UNITED STATES GOVERNMENT GENERAL ACCOUNTING OFFICE

Memorandum

B-204730 - O.M.

July 26, 1982

Released

TO : Director, GS&C-OD - Richard Brown

FROM : For Acting General Counsel - Harry R. Van Cleve

SUBJECT: Proposed Block Rental of Hotel Space for GAO Headquarters Travel (B-204730-O.M.)

This will confirm several conversations between Joel Dwyer of your staff and Margie Armen of OGC on the subject of block rental of hotel rooms in the Washington, D. C. area for the use of traveling GAO employees. It is our understanding that, based on these preliminary informal discussions, OAPS has decided not to pursue the matter actively at this time. This memorandum will document our findings and, as you requested, elaborate on the several legal considerations which would be involved in such a plan, should you decide to attempt rental at a later time.

Our findings are as follows: 1) because of the restriction in 40 U.S.C. §34 (1976), any block rental of hotel rooms by Government agencies in the District of Columbia is prohibited. However, there is no restriction on such block rentals in either Maryland or Virginia. 2) GAO may be subject to liability relating to employee-caused property damage in GAO-rented rooms in either Maryland or Virginia, (which would not be the case if the employee rented the room himself and the Government reimbursed him). 3) There is no additional liability for personal injuries or damage to employees' property merely because they were using GAO-rented rooms, nor any financial liability to the hotel owner for employee debts. 4) Employees must be permitted to stay in any accommodations they choose without penalty or restriction, and therefore GAO may have to pay not only for unused contract rooms but also for the cost of alternative quarters selected by the employee. 5) The total combined costs of GAO headquarters travel may not exceed the established maximum of $75 per travel day which might greatly reduce the amount available for contract payments if employees choose other quarters instead. 6) GAO may not pay for non-subsistence items charged to GAO-rented rooms. 7) GAO may not pay any state or local sales taxes on bulk hotel room rentals.

Our understanding of your proposal is, briefly, that GAO would book in advance and on a guaranteed basis 600 hotel room nights per month, equally allocated on Sunday through Thursday nights (30 rooms per night). GAO would pay a stated monthly rate whether the rooms were actually occupied or not. GAO travel staff would handle reservations, and employees traveling to the Washington, D. C. area who did not stay in the GAO hotel would be asked to sign a statement that GAO rooms were not available. This, along with anticipated favorable "word of mouth" publicity among traveling employees, would be expected to ensure full occupancy.

The purpose of the bulk rental arrangement is twofold. First, with the large volume and consistent business offered by the arrangement, it is expected that significant savings could be achieved on the daily room charge, and second, GAO travelers would enjoy increased convenience in making travel arrangements and benefit from the savings by not having to devote more than the allocated amount of their subsistence allowance to obtaining hotel accommodations.

I. APPROPRIATIONS RESTRICTION BARS RENTAL IN D. C.

Congress intended to control strictly the acquisition of space for the use of the Government in the District of Columbia. To this end, 40 U.S.C. §34 (1976), provides

> "[n]o contract shall be made for the rent of any building or part of any building for the purposes of the Government in the District of Columbia until an appropriation therefor shall have been made in terms by the Congress***."

This means that specific statutory language authorizing the rental of space in the District of Columbia is necessary. Compare, for example, 2 Comp. Gen. 214 (1922), 11 Comp. Gen. 238 (1931) and B-195260, July 11, 1979. The General Services Administration (GSA) has been given statutory authority to procure all necessary space for the Government, including space in the District of Columbia. 40 U.S.C. §490 (1976).

Applying this appropriation restriction to hotels in the District, two distinct rules have evolved. If conference facilities alone, (i.e., meeting rooms and catering services) are procured, the restriction is not violated. 54 Comp. Gen. 1055 (1975) and 50 Comp. Gen. 610 (1971). On the other hand, if sleeping rooms (lodgings) are procured, we have held that the appropriation restriction bars rentals. 60 Comp. Gen. 181 (1981); 56 Comp. Gen. 572 (1977); 46 Comp. Gen. 379 (1966). We have also held that cost reimbursement arrangements for overnight accommodations

are improper. 49 Comp. Gen. 305 (1969). (However, we have allowed donated funds to be used for hotel room rentals in the District. 46 Comp. Gen. 379 (1966).)

Explaining our position in B-159633, May 20, 1974, we said,

> "[o]ur Office has held that the prohibition expressed in 40 U.S.C. § 34 against the execution of a contract for the rental of any building in the District of Columbia for governmental purposes until an appropriation has been made is comprehensive and applies to all uses whether temporary or permanent."

