972.

His updated technical proposal covered the furnishing of services necessary to provide management direction and support for TRANSPO as well as preparing reports thereon. In his proposal he stated that he would be concerned with (a) carrying out all necessary tasks and functions required in developing and managing the exposition as well as ensuring necessary coordination with the Secretarial Special Assistant assigned to the project, and (b) upon completion of all tasks performed under the contract, preparing and submitting a detailed report setting forth the considerations involved in developing and managing an exposition of this nature. He proposed to perform work directed by W. J. Bird at a rate of \$25 per hour.

The contract provided for payment of \$34,100 on the basis of 10 reports to be submitted essentially at 2-week intervals. The balance of the contract (\$5,900) covered estimated travel expenses. The enabling legislation (Public Law 91-142) provided that temporary or intermittent services as authorized by section 3109(b) of title 5, United States Code could be obtained but at rates not to exceed \$100 per diem in the case of any individual.

All available information indicates that Mr. Krusz was paid solely for his personal efforts. He had no administrative or clerical personnel in his employ providing direct or indirect assistance to TRANSPO. Such services were provided by Government clerical personnel. It appears that Mr. Krusz devoted full time to directing TRANSPO beginning January 3, 1972. See attachment 4 for copies of the Krusz proposal, contract, and certain related paid vouchers.

The Senator questioned whether the contractual arrangement with H. J. Krusz was a subterfuge to pay him for consultant work at the rate greater than that permitted under the law. We would like your views as to whether we would have any legal basis for questioning the Department's contract with Mr. Krusz.

CONTRACT WITH HARGROVE DISPLAYS, INC.

TRANSPO awarded a contract to Hargrove Displays, Inc., to provide support services to TRANSPO exhibitors. Exhibitors were required by the terms of their lease to use only the services of Hargrove at Dulles. Hargrove provided all labor and services to load and unload material, move material to and from exhibitor locations, hookup and disconnect utilities, and remove, store, and return exhibitors' empty display crates, as well as all other labor and services required at the TRANSPO site. Hargrove is required to pay TRANSPO a commission based on a percentage of its billings to customers.

The Senator questioned the suitability of the clause in the contract requiring Hargrove to pay to the Federal Government a percentage of its billings. We would like your views as to whether there is any legal basis to question this feature of the Hargrove contract. See attachment 5 for pertinent details of the contract and related documents.

COMMISSION PAID CLAPP AND POLIAK, INC.

Clapp and Poliak, Inc., was the TRANSPO space sales contractor. Under the contract this firm was responsible for a variety of matters relating to exhibitor sales. For example, the contract required the firm to produce and distribute announcements, promotion sales materials, an exhibitor information booklet and technical manual, and to develop and conduct a series of briefing presentations. The contractor also handled a variety of matters at the site and provided certain advisory services to TRANSPO officials. The contractor received a commission based principally on a sliding scale percentage of total sales revenue. Revenues to TRANSPO from sales of space to exhibitors were estimated at \$1,585,000 and commissions to the contractor were estimated at \$454,000. As in the Hargrove Displays, Inc., contract, the Senator questioned the suitability of the commission clauses in the Clapp and Poliak contract. We would like your views as to whether there is any legal basis for questioning these clauses. See attachment 6 for copy of Clapp and Poliak contract.

BUS TRANSPORTATION SUBSIDY

Alan M. Vorhees Associates, Inc., under a cost reimbursement type contract, provided public mass transportation to and from the Dulles Airport site. Total estimated cost, including Vorhees' expenses and payments to bus companies was estimated at \$234,000. Vorhees' fixed fee was \$17,500. Fare collections from riders were estimated at \$150,000. The contract (see attachment 7) was entered into under the authority of section 709(7) of Public Law 91-142, which states that

"For the purpose of conducting the exposition, the President is authorized--

* * * *

(7) to enter and perform, with any person or body politic, contracts, leases, cooperative agreements, or other transactions on such terms as he may deem appropriate, without regard to the provisions of section 3709 of the Revised Statutes of the United States Code * * *"

The Senator questioned the Department's authority for providing the TRANSCO bus subsidy. We would like your views as to whether the legislation cited above by the Department grants such authority. If there is a question as to the adequacy of the cited legislation, does the Department have other authority to provide such transportation service?

