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The Honorable John D. Dingell
Chairman, Subcommittee on Energy
and Power
Committee on Interstate and Foreign
Commerce
House of Representatives

Dear Mr. Chairman:

Reference is made to your letter of December 6, 1976, supplementing a previous letter dated November 5, 1976, concerning the partial relocation of the Federal Energy Administration (FEA) to the Buzzard Point building, which has been leased by the General Services Administration (GSA) in Southwest Washington, D.C. In your December 6 letter, you requested our opinion as to the validity of GSA's lease of the Buzzard Point building and our comments on a GSA economic analysis of various alternatives for using the Buzzard Point building.

As agreed with your Subcommittee staff, our response is divided into two reports. This letter deals with the validity of GSA's lease of the Buzzard Point building. Our comments on GSA's economic analysis of various alternatives for using the Buzzard Point building are in a separate report.

BACKGROUND

On March 24, 1974, the Securities and Exchange Commission (SEC) requested that GSA provide 434,771 square feet of space for the expansion and consolidation of SEC's headquarters and Washington regional offices. At that time, part of SEC's offices were at 500 North Capitol Street, NW., Washington, D.C., under a lease which was scheduled to expire in April 1976.

GSA determined that there was no space in its inventory which would satisfy SEC's request, and, therefore, in accordance with section 7(a) of the Public Buildings Act of 1959, as amended, 40 U.S.C. §606(a) (Supp. V, 1975), submitted a prospectus for a proposed SEC lease to the House and Senate Committees on Public Works. The prospectus, dated August 2, 1974, stated in part:

> "This prospectus proposes the acquisition of about 403,000 occupiable square feet of space, which includes space for the parking of 271 vehicles in a building(s) in Washington, D.C. The space will house the consolidated operations of the Securities and Exchange Commission (SEC). The proposed leasehold(s) will be for a period not to exceed twenty (20) years at a total estimated annual cost of about $2,471,500. Additionally, the lease(s) will contain escalation clauses providing for adjustments in the annual rental rate based on tax and operating cost increases (or decreases)." (Emphasis added.)

By Committee Resolutions dated October 10, 1974, the House and Senate Committees on Public Works approved the acquisition by lease of approximately 460,000 square feet of office and parking space in Washington, D.C., at an estimated annual cost of $2.8 million "to house the consolidated operations of the Securities and Exchange Commission." The Resolutions restricted the lease to a 5-year term, with a possibility of renewal options, rather than the 20-year term requested by GSA. In a letter to the Administrator of GSA dated October 11, 1974, Senators Jennings Randolph and Howard H. Baker, Jr., the Chairman and the Ranking Minority Member of the Senate Public Works Committee, gave the following explanation of the Committee's action:

> "It was with reluctance that the Committee approved the two leases for additional office space in Washington, D.C. This Committee has long recognized that leasing is not normally in the best interest of the nation or the taxpayers. While we recognize that a need exists to consolidate the offices of the Federal Energy Administration and the Securities and Exchange Commission, the Committee agreed to approve these leases for a term of five years, with a provision for additional five-year options.

"We anticipate that the General Services Administration will use this time to plan and develop Federally owned space that these and other agencies can use as permanent headquarters.

"It is the Committee's position that the Federal Government should lease space under three conditions only: as a temporary measure, to meet special emergencies, or in special situations involving special uses. Long-term leasing should not be used by GSA for the acquisition of general office space. The Committee intends to base its future actions on prospectuses on this position."

On December 9, 1974, GSA issued Solicitation for Offers (SFO) No. 697 to procure either 460,000 square feet of space in Washington, D.C., for full consolidation of SEC or 263,000 square feet of space within six blocks of 500 North Capitol Street, NW., for partial consolidation of SEC. The solicitation had SEC's concurrence.

To generate competition, the SFO was later amended on January 31, 1975, to extend the delivery date for the space from July 1975 to July 1976. GSA notified SEC of the extension as follows in a letter dated January 27, 1975:

"We have received only a single offer [for a building at 400 North Capitol Street, NW.] in response to solicitation #697 for the total consolidation of the SEC in one building. This offer is exorbitant. Therefore, we have determined that it is in the best interests of the government to amend solicitation #697 so as to provide for a delivery date of July 1, 1976, thereby assuring more competition and a favorable rental rate."

On February 6, 1975, the Chairman of SEC sent a letter to the Administrator of GSA expressing his "grave concern over the space problems of the SEC and the current status of GSA's

efforts to resolve them." The Chairman also questioned the decision to extend the delivery date for the space to be leased for SEC.

By letter of February 27, 1975, the Administrator of GSA defended the delivery date extension as being in the best interests of the Government. The Administrator further said that the Acting Regional Administrator, Region 3, would meet the Chairman of SEC at the Chairman's convenience to discuss SEC's consolidation.