We relaxed our rule with respect to conference space only after GSA issued regulations allowing agencies to obtain the use of conference rooms under their own contracting procedures. The GSA regulation states that,

> "[p]ayment for use of privately-owned conference or meeting rooms is, in fact, payment for the services and furnishings that are provided."

41 C.F.R. (FPMR) §101-17.101-4 (1980). In other words, the rental of a conference room is not a rental of space, but a purchase of services such as chairs, a speaker's rostrum, amplification and audio-visual equipment. Accordingly, the regulation has designated conference room booking as a service contract rather than a lease.

In 54 Comp. Gen. 1055 (1975), where we examined this regulation for the first time, we limited its application to conference room facilities only, and did not extend the theory to cover hotel rooms used for overnight accommodations. See also, 56 Comp. Gen. 572 (1977). In the intervening years, GSA has not expanded its regulation and the GAO similarly has not extended its decisions. The result is that rental of hotel rooms in the District still may not be accomplished with the use of appropriated funds.

To overcome the prohibition in 40 U.S.C. §34, when GAO first decided to investigate bulk room rentals, OAPS requested from GSA a delegation of authority to lease space. GSA responded that its regulations did not prohibit obtaining rooms on a service contract basis. This prompted your question to our Office whether an agreement to rent hotel rooms could properly be called a service contract, or whether it must necessarily be a lease and hence barred.

In order for a legitimate service contract to exist, it would have to be assumed that GAO was actually paying for beds, closets, tv sets, and bathrooms, and not the space they occupy. We find this to be a

difficult analogy to sustain, especially because the private separate space of a hotel room is an integral part of the service furnished. The analogy is further complicated by the fact that the proposed agreement in this case is for a stated number of sleeping rooms on a regular basis (whether used or not) over several months for a stated monthly rate. This kind of agreement has all the earmarks of a lease or rental agreement, and the fact that different rooms may actually be used each night does not alter the basic character of the agreement itself.

Since we cannot fairly characterize the proposed agreement as a service contract and GSA did not delegate authority to enter into a lease (and noting that GAO lacks statutory authority to engage in space rentals on its own), we conclude that the rental of hotel rooms is prohibited in the District of Columbia. However, there is no such restriction in either Maryland or Virginia. If you wish to consider renting in either of those jurisdictions, the following information will be of interest.

II. LEGAL CONSIDERATIONS RELATING TO RENTALS IN MARYLAND OR VIRGINIA

A. Possible extra liability. (Findings 2 & 3)

A major consideration in deciding whether GAO should undertake to rent rooms on a block basis in either Maryland or Virginia is whether such an arrangement might subject GAO to potential liability to which it would not be subject if the rooms were rented by the individual traveler. Such liability falls into two broad categories: additional liability to GAO employees for personal injuries or for personal property loss and liability to the hotel owner for financial losses or property damage to the hotel. With regard to employee losses and hotel property damage, there is some potential additional liability for GAO.

1. Employee property loss

The Civilian and Military Employees Claims Act, 31 U.S.C. §§240 et seq. provides a remedy for employees who, without negligence on their part, sustain a personal property loss incident to official duties. Theft, damage or destruction of an employee's personal belongings, occurring without negligence on the employee's part while he was on official business might give rise to a claim for the cash value, repair, or replacement of the item(s). See GAO Order 0267.1. The employee would be covered whether he utilized GAO rented room or booked his own room and received per diem.

However, claims for stolen or destroyed currency are covered only if the employee was staying in Government-assigned quarters. (A later section of this memorandum establishes that contract rooms are "quarters", as that term is defined in chapter one of the Order.) Accordingly, GAO could be exposed to additional financial liability if an employee using the contract rooms had cash stolen or destroyed and filed a claim under GAO Order 0267.1 and 31 U.S.C. §241.

2. Damage to hotel property

Whenever the Government leases space, it expressly or impliedly agrees to return the leased premises in the same condition as at the start of the lease term, ordinary wear and tear excepted. A hotel owner renting rooms to GAO on a contract basis would have an enforceable legal right for property damages incurred due to our employees' willful or negligent damage to contract rooms. 25 Comp. Gen. 349 (1945) and 26 Comp. Gen. 585 (1947).

Although we could attempt to contract this responsibility away by adding an exculpatory clause to the contract, the inclusion of such a clause would undoubtedly drive up the contract price or cause otherwise desirable hotels to shy away from a contract with the GAO.

GAO would not be liable under its contract for employee-caused property damage in public areas of the hotel, such as the lobby or restaurants, because the warranty of good condition only applies to the rented premises. To recover for property damage to public areas of a hotel, the owner would have to take legal action under the Federal Tort Claims Act, 28 U.S.C. §2671, et seq. That Act provides that the Federal Government is liable for tortious acts of Federal employees while they are on official business to the same extent as a private employer would be under the particular state's laws. However, this does not constitute additional liability attributable to the renting of a block of rooms; it would exist, potentially, even if the employee were staying at a non-contract hotel.