ENVIRONMENTAL IMPACT

Section 102(2)(C) of the National Environmental Policy Act of 1969 (Public Law 91-190 approved January 1, 1970) requires Federal agencies to prepare detailed environmental statements on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.

In preparing the required statements, agencies are to consider:

- the environmental impact of the proposed action,
- any adverse environmental effects which cannot be avoided should the proposal be implemented,
- alternatives to the proposed action,
- the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official is required to consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.

Copies of the environmental statement and the comments and views of appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, are to be made available to the President, the Council on Environmental Quality (CEQ) and to the public as provided by section 552 of title 5, United States Code, and are to accompany the proposal through the agency review process. The CEQ's guidelines for Federal agencies' consideration of environmental impact were published in the Federal Register on April 23, 1971.

The law and related regulations are silent about proposed Federal actions which, in the agency's judgement, would not significantly affect the environment. Some agencies, including the Department, use documents resembling environmental statements, sometimes called negative declarations, to record agency judgements that statements are not warranted on certain actions.

The Special Assistant to the Secretary for TRANSPORTATION Development stated that the exposition was expected to have negligible impact on the environment because of its short duration and because of the consideration given to environmental factors in the project's planning.

The development of a negative impact statement was begun by the Department in late 1971. According to Department officials, CEQ's guidelines do not require negative statements to be circulated for comment outside the agency. In response to demands by environmental groups, DOT released to the public a negative declaration statement dated April 12, 1972, at which time the construction at the Dulles Airport site was substantially completed.

The Senator asked whether the Department's refusal to file an environmental impact statement was a violation of Federal law. The Senator's Legislative Assistant, informed us that the Senator was questioning specifically the legality of the Department's beginning of construction at Dulles Airport without having prepared an impact statement. See attachment 8 for copy of negative environmental impact statement.

We would like your views as to whether there is a legal basis to question the agency's action.

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We are available to discuss this request in more detail with your representatives and to obtain any additional information which may be required in consideration of the issues raised. Mr. Frank Matters is responsible for our audit work on this request. He may be reached on 118-61777.

Attachments - 8

1. Copy of May 12, 1972, letter from Senator Frossiere.
2. Copies of contract with Watergate Hotel and selected paid vouchers.
3. Copies of William J. Bird's authorization for travel, listing of air travel to March 1972, selected paid vouchers, and listing of chauffeur-driven ground transportation provided in the Washington area to March 1972.
4. Copies of Harry J. Krusk's proposal to provide consultant services, contract with Harry J. Krusk Company, and selected paid vouchers.
5. Copies of contract with Hargrove Displays, Inc., related proposal evaluation studies, pro forma lease for exhibitors, and Conditions of Participation.
6. Copy of contract with Clapp and Poliak, Inc.
7. Copy of contract with Alan M. Vorhees Associates, Inc.
8. Copy of negative environmental impact statement.

cc: Mr. Samuelsen, OCG
Control Desk (RED2-41)
Mr. Kelley

Indorsement

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Director, Resources and Economic Development Division

Returned. We have reviewed the legal matters raised in your submission concerning some of the questions raised by Senator William Proxmire in connection with the United States International Transportation Exposition (TRANSEPO) held at Dulles International Airport from May 27 through June 4, 1972, and our comments follow:

The International Aeronautical Exposition was authorized to be established and conducted by section 709 of the Military Construction Authorization Act of 1970, Pub. L. 91-142, dated December 5, 1969, 83 Stat. 317. Section 609 of the Military Construction Authorization Act of 1971, Pub. L. 91-511, October 26, 1970, 84 Stat. 1224, authorized the Exposition to be held in 1972 and increased the appropriations authorized in Pub. L. 91-142 from \$750,000 to \$3,000,000. The amounts of authorized appropriations were increased by the Act of March 17, 1972, Pub. L. 92-252, to \$5,000,000.