On March 20, 1975, the Chairman of SEC wrote another letter to the Administrator of GSA expressing concern about the procurement. In a letter dated April 2, 1975, the Administrator of GSA advised that the negotiations for the space would conclude by April 4, 1975. The letter added:

> "We will submit an offer to you by April 10 1/ and, based on your approval, you can be assured we will select the best and most satisfactory offer to meet SEC's requirements. If SEC concurs in our selection, we will then make an award to the successful offeror, with whom we will develop a schedule for the completion of his building, and submit a copy of the schedule to you." (Emphasis added.)

On March 24, 1975, the Special Assistant to the Commissioner for National Capital Area Affairs, Public Buildings Service (PBS), GSA, spoke to officials of the National Capital Planning Commission (NCPC) and the District of Columbia Government regarding development plans for Southwest Washington, D.C., and whether the proposed Buzzard Point building, which at that time had not been constructed, would be consistent with those plans. By letter of April 3, 1975, NCPC responded in part:

1/ The date for "best and final" offers in response to SFO No. 697 was later extended to May 30, 1975.

"The Comprehensive Plan for the National Capital designates Square 666 [the site of the proposed Buzzard Point building] as part of the National Open Space System. Objectives of Comprehensive Plan policies related to the National Open Space System are to expand the inventory of existing open space in public ownership and particularly to have all waterfront properties along the Potomac and Anacostia Rivers within the District of Columbia as a part of the National Open Space System under the jurisdiction of the National Park Service. Square 666 is currently zoned M which in addition to manufacturing uses permits office uses. However, office use at this location is highly inappropriate and contrary to previously adopted planning policies as well as to more detailed policies being formulated at this time.

* * * * *

"It is strongly recommended that the General Services Administration not enter into an agreement leasing office space in a building proposed to be constructed in Square 666." (Emphasis added.)

In a May 2, 1975, memorandum from the Director of the Space Management Division of Region 3, GSA, it was recommended to the Acting Assistant Commissioner, Office of Operating Programs, GSA, that SFO No. 697 be cancelled and that GSA readvertise for space in order to effect the consolidation of SEC. The memorandum lists the following "major procurement problems * * * which make questionable the advisability of awarding a lease contract based on this SFO":

"1. One offer [for a building at 400 North Capitol Street, NW.] greatly exceeds the monetary limitations set forth in the Congressionally approved Prospectus.

"2. The financial capability of one offeror [for a building at Union Center Plaza] is dubious.

"3. One offeror [for the Buzzard Point building] faces strong opposition from local and governmental planning authorities.

"4. We have strong indications that conversations regarding this acquisition have taken place between two potential lessors. Subsequent to these alleged conversations, the higher lessor has revised his offer and is now the low bidder.

"5. The administrative aspects of this procurement have delayed the award date to the point that delivery of a building by July, 1976 (specified in our SFO) is highly improbable. We have already asked all responsive offerors for a second one-month extension of the closing date of their offers.

"6. The likelihood of a required complete Environmental Impact Statement of the proposed building site of the present low offeror would delay any award by several more months, thereby making the July, 1976, delivery date impossible and rendering all offerors nonresponsive."

Despite this recommendation, GSA proceeded with the procurement pursuant to SFO No. 697.

According to an SEC document submitted to the Office of Management and Budget (OMB) regarding the procurement, in a telephone conversation in May 1975, the Chairman of SEC and the Administrator of GSA discussed three offers that had been submitted to GSA in response to SFO No. 697: 1) an offer by Southwest Joint Venture (SJV) for the Buzzard Point building, 2) an offer by Union Center Plaza Associates for Union Center Plaza East, and 3) an offer by Raymond C. Brophy, Inc., for a building at 400 North Capitol Street, NW. The Chairman told the Administrator that the Buzzard Point building was unacceptable to SEC, that the Union Center Plaza building would be a reasonable resolution of SEC's needs, and that the 400 North Capitol building was the most desirable of the three.

On May 29, 1975, 5 days before the lease award was made, NCPC passed a resolution which stated in part:

"WHEREAS, Square 666 has been designated as part of the National Open Space System by the Parks and Recreation Facilities Chapter of the Comprehensive Plan for the National Capital;

"WHEREAS, the draft report of the Interagency Task Force on South Capitol Street/ Buzzard Point recommends the acquisition of Square 666 by the National Park Service and its development as part of the National Park Open Space System;

"WHEREAS, the owner of Square 666 has proposed the construction of a high-rise office building on that square;

"WHEREAS, the General Services Administration recently solicited bids for additional leased office space and received the lowest bid thereon from the owner of this square;
* * *

* * * * *

"BE IT RESOLVED that the National Capital Planning Commission finds that the construction of an office building on Square 666 contravenes the Comprehensive Plan for the National Capital adopted by the Commission and would be inconsistent with the sound and orderly development of the Nation's Capital and with the Federal interest in creating continuous public open space along the Potomac and Anacostia Rivers in the District of Columbia.