3. Liability to employees for personal injuries

Regarding injuries to employees incurred on the hotel premises, it appears that in either Maryland or Virginia, the hotel keeper's duty to GAO guests would be the same as toward regular (paying) guests and GAO guests would have the same legal rights against the hotel keeper for negligence as if they were paying guests.

In Virginia, a hosteler makes an implied warranty of fitness of the premises. That warranty does not depend on any contractual relationship between the hosteler and the injured party, and a breach occurs whenever the furnishings or fixtures fail "without any reason apparent to the user." Schnitzer v. Nixon, 439 F.2d 940 (4th Cir. 1971). See also, VA Code §35-10. In Maryland, any member of the public using a hosteler's premises is considered a business invitee whom

> "[t]he owner must *** protect *** from injury caused by unreasonable risk which the invitee, by exercising ordinary care for his own safety, will not discover."

Apper v. Eastgate Assoc., 28 Md. App. 581, 347 A.2d 389 (Md. Sp. App. 1975), rev'd on other grounds, 276 Md. 698, 350 A.2d 665 (Md. Ap. 1976); Nalee, Inc. v. Jacobs, 228 Md. 525, 180 A.2d 677 (Md. App. 1962). In both jurisdictions, the person injured in a hotel is entitled to the same legal treatment whether he is a paying guest or not. Because GAO employees would be in exactly the same position regardless of the fact that GAO pays for their accommodations, it seems unlikely that any additional liability would ever be imposed on GAO.

Another question arises as to an injured employee's right to seek compensation from GAO for injuries sustained in a GAO-rented hotel room. The exclusive remedy against the Government by its employees injured in the performance of duty is the Federal Employees' Compensation Act, 5 U.S.C. §8101 et seq. This Act covers injuries sustained while on official travel and would apply to the same extent whether an employee was staying in a Government-provided room or in any other accommodations. Thus, GAO's liability to its employees for accidental injuries would remain the same whether or not a rental agreement existed.

4. Liability to hotel owner for employee's bad checks

GAO would not be responsible to a hotel owner for financial losses caused by a GAO guest's dishonored check or bad credit. GAO's contractual obligation would be to pay the basic room rental only. In the event of such financial losses no tort or contract action could be maintained against GAO. The hotel owner would have to resort to legal action against the employee, based on the check or on an actual or implied contract of the employee to pay for service provided by the hotel, other than the basic room rent which was paid by GAO. In our opinion, GAO could not legally agree to indemnify a hotel owner for such financial losses nor could it guarantee an employee's credit, whether or not the items which were purchased by the employee from the hotel are reimbursable by the Government as travel expenses. There would be no privity between the Government and the hotel except for the costs of the room rentals.

B. Employees free to refuse to stay in contract hotel rooms. (Findings 4 & 5)

In 60 Comp. Gen. 181 (1981) we examined financial issues related to lodgings procured by contract and arrived at some conclusions which are relevant to this case. First, hotel rooms booked by GAO would be considered Government-furnished quarters, and employees may not be required to use them. Second, the total combined expenses of travel during the contract term may not exceed the established maximum of $75 per day in the Washington, D. C. area. These conclusions may have a significant bearing on the determination of whether block rental of hotel rooms is in fact more economical and beneficial to employees.

Under 5 U.S.C. §5911(e) (1976), employees may not be required to stay in Government-furnished quarters unless it is necessary to the accomplishment of the mission. "Necessity" does not exist merely because the agency is short of travel funds and contract lodgings offer a savings. B-192714-O.M., March 2, 1979. A plausible administrative determination of necessity (such as the benefits to be gained by having employees in a training course stay at the same place to enhance the interchange of ideas, etc.) must be made in advance and communicated clearly to the employees. Id.

Assuming that no finding of necessity is made, employees must be permitted to stay where they choose without any penalty or coercion. In this regard, we have held that allowing the full per diem when Government quarters are not available and a reduced per diem when they are, amounts to improper economic coercion. B-170618, October 15, 1970. As an extension of that principle, we held that an employee whose travel orders authorized a reduced per diem based on the expected use of Government quarters, need not prove that Government-furnished quarters were unavailable in order to qualify for the full per diem when he elected to use other commercial lodgings. B-175445-O.M., May 15, 1972. These two decisions, then, would not permit you to ensure full occupancy by requiring GAO travelers who stayed elsewhere than at the GAO contract hotel to sign a statement that contract rooms were unavailable. See also 44 Comp. Gen. 626, 633 (1965). A GAO employee would be entitled to the otherwise proper amount of reimbursement if he chose to stay in other lodgings. If this happened when GAO contract rooms were available but not chosen, the cost to GAO might be up to $75.00 (or whatever the current maximum rate might be) plus the cost of the unused room.