EXPENSES OF MR. WILLIAM J. BIRD

Concerning the "per diem" paid Mr. Bird, in addition to transportation expenses, 5 U.S.C. 5703 provides that an individual serving without pay or at a dollar a year may be reimbursed for the actual and necessary expenses of the trip, not to exceed the amount named in the travel authorization and not to exceed \$40 per day when the maximum per diem allowance would be much less than the actual expenses due to the unusual nature of the travel assignment. Whether to authorize travel on an actual expense basis is a matter for administrative determination. Accordingly, and since Mr. Bird's actual expense authorization was reduced from not to exceed \$40 per day to not to exceed \$27 per day as of the date housing accommodations were furnished Mr. Bird by the Government, we would have no legal basis for questioning the "per diem" payments made to Mr. Bird provided his actual daily expenses equaled or exceeded the amount of the "per diem" payment for such day.

Insofar as making a Government car available to Mr. Bird while he was in a travel status for travel which would otherwise be authorized at Government expense, that is a matter of administrative discretion and we would have no legal basis for questioning such determination.

As to the number of first class air trips made by Mr. Bird between his home in California and his place of employment in Washington, D.C., the record discloses that during the period August 25, 1971, through March 2, 1972, a period of approximately 155 days, Mr. Bird was in a travel status 79 days. It appears from the record that some weeks during the period in question he was in Washington only 2 or 3 days. Under 5 U.S.C. 5703(c) an individual serving without pay or at a \$1 a year may be allowed transportation expenses for travel between his home and duty station. The frequency of the trips allowed under circumstances such as here involved is a matter of administrative discretion and in the absence of a showing of abuse of such discretion, we are aware of no legal basis upon which this Office can question the agency's determination in this regard.

Concerning the leasing of the room in the Watergate Hotel in the District of Columbia for a conference and meeting room, section 709 of Public Law 91-142 authorized the President or his designee to (1) hold the exposition "at a location of his choice within the United States," (2) to acquire real property by lease, and (3) to enter with any person or body politic leases on such terms as he may deem appropriate. Thus, there was authority for the leasing of space if necessary to carry out the purposes of section 709, and whether the leasing of space was necessary is primarily a matter for determination by the President, or his designee, in this case the Secretary of Transportation. While the Department of Transportation kept no records of meetings or conferences held in the room in question, that does not necessarily mean that the room was not used for the stated purpose. Thus we are unable to state that the lease of the room in question was, as a matter of law, unreasonable or unjustified.

While 40 U.S.C. 34 prohibits the renting of property in the District of Columbia until a specific appropriation has been made for such purpose, section 210(h) of the Federal Property and Administrative Services Act of 1949, as added by Public Law 85-493 (approved July 2, 1958) 72 Stat. 294, 40 U.S.C. 490(h) together with its legislative history, may be considered as authorizing the Administrator of the General Services Administration to lease land in the District of Columbia (see page 1, House Report No. 1814, and pages 1, 2, and 3 of Senate Report No. 1146, 85th Congress, 2nd Session); and the Administrator may delegate such authority (40 U.S.C. 486(d) and (e)). Thus, the Administrator of GSA at the request of the President or his designee (or by delegation of authority, the Secretary of Transportation) could have leased the room

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at the Watergate Hotel for use as a meeting and conference room. While the lease in this case was not entered into by GSA, under the circumstances we see no useful purpose in raising a question at this time as to whether renting the space in question for the purposes in question was contrary to 40 U.S.C. 34.X

HARRY J. KRUSZ CONTRACT

Harry J. Krusz and Company entered into a contract to conduct studies to identify management and operational problems confronting TRANSPO and to recommend corrective action in periodic reports. The contract provided for payment of an estimated \$40,000--consisting of \$34,000 for payment on the basis of 10 reports to be submitted essentially at two-week intervals and \$5,900 covering estimated travel expenses--for specified services to be performed during the period of January 3, 1972, through June 15, 1972.