"BE IT FURTHER RESOLVED that the Commission urges the General Services Administration not to accept any bid for leased space in an office building proposed to be constructed on Square 666." (Emphasis added.)

On June 3, 1975, the Acting Chief, Metropolitan Operations Branch, Space Management Division, PBS, wrote a memorandum for

the record stating that he had been directed to prepare all necessary documents to award the lease by the close of business that day. After it was determined that the lowest responsive offer was submitted by SJV for the Buzzard Point building, the Chairman of SEC was notified by letter that SJV would receive the lease award and was asked to concur with the selection of the Buzzard Point building. On the same day, despite the fact that SEC officials again informed GSA of SEC's opposition to the selection of the Buzzard Point building, GSA awarded a 5-year lease, with three 5-year renewal options, to SJV.

A GSA news release dated June 3, 1975, supplied the following explanation from the Administrator of GSA regarding the selection of the Buzzard Point building:

> "'We recognize that there is opposition from some quarters to our selection of this site,' Sampson said, 'including from the National Capitol Planning Commission. However, we were not made aware of NCPC's position until it was too late in the decision-making process. We fully respect the position of the Commission and will take that position into consideration in the future. But to back away from this transaction at this point would undermine our reputation in the marketplace.'"

After being notified of the selection of the Buzzard Point building, SEC appealed GSA's relocation decision to the Office of Management and Budget in accordance with section 2(b) of Executive Order 11512, 3 C.F.R. $100 (1970), reprinted in 40 U.S.C. $490, at 9415 (1970). In a letter to the Administrator of GSA dated January 3, 1976, OMB ruled:

Feb. 27, 1970

> "In accordance with the provisions of Executive Order 11512 we have considered the Securities and Exchange Commission's (SEC) request for review of the General Services Administration's (GSA) decision to relocate the SEC at Buzzard's Point. Because of GSA's failure to adhere to the procedures required and intended by the Executive Order, with regard to the right of appeal, we have concluded that the SEC should not be assigned the space at

> Buzzard's Point. We suggest that GSA meet with the SEC promptly to explore what steps need to be taken to resolve their space requirements." (Emphasis added.)

As a result of OMB's ruling, GSA is now planning to relocate some of the offices of FEA and other Federal agencies to the Buzzard Point building. FEA has appealed GSA's decision to OMB, and the appeal is currently under consideration.

LITIGATION REGARDING GSA'S LEASE OF THE BUZZARD POINT BUILDING

On July 3, 1975, a lawsuit was filed challenging GSA's lease of the Buzzard Point building. Southwest Neighborhood Assembly v. Eckerd, No. 75-1073 (D.D.C., filed July 3, 1975). The plaintiffs in the lawsuit allege that GSA failed to prepare an environmental impact statement as required pursuant to section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. §4332(2)(C) (1970), and its implementing guidelines issued by the Council on Environmental Quality (CEQ), 40 C.F.R. §1500 et seq. (1974). Further, plaintiffs contend that, contrary to the requirements of Executive Order 11512, GSA failed to consult in a substantive manner with NCPC, the District of Columbia Government and other agencies regarding the procurement, and that the Buzzard Point lease contravenes local plans and programs for the Buzzard Point area. The plaintiffs also argue that GSA failed to give material and adequate consideration to the efficient performance of the missions and programs of SEC and other agencies that would be relocated to the Buzzard Point building, and that GSA failed to give due regard to the convenience of the public served and to the maintenance and improvement of safe and healthful working conditions for affected Federal employees in accordance with Executive Order 11512. Other violations of the Executive Order, such as failure to give adequate consideration to the accessibility of the site from other areas of the District of Columbia and failure to advise the Chairman of SEC prior to the site selection decision of GSA's intended course of action, are also alleged. Finally, the plaintiffs contend that GSA's actions or inactions during the procurement violated some of its own regulations in GSA Order PBS 1600.1, "Acquisition of Leasehold Interests in Real Property."

Based on the above allegations, the plaintiffs, in their amended complaint, have asked the court to enter a judgment:

> "1. declaring that the Buzzard Point agreement was entered into in violation of law,
>
> "2. permanently enjoining defendants [GSA] from implementing the Buzzard Point agreement.
>
> "3. directing defendants to rescind or terminate said agreement, and
>
> "4. granting such other and further relief as to the Court may seem just and proper."

