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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

29886

**FILE:** B-214810

**DATE:** November 29, 1984

**MATTER OF:** Department of Agriculture Graduate  
School -- Interagency orders for training

**DIGEST:**

✓ Graduate School of Department of Agriculture, as a non-appropriated fund instrumentality (NAFI), is not a proper recipient of "interagency" orders from Government agencies for training services pursuant to the Economy Act, 31 U.S.C. § 1535, or the Government Employees Training Act, 5 U.S.C. § 4104 (1982). Interagency agreements are not proper vehicles for transactions between NAFIs and Government agencies.

✓ This is in response to a request from the Secretary of Agriculture for a decision regarding the propriety of "interagency agreements" under which the Graduate School of the Department of Agriculture provides education or training services to Federal agencies on a reimbursable basis. As authority for these agreements, the Secretary cites provisions of the Economy Act, 31 U.S.C. § 1535, and the Government Employees Training Act, 5 U.S.C. § 4104 (1982). As set forth below, we conclude that neither of these statutes constitutes authority for the agreements in question.

The Graduate School of the U.S. Department of Agriculture conducts academic courses and training programs in a large number of disciplines, ranging from Arts and Humanities to Secretarial Studies. The Graduate School is a non-profit organization under the general supervision of the Department of Agriculture. The Secretary of Agriculture appoints a General Administration Board of 15 members (more than half of whom are Department of Agriculture officials,) which functions similarly to a university board of trustees. ✓ The Graduate School receives no appropriated funds, but rather operates with funds derived from student fees and revenue from training services. Full time employees of the Graduate School are not Federal employees for purposes of the Federal employment laws. Most of the instruction is conducted by independent contractors.

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✓It is the position of the Secretary that the Graduate School constitutes a non-appropriated fund instrumentality (NAFI) of the Department of Agriculture. NAFIs encompass a wide range of activities and resist a general definition. They share common characteristics in that they are associated with governmental entities, and, to some extent, are controlled by and operated for the benefit of those Government entities. However, the essence of a NAFI is that it is operated with the proceeds of its activities, rather than with appropriated funds. ✓For purposes of this decision, we agree with the Secretary's opinion that the Graduate School constitutes a NAFI.

As indicated above, the Department of Agriculture cites the Economy Act, 31 U.S.C. § 1535, and the Government Employees Training Act, 5 U.S.C. § 4104 (1982) as authority for the "interagency agreements" here under review. These two statutes, although not interchangeable, are substantially similar in some respects. The first statute authorizes reimbursable orders for goods or services between agencies or major organizational units within agencies. The second statute authorizes reimbursable agreements between agencies for training services.

✓This Office consistently has taken the position that interagency or intra-agency agreements are not appropriate vehicles for transactions between NAFIs and Government agencies. We conclude that this position is valid whether the transaction in question is purportedly based on the Economy Act or on the Training Act.

The leading case in this area is 58 Comp. Gen 94 (1978), wherein we considered the propriety of procurement of services and merchandise by the Army from Army-related NAFIs through the use of "intra-Army orders." In that decision, we observed:

"Although the NAFIs are recognized as being Government activities, they differ significantly from other Governmental activities, particularly with respect to budgetary and appropriation requirements.

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"We believe that it is these differences, rather than the status of NAFIs as Government instrumentalities, which must be controlling here. In all three cases, what

is involved is the transfer of moneys from the Army's appropriation accounts to the accounts of the NAFIs over which there is no direct control either by the Congress (through the appropriation process) or this Office (through the account settlement authority of 31 U.S.C. 71, 74 (1970)). Thus, for all practical purposes from an appropriation and procurement standpoint, the obtaining of goods and services from a NAFI is tantamount to obtaining them from non-Governmental, commercial sources." 58 Comp. Gen. at 97-98

✓ Accordingly, because "obtaining goods and services from a NAFI is tantamount to obtaining them from non-governmental commercial sources," a regular purchase order rather than an intra-agency or interagency order should be used when services are furnished by a NAFI to an appropriated fund activity. 58 Comp. Gen. at 98-99. See also B-199533, August 25, 1980 (Army acted improperly in purchasing services from NAFI without contract or regular purchase order processed through contracting official); B-192859, April 17, 1979 (disposition form, amounting to inter-office memorandum, is not proper vehicle for transaction between NAFI and Army).

✓ We have recognized that sole source procurement through a NAFI may be permissible in certain circumstances such as when there are "organizational or functional reasons which dictate the impracticability of having services furnished by other than a NAFI" or when only a NAFI can provide goods and services in "extreme exigency situations." 58 Comp. Gen. at 98. However, where such procurements are justified, "appropriate sole-source justifications" and the use of regular purchase orders are required. 58 Comp. Gen. at 98-99. See B-148581, et al., September 2, 1980 (fact that NAFI had regular supply channel and established transportation and warehouse system for items to be procured was not itself sufficient to justify sole-source procurement). Additionally, of course, a NAFI may compete in, and be awarded a contract under a competitive procurement unless otherwise precluded by its charter from doing so.