This contract was entered into on a negotiated basis pursuant to the authority of section 709(7) of the Military Construction Act of 1970, Pub. L. 91-142, which section provides, in pertinent part, that the President, or his authorized designee, is authorized to enter into contracts, and other types of arrangements, with any person and on such terms as he may deem appropriate and--as far as pertinent here--without regard to the provisions of 41 U.S.C. 5 (dealing with formal advertising).

In view of the nature of the work to be performed by the contractor under the contract we are unable to say that the contractual arrangement in question was a subterfuge to pay for consultant work at a rate greater than that permitted under section 709(2) of Pub. L. 91-142, for temporary or intermittent services; nor are we aware of any basis for questioning the legality of the subject contract in view of the broad authority contained in section 709(7) of such Public Law.

CONTRACTS WITH HARGROVE DISPLAYS INCORPORATED AND CLAPP AND POLIAK INCORPORATED

As to the provision in the Hargrove contract requiring Hargrove to pay the Government a percentage of its (Hargrove's) billings and the provision in the Clapp contract requiring the Government to pay Clapp a commission based on a sliding scale percentage of total sales revenue, in light of the broad authority provided by section 709(7) we would have no legal basis for questioning such contract provisions.

With respect to the question in the Senator's letter relating to the failure of the Department to use competitive bidding procedures in these and the other contracts discussed in this memorandum, we wish to point out that section 709(7) of Pub. L. 91-142 specifically provides that the President, or his designee, can enter into contracts for TRANSPO without regard to the provisions of 41 U.S.C. 5, the competitive bidding statute.

BUS TRANSPORTATION SUBSIDY

Appropriations authorized to carry out section 709 of Pub. L. 91-142 are available to pay for those goods and services which the Department determines to be necessary to carry out the purposes of that section. Having determined that special bus service to and from the TRANSPO site is necessary, appropriations available to the Department to pay the expenses of TRANSPO are clearly available to provide and subsidize such bus service. Moreover, the broad authority given to the Secretary pursuant to section 709(7) (to enter with any person contracts or other agreements on such terms as he deems appropriate) is clearly sufficient to permit him to enter into the subject contract. Accordingly, we are aware of no basis upon which to question the legality of this expenditure. Cf. 46 Comp. Gen. 616. ✓

ENVIRONMENTAL IMPACT

Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), Pub. L. 91-190, approved January 1, 1970, requires Federal agencies to prepare detailed environmental impact statements on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. Whether a proposed Federal action will significantly affect the quality of the human environment is primarily for determination by the head of the agency having major responsibility for the project. While agency determinations that particular action would not significantly affect the human environment have frequently been challenged in the courts, this Office would have no basis to object to such determinations unless they could clearly be shown to have been made arbitrarily or without a rational basis. In the instant situation, the Department has determined in its negative declaration of environmental impact dated April 12, 1972, that: "The Exposition is expected to have negligible impact on the environment because of short duration and the consideration of the environmental factors in planning." We cannot say that, as a matter of law, the Department's determination in this regard was unreasonable, and therefore we are aware of no legal basis to question the Agency's decision that ~~an~~ environmental impact statement was not required.

Having determined that a particular proposed Federal action would not significantly affect the quality of the human environment and therefore that it was not required to file an environmental statement with regard to that proposed action, an agency's responsibilities under section 102(2)(C) have been complied with. That is, the agency is required to take no further action after it determines that an environmental impact statement is not required with regard to particular proposed action. Of course, there is nothing to preclude an agency from filing a statement with respect to such proposed Federal actions.

We might further point out that NEPA does not require an agency to record in any particular form its judgment that a statement is not required with respect to a particular proposed action. Thus, while some agencies, including the Department of Transportation, use documents resembling environmental statements, sometimes called "negative declarations," to record agency judgments that statements are not required with regard to certain actions, such "negative declarations" are not required by law and need not be circulated for comment outside the agency in the same manner as environmental impact statements.

Since the Department has determined that TRANSPO would not significantly affect the quality of the human environment and since, as noted above, we have no basis for questioning this determination, we would have no legal basis for questioning the Department's actions in this regard.

WILLIAM SCULLAR

For Paul G. Dembling
General Counsel

Attachments