In its answer to the plaintiffs' complaint, GSA denied the above allegations and, subsequently, filed a motion to dismiss the case or, in the alternative, for summary judgment in GSA's favor. In its motion, GSA contends that the plaintiffs have no standing to bring the action and that the issues raised by the plaintiffs are moot. Further, GSA argues that the plaintiffs have failed to join an indispensable party, SJV, and, even if the court were to decide that the plaintiffs have standing to sue, they would not win the case on the merits of their allegations.

Subsequently, the plaintiffs also filed a motion for summary judgment. The plaintiffs' motion concluded:

> "We ask the Court to deny defendant's motion to dismiss or in the alternative for summary judgment and to grant plaintiffs' motion for summary judgment ordering:
>
> "1. That GSA shall prepare an environmental impact statement forthwith in full compliance with NEPA and the CEQ Guidelines on the decision to lease and proceed with federal use and occupancy of the building at issue herein;
>
> "2. That GSA shall take all necessary steps to immediately, and in a continuing fashion, comply with all pertinent provisions of Executive Order 11512;

> "3. GSA shall not permit, assist or in any way facilitate occupancy of the subject premises by any federal agency until such time as the above responsibilities are met and the Court, which will retain jurisdiction of this action, has entered an order allowing such occupancy."

We understand that the court later asked the parties to submit depositions by December 14, 1976, concerning the issue of whether the Buzzard Point building would have been constructed had SJV not been awarded the lease.

On December 28, 1976, the plaintiffs filed a supplemental pleading in further support of their motion for summary judgment. This pleading raised the issue of GSA's failure to comply with GSA Order PBS 1095.1C, which requires the concurrence of certain GSA officials with an environmental assessment and negative declaration--a determination that an environmental impact statement is not required for a project--before further action is taken on a project. This issue was discussed in a December 17, 1976, hearing held by your Subcommittee, and selected pages of the transcript of that hearing were submitted to the court by the plaintiffs. The plaintiffs conclude that GSA's failure to comply with the Order rendered the lease award illegal.

We have been informally advised that GSA is currently preparing a response to the above supplemental pleading. Further, we understand that some of FEA's employees have retained legal counsel and intend to join the lawsuit as plaintiffs to challenge the Buzzard Point lease and GSA's proposed relocation of FEA to the Buzzard Point building. Additional issues may be raised by the FEA employees if they are permitted to join the lawsuit.

DISCUSSION

Several issues raised in your December 6, 1976, request are currently in litigation in the Southwest Neighborhood Assembly case. As mentioned earlier, the court has before it the questions of whether an environmental impact statement should have been prepared prior to the lease award, whether

the requirements of Executive Order 11512 were met, whether the lease should be rescinded or terminated, and whether GSA's failure to comply with its own regulations in issuing an environmental assessment and negative declaration renders the lease illegal.

Our Office generally declines to offer our judgment on issues that are in litigation in the courts. Exceptions to this policy have generally been restricted to circumstances where the courts have expressed a desire to receive or await our opinion. B-141529, December 26, 1972. In the absence of special circumstances, we think it would be inappropriate to volunteer an opinion of how we might adjudicate the rights of the several parties concerned about GSA's lease of the Buzzard Point building. They have chosen the U.S. District Court for the District of Columbia as the forum to decide the dispute, and are availing themselves of the procedures offered by the court to resolve disputed facts, such as the taking of depositions. The record upon which the court bases its ruling may differ from, indeed may be more complete than, the information we have gathered. Even the issues ultimately joined by the parties for decision may substantially depart from those now addressed to the court or identified in this letter. For these reasons, we believe we should not offer opinions on the matters related to the Southwest Neighborhood Assembly case.

However, we do offer certain observations on the issues not currently in litigation in order to provide the assistance you have requested to the extent that our observations remain congruent with our stated policy.

Prospectus Approval for the SEC Lease

Regarding the prospectus approval for the SEC lease, you have noted that the Public Works Committees did not authorize the SEC lease acquisition with the intention that GSA assign the acquired space to any Federal agency. It appears that the Committees approved the lease acquisition because of a specific SEC need, and, although GSA knew of SEC's objections to the Buzzard Point building, it still awarded the lease to SJV. The result of this decision appears to be that GSA now has an unoccupied building which few agencies care to use. This raises a question of whether, upon OMB's ruling that GSA

could not relocate SEC to the Buzzard Point building, the validity of the lease was affected, since the prospectus and congressional approval expressly contemplated a lease of office and parking space for the consolidation of SEC.