✓ The Department of Agriculture cites 37 Comp. Gen. 16 (1957) in support of its position that the Graduate School is a proper recipient of an "interagency" order. In that decision we considered a protest by a disappointed bidder on a contract for laundry service ultimately awarded to a NAFI. The contracting officer had solicited bids from

commercial services, but then procured the services from a NAFI on the basis of a cost comparison. We decided to take no action on the protest. However, we did state our view that "it would be solely a matter of administrative discretion as to whether or not to procure the work or service from another Government agency or instrumentality when determined that its prices are lower than all bids received in response to a formal advertisement." 37 Comp. Gen. at 18-19. ✓

The decision in 37 Comp. Gen. 16 concerned the propriety of the contracting officer's rejection of the submitted commercial bids. The decision did not reach the issue of whether the procurement from the NAFI was proper, and whether, if proper, such procurement could be done by interagency agreement. Accordingly, to the extent our language in 37 Comp. Gen. 16 suggests a different result than our holding in 58 Comp. Gen. 94 (1978) and similar cases, discussed above, it should not be followed.

Further, the Department of Agriculture contends that 58 Comp. Gen. 94 can be distinguished from the instant case. The Secretary specifically points to language in that decision where we observed:

"This does not mean that Defense Department NAFIs must now compete with regular commercial contracting services. NAFIs exist to help foster the morale and welfare of military personnel and their dependents. DOD Directive 1330.2; Army Regulation 230-1. Providing regular Defense Department operating activities with goods or services is not directly related to that purpose. This is particularly so with respect to the resale NAFIs such as the exchanges, which operate for the purpose of selling goods and services primarily to military personnel and dependents; they are not expected to sell to the 'Government' itself. Thus, as a general proposition, we would view the sale of goods and services by NAFIs to regular Governmental operating activities to be outside the scope of the NAFIs' proper functions. Accordingly, as a general rule there should be no competition between NAFIs and commercial sources simply because NAFIs are not in the business of supplying the Government with its procurement needs." 58 Comp. Gen. at 98.

Agriculture infers from this paragraph that the "principle factor leading to the conclusions [of 58 Comp. Gen. 94] is the fact that the sale of goods and services to regular Governmental operating activities is outside the scope of the authorized activities of the Defense non-appropriated fund instrumentalities." On the other hand, the Secretary observes, the mission of the Graduate School specifically includes cooperation with other agencies. Accordingly, he concludes that the rationale of 58 Comp. Gen. 94 is not applicable in the instant case.

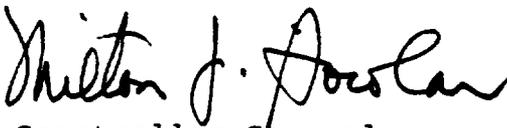
The analysis quoted above regarding the "scope of the NAFIs' proper functions" was not the basis of our conclusion that interagency agreements are not proper vehicles for transactions between NAFIs and Government agencies. That conclusion was based on several critical differences between NAFIs and Government agencies, including coverage under the procurement and appropriation laws. 58 Comp. Gen. at 98. The analysis regarding the "scope of the NAFIs proper function" was merely an observation that, although military NAFIs for some purposes were not required to compete with commercial enterprises, it seldom would be appropriate for a Government agency to purchase goods and services from Defense NAFIs, by any procurement method, "because NAFIs are not in the business of supplying the Government with its procurement needs." 57 Comp. Gen. at 98.

We agree with the Secretary that this analysis would not be fully applicable in the instant case, given the wide range of activities of the Graduate School. However, our agreement in this regard, indicates that it is more likely that the Graduate School would be an appropriate recipient of a sole source or competitive procurement contract. It does not affect our conclusion that the Graduate School, as a NAIFI, is not a proper recipient of an interagency order.

Finally, Agriculture has included in its submission an internal Civil Service Commission memorandum dated December 13, 1978. The memorandum concludes that there is "no legal impediment to designation of DOA [Agriculture] as the lead agency for Federal interagency training of auditors" under the Economy Act or the Training Act. Further, it concludes that there is "no legal problem with the assignment by DOA of the training responsibility to the Graduate School." However, this memorandum is not helpful to DOA's position in this case. As the memorandum correctly

✓points out, the "issue of whether the [training] may be assigned to the Graduate School through DOA under section 601 of the Economy Act without going through contracting-out procedures is subject to the supervening authority of GAO to determine." In exercising this authority, we have determined that training may not be obtained from the Graduate School by interagency order either under the Economy Act or under the Training Act.

✓Accordingly, it is our conclusion that neither the Economy Act, 31 U.S.C. § 1534, nor the Government Employees Training Act, 5 U.S.C. § 4104 (1982), constitutes authority for the Graduate School to enter into "interagency agreements" with Federal agencies. However, in view of the long-standing uncertainty in this area of the law, this decision should be applied prospectively only, and the termination of agreements now in effect will not be required.

*for*   
Comptroller General  
of the United States