This brings us to the second matter dealt with in 60 Comp. Gen. 181: the observance of the established ceiling for travel expenses. We held in the cited decision that the total combined cost to an agency for all contract-type travel may not exceed the established maximum. For GAO headquarters travel that would be $75.00 per travel day in

the Washington, D. C. area (i.e., Montgomery and Prince Georges counties Maryland, and all the border counties in Virginia.) Assuming that GAO Order 0300.1 (Change 24, p. III-19) would apply, GAO headquarters travelers using contract accommodations would receive $28.00 per day for meals and other necessary subsistence items. In our 60 Comp. Gen. decision, we said that in actual subsistence areas, expenses for contract hotel accommodations would not be reimbursed, but we did not mean that the difference between the cost of contract and individually obtained lodgings (that is, the potential savings which could be achieved) would then become available to the traveler as additional subsistence funds.

Subtracting $28.00 from the maximum $75.00, we find that GAO may spend no more than $47.00 per night on contract lodgings. In our opinion, this must also include all the "overhead" costs related to the contract — any consideration paid to the hotel owner, the cumulated cost of unused rooms, the extra costs associated with "double pay" situations where employees stay in other commercial accommodations, and the extra processing costs incurred by GAO's travel office. A reasonable overhead factor would have to be added to the actual contract cost per room night, and the total could not exceed $47.00 per night. This suggests that the actual amount available to obligate by contract for a block of hotel rooms might be even less than $47 per night. At today's prices, the likelihood of obtaining desirable quarters in these high cost areas at much less than $47 per night is not great, which further compounds the problem.

An agency freeze on travel for budgetary reasons, or a trend among GAO employees not to use the GAO-provided lodgings, or a miscalculation of the distribution of travel nights, too few rooms available on peak nights (Monday through Wednesday) and too many rooms on shank nights (Sunday and Thursday), could quickly reduce the potential savings as well and even exceed the established maximum.

We further suggested in 60 Comp. Gen. that if the total combined expense limits were exceeded, an agency would have no choice but to require employees to return travel funds. We need not comment on the employee relations implications of such an event other than to say that any employee goodwill earned by the convenience or the expected savings to employees would quickly evaporate.

C. Government cannot contract for non-subsistence items.

The Government cannot pay by contract for non-subsistence items. 60 Comp. Gen. 181. This leads to some complicated bookkeeping arrangements. The most reliable way of insuring that such items are not inadvertently included in charges would be for GAO to pay only for the basic room rent. On arrival, GAO employees would have to register as guests

of the hotel, and the hotel owner would have to maintain a separate account for all additional services provided to GAO guests. Such services would include telephone calls, tv movies, room service, in-house restaurant meals, laundry, etc., which can under normal circumstances be charged to the guest room. Some of these items would be reimbursable, others would not. In either event, the employee would have to pay these items from personal funds and submit a travel voucher for those expenses which are reimbursable under the normal procedures.

The fact of registration and the creation of a room folio for each GAO guest would create an actual or implied contract between the employee and the hotel owner to pay for the services rendered, over and above the basic room charge. This would insure the continuation of a normal hotel/guest legal relationship with all the rights and remedies discussed above. If more were needed to perfect the hotel/guest relationship, it would be up to the hotel owner to take whatever steps were required under the particular state's laws to ensure his status and the availability of hosteler's remedies.

D. GAO's contract cannot include the payment of tax on rooms rented.

It is an established principle that sales, use, license and other taxes may not be applied to purchases made directly by the Federal Government. In the usual travel situation, an employee traveling on official business who is required to pay a state or local tax on hotel accommodations may be reimbursed for the tax as a travel expense. B-172621-O.M., August 10, 1976. This is because the legal incidence of the tax is on the employee and not directly on the Government. However, if GAO should undertake to rent the room directly, the transaction should be tax exempt. 55 Comp. Gen. 1278 (1976).

An alternative option would be the standard Government contract language that the offeror's price includes all applicable taxes. 52 Comp. Gen. 63 (1973). This option would be somewhat less desirable, as it would result in a higher price for the rooms.

III. CONCLUSIONS

As you have seen, there are many legal and practical considerations which would affect a contract arrangement for hotel accommodations. While such an arrangement would not be precluded on legal grounds, we think the decision not to actively pursue a contract arrangement at this time was wise, given the potential administrative and financial complications of such an arrangement. If you should elect at some future time to reactivate the proposal within the legal framework explained in this memorandum, we will be happy to offer our continued legal assistance.