We have found no other expressions of congressional intent concerning the lease in question. Neither the three appropriation acts for GSA covering the period of time since the prospectus was approved nor the legislative histories of those acts contain anything helpful in resolving this question. The three appropriation acts only appropriate lump-sum amounts to GSA for all space rental, and there does not appear to be any reference to or restriction on the use of the Buzzard Point building in either the acts, the hearings in support of the acts, or the budget justifications supplied by GSA. See Pub. L. No. 93-381, 88 Stat. 613, August 21, 1974; Pub. L. No. 94-91, 89 Stat. 441, August 9, 1975; and Pub. L. No. 94-363, 90 Stat. 963, July 14, 1976.

The relevant statutory language governing prospectus submissions for leases is in 40 U.S.C. §606(a) (Supp. V, 1975):

> * * * * No appropriation shall be made to lease any space at an average annual rental in excess of $500,000 for use for public purposes if such lease has not been approved by resolutions adopted by the Committee on Public Works of the Senate and the House of Representatives, respectively. * * * *

This sentence was added to 40 U.S.C. §606(a) by section 2(4) of the Public Buildings Amendments of 1972, Pub. L. No. 92-313, 86 Stat. 216, June 16, 1972. It was based on a similar approval procedure for lease-construction contracts, which had been in previous GSA appropriation acts starting with fiscal year 1963.

The significance of the language added to 40 U.S.C. §606(a) was explained as follows by Congressman Kenneth J. Gray, who introduced the bill in the House and served as one of the House managers for the bill (H.R. 10488, 92d Cong., 2d Sess.):

> "Fourth, the bill would require the Administrator of GSA to submit a prospectus for approval by the House and Senate Public Works Committees whenever he proposes to secure leased space for which he pays an average annual rental in excess of $500,000. This is a tightening of congressional control over present leasing laws. At the present time, Congress has no control over leasing of public buildings. We feel this should be brought under control so we can monitor the amount spent for leased space where it is not feasible to construct a new building." 118 Cong. Rec. 13500 (1972).

Congressman Gray's statement appears to be the best explanation of the legislative intent behind the pertinent language of 40 U.S.C. §606(a). However, it does not treat the effect that potentially limiting language in a prospectus and its approval may have on a project where the appropriation acts providing funds for the project contain no such limitation.

A case in which a similar issue was raised before the GAO is Matter of LTV Aerospace Corporation, 55 Comp. Gen. 307 (1975). There, the Navy received a lump-sum appropriation for research and development of a new Navy combat fighter aircraft. The conference report which led to passage of the appropriation act stated that the funds should be used by the Navy to produce a derivative of the selected Air Force Combat Fighter design. However, the Navy awarded contracts for the development of an F-18 fighter, which was not a derivative of the Air Force Combat fighter, the F-16. In deciding that the contract awards were valid, we said:

> "We think it follows from the above discussion that, as a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there.

"If a statute clearly authorizes the use of funds for the procurement of 'military aircraft' without restriction, it must be construed to provide support for the validity of procuring any such aircraft. The fact that the legislative history makes clear that one type of military aircraft rather than another is to be acquired does not restrict the unequivocal grant of authority carried in the statute itself. To be binding as a matter of law, an intention to so restrict the legal availability of the funds provided would have to be expressed in the statute. However, if the issue is whether a particular aircraft is in fact a 'military aircraft,' as that term is used in the statute, resort to legislative history is required.

"An accommodation has developed between the Congress and the Executive branch resulting in the appropriation process flexibility discussed above. Funds are most often appropriated in lump sums on the basis of mutual legislative and executive understandings as to their use and derive from agency budget estimates and testimony and expressions of intent in committee reports. The understandings reached generally are not engrafted upon the appropriation provisions enacted. To establish as a matter of law specific restrictions covering the detailed and complete basis upon which appropriated funds are understood to be provided would, as a practical matter, severely limit the capability of agencies to accommodate changing conditions.

"As observed above, this does not mean agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress. The Executive branch--as the Navy has recognized--has a practical duty to abide by such

> expressions. This duty, however, must be understood to fall short of a statutory requirement giving rise to a legal infraction where there is a failure to carry out that duty.
>
> "Accordingly, for the reasons discussed above, we believe that the Conference Committee statement on which LTV relies constitutes, in effect, a 'directive' which parallels and complements--but, in a strict legal sense, remains distinct from--the actual appropriation made. Therefore, it is our conclusion that the Navy's award of contracts to MDC and GE did not violate Title V of the 1975 DOD Appropriation Act and in that regard the contracts cannot be considered illegal." 55 Comp. Gen. at 325-36.

GSA's prospectus for the SEC lease was approved by resolutions of the House and Senate Public Works Committees. We do not consider the effect of those resolutions on GSA's lease of the Buzzard Point building significantly greater than the effect of the conference report on the contracts in Matter of LTV Aerospace Corporation.

However, because of the apparent intention of the Public Works Committees in approving the SEC lease prospectus, we believe GSA should have taken certain action to reduce the risk of frustrating that intention. In this instance, after becoming aware of SEC's objections to the Buzzard Point building, GSA should have given SEC a reasonable opportunity to exercise its appeal rights under Executive Order 11512 before awarding the lease to SJV.

Further, GSA could have informally discussed the proposed Buzzard Point lease with the Committees on Public Works prior to the lease award. The following language in SFO No. 697 suggests that GSA could have kept the offers open an additional 120 days in order to advise the Committees of objections to the Buzzard Point building:

> * * * * However, in the event this solicitation results in an offer where the average annual rental exceeds $500,000, such offer shall remain open for 120 days beyond the date specified for acceptance elsewhere in this solicitation. This will afford the Government time to submit a prospectus to the appropriate committees of Congress pursuant to the Public Buildings Amendment [sic] of 1972."

Communications between Offerors and between GSA and SJV during Negotiations for the Lease

Another issue raised in your December 6, 1976, request, and elaborated on further during informal discussions with your Subcommittee staff, is whether there were improper communications between two offerors who responded to SFO No. 697 or between GSA officials and SJV during the negotiations for the procurement.

With respect to communications between offerors, the May 2, 1976, memorandum from the GSA Director of the Space Management Division of Region 3, quoted earlier, described the following problem relating to the procurement:

> "4. We have strong indications that conversations regarding this acquisition have taken place between two potential lessors. Subsequent to these alleged conversations, the higher lessor has revised his offer and is now the low bidder."

The conversations referred to above were apparently reported in an internal memorandum of the Westwood Management Corporation dated April 16, 1975. We understand that SJV is affiliated with the Westwood Management Corporation. The April 16 memorandum reads in part:

> "11. On April 9, 1975, Tauber [trustee for SJV] received a call from a Mr. Ben Weiner, mortgage broker who advised him that Mr. Sheldon Bernstein [an official

with Union Center Plaza Associates] had come to him to assist in obtaining a mortgage on a building of theirs which they were going to build for G.S.A. Weiner advised Bernstein that in light of the fact that he could not raise any money, he might interest a private investor and mentioned Tauber's name. Bernstein mentioned he would be glad to talk to him because Tauber had been 'knocked out of the box' in connection with his offer for the same project. Weiner inquired if Tauber wanted to meet Bernstein. Tauber called him back and advised that he would meet him and set up a meeting for 2:30 PM on April 10, 1975 at Jefferson Memorial Hospital.

"12. The meeting was held and attended by Mr. Sheldon Bernstein, his son Steven Bernstein, Bobby Kaufman, Warren Montouri, Dr. Tauber and Weiner. At the outset of the meeting Tauber questioned Bernstein as to what he mwnt [sic] by the expression 'knocked out of the box' and Bernstein explained that it was Baseball slang for having been eliminated. Bernstein then went into great detail indicating that he did not have a building permit, financing, agreement with general contractor. * * *

"13. On April 11 late in the afternoon Tauber called Bloominstein [a GSA official] and told him of his distress with Bernstein in quoting he had been 'knocked out of the box'. * * * "

We have no information that the two offerors entered into any type of business arrangement for submitting proposals in response to SFO No. 697. Further, at the December 17, 1976, hearing of your Subcommittee, a GSA attorney indicated that a lawsuit was later filed by Mr. Bernstein against Dr. Tauber alleging that Dr. Tauber improperly found out what Mr. Bernstein's offer was. We understand that the lawsuit was

subsequently dismissed when it was shown that throughout the entire negotiations for the Buzzard Point lease, SJV was the low offeror.

We have found nothing in SFO No. 697 or the Federal Property Management Regulations which required submission of a Certificate of Independent Price Determination in connection with the SEC lease procurement, as is required for procurements of supplies and services subject to the Federal Procurement Regulations. In this regard, section 1-1.004-1 of the Federal Procurement Regulations (FPR) (1975) states:

> "Leases of real property.
>
> "The FPR apply to leases of real property only to the extent explicitly stated in specific FPR provisions * * *."

Certificates of Independent Price Determination are required as follows by FPR §1-1.317(a) (1965):

> "In order to promote full and free competition for Government contracts, the following certification shall be included in all (1) invitations for bids and (2) requests for proposals or quotations * * *."

Despite the broad scope of this language, it does not explicitly cover leases of real property as required by FPR §1-1.004-1. Thus, it does not appear that the offerors who responded to SFO No. 697 were required to submit Certificates of Independent Price Determination.

Our opinion has also been requested as to whether GSA had any obligation to investigate the communications between offerors when it became aware of them. There appear to be no statutes or regulations specifically requiring GSA to investigate allegations of improper communications between offerors. Nevertheless, in the interest of protecting the integrity of the competitive procurement process, we believe GSA should have taken some action in this situation to ensure that such conversations did not prejudice the interests of the Government or any of the offerors. In this regard, our Office has held that where GSA's space requirements are competed, all responding offerors

are entitled to have their offers evaluated in an impartial and equitable manner, and no offeror may obtain an undue advantage which is not contemplated or authorized by the solicitation or selection procedures and which prejudices other offerors. B-180431, May 20, 1974.

According to GSA officials in testimony before your Subcommittee on December 17, 1976, the offers GSA received in response to SFO No. 697 did not indicate that there had been collusion between any of the offerors for the purpose of restricting competition on the SFO. Further, after being informed of the conversations between offerors, a GSA official reviewed the documents relating to the procurement and found no evidence indicating improper conduct by any of the offerors.

However, in a letter to GSA dated May 27, 1975, Dr. Tauber had stated:

> " * * * In the above solicitation [No. 697], however, basic facts of the greatest importance are of common knowledge; we learned from one of the offerors that we are 'knocked out of the box'. * * * "

Further, the resolution passed by NCPC 5 days before the lease award stated that the lowest offer in response to SFO No. 697 had been submitted by the owner of Square 666 in the District of Columbia. Square 666 is the site of the Buzzard Point building.

On the basis of the present record it appears that GSA officials, in addition to reviewing the procurement documents, should have investigated whether there were improper communications between offerors or there was a lack of confidentiality of offers, and determined more convincingly whether the interests of the Government or any of the offerors had been prejudiced.

With regard to whether there was favoritism in GSA's negotiations with SJV, we have found nothing during the course of our review which shows that SJV received favorable treatment in comparison with the other offerors.

SEC's Economic Comparison of the Alternatives to the Buzzard Point Lease

Another question in your December 6 request is whether the Buzzard Point lease is in the best interests of the Government, a finding made by GSA in awarding the lease to SJV. In this regard, you have requested that we review Part IV of SEC's brief in support of its appeal to OMB, entitled "Request for Reversal of the GSA Decision to Relocate the SEC to Buzzards Point."

Part IV of SEC's brief is entitled "The Economics of the Decision Made Versus Available Alternatives" and concludes, in part, that GSA rejected an offer which appears clearly favorable to SJV's offer. Essentially, SEC contends that, even using GSA's criteria for the lease award:

> "1. GSA rejected an offer which, by any reasonable standards, is superior;
>
> "2. They did not give adequate consideration to the SEC's needs and preference."

Enclosed is Exhibit 16 of SEC's brief, with emphasis supplied by SEC, showing a worksheet comparing the Buzzard Point building and the Union Center Plaza building. In six of the seven criteria listed for the comparision, the Union Center Plaza building appears to be preferable.

Also, SEC made an economic comparison of the Buzzard Point building and the Union Center Plaza building taking into account such factors as additional overtime costs and professional travel time necessary to carry out SEC's contact with other Government agencies. Based on this comparison, the SEC brief concludes that Union Center Plaza, rather than costing $59,000 more per year than the Buzzard Point building, costs $60,000 less per year. With respect to overtime, we could not verify SEC's calculation that the Government will incur costs of $62,500 annually for the Buzzard Point lease because, among other things, an overtime rate has not yet been established for that building.

Although several of the factors discussed in the worksheet and in Part IV of SEC's brief appear to be reasonable considerations for evaluating offers for the SEC lease, Schedule A of

SFO No. 697, "General Outline of Space Requirements," states in part:

> "11. In evaluating offers received in response to this solicitation only the rental rate offered for the initial lease term will be considered. However, negotiations will be conducted to obtain the most reasonable rental offer possible for both the initial term and the renewal period."

The above statement appears to conflict with Schedule D of SFO No. 697, "Miscellaneous Provisions," which reads in part:

> "10. AWARD FACTORS
>
> "In determining which offer will be most advantageous to the Government, the contracting officer shall consider the following factors in addition to the rental proposed and conformity of the space offered to the specific requirements.
>
> "a. Susceptibility of the design of the space offered to efficient layout and good utilization.
>
> "b. The effect of environmental factors, including the physical characteristics of the building and the area surrounding it, and the efficient and economical conduct of agency operations planned for the requested space, including the cost of telephone installation and operation during firm term of the lease, transportation, guard and messenger service.
>
> "c. Consideration will be given to the availability of adequate low and moderate income housing, adequate access from other areas of the urban center, and adequacy of parking to offered location.

"d. Consideration will be given to the need for development and redevelopment of areas and the development of new communities and the impact section [sic] of the offer will have on improving social and economic conditions in the area.

"e. Consideration will be given to the consistency of the proposed development at the location offered with state, regional and local plans and programs.

"f. The availability of public transportation and number of parking spaces.

"g. Adequate food service facilities must be available, either in the building in which the space offered is located, or within reasonable walking distance therefrom as determined by the Government (normally the Government lunch period does not exceed 30 minutes).

"h. The effect of environmental factors on the efficient and economical conduct of agency operations planned for the space and the safety of the visitors and occupants. These factors include the physical characteristics of the buildings, the location and distance above or below grade of the offered space in the building, the type of business and activities of other occupants, the surrounding area and the type of commercial, mercantile or other activity which may contribute to a higher fire potential than the usual office-type functions. Such activities may include, but are not limited to, enclosed garages, shops, storage areas of hazardous materials, manufacturing concerns, automotive repair shops, and multiple types of occupancy buildings." (Emphasis added.)

Thus, it is not apparent from the face of the solicitation how much weight, if any, GSA should have given to the above

award factors before making the lease award. This is contrary to the principle, frequently stated by our Office, that in properly prepared solicitations offerors will be advised of the relative importance of technical, price and other evaluation factors in relation to each other. The reason for this rule is to provide all offerors with the information necessary to properly prepare their proposals. See, e.g., Matter of Minjares Building Maintenance Company, 55 Comp. Gen. 865, 872 (1976); and B-149610, December 11, 1962.

In view of the court proceedings and the fact that we have not requested the parties to comment to us, we are not prepared to state whether GSA issued a legally defective invitation by not giving adequate notice of the award factors to be weighed in making the lease award.

In our opinion, GSA and SEC should have worked together more closely and thoroughly in preparing an SFO and in making the lease award. For example, questions concerning location should have been aired and, if possible, resolved prior to the lease award. Had this been done, a lease award more satisfactory to all parties concerned might have resulted.

Termination of the Lease

Finally, you have asked our opinion as to the expected consequences to the Government in the event a decision is made to terminate the Buzzard Point lease. If the Buzzard Point lease were terminated, absent a court ruling that the award of the lease was illegal, GSA could be potentially liable for the lease amount less any rent SJV received in mitigation from subsequent tenants of the Buzzard Point building during the remainder of the lease term.

We trust that this response will be of assistance to you in your review of GSA's proposed relocation of FEA to the Buzzard Point building.

Sincerely yours,

R.F. KELLER

Deputy Comptroller General
of the United States

Enclosure

SEC Exhibit Showing a GSA Worksheet Evaluating the Buzzard Point and Union Center Plaza Buildings 2/

Criterion	Buzzards Point	Union Center Plaza
1. Rental Rate		
a. Fully Serviced 2/	$ 5.5454	$ 5.62
b. Govt' pays Utilities	5.6089	5.79
2. Overtime		
a. Fully Serviced	125.00	80.00
b. Excluding Utilities	50.00	37.50
3. Availability of Low and Moderate Income Housing	The site is located at the extreme end of the Buzzard Point peninsula somewhat isolated from the city proper. Low and Moderate Income Housing is available within walking distance on a limited basis in the area south of M Street, S.W. Otherwise, bus or car use would be necessary from elsewhere in the District or nearby suburbs.	The site is located on North Capital Street in Northeast within walking distance of considerable low and moderate income housing including many new housing units in the vicinity of Gonzaga High School.

2/ SEC reformatted the GSA Worksheet, and the rental rates in SEC's exhibit do not reflect GSA's analysis of the final offers as of May 30, 1975. GSA's analysis shows an average effective rental of $5.49 per square foot for office and parking space for the Buzzard Point building and $5.62 per square foot for Union Center Plaza. However, for only office space, GSA's analysis shows an average effective rate of $6.54 per square foot for the Buzzard Point building and $6.50 per square foot for Union Center Plaza.

Criterion	Buzzards Point	Union Center Plaza
4. Availability of Parking and Public Transportation	The building will have garage space available capable of parking approximately 840 cars. Off street parking is generally available due to the lack of development in the area. Bus service is available but on a limited basis. The closest Metro subway station would be located at 4th & M, S.W. (12 blocks away) which would require shuttle service. Taxi cabs available only by telephone request.	The building will have 200,000 spuare feet of garage space capable of parking approximately 700 cars. Bus service is good as the building is located on the highly travelled North Capitol Street. Metro subway service will be available at Union Station which is within a walking distance of 4-5 blocks. Taxi cabs are generally available.
5. Effect on Development in site area and consistency with local plans	1900 Half St., S.W., is in the South Capitol Street/Buzzard Point Area, which is currently under review for redevelopment purposes by the Municipal Planning Office of the D.C. Government and the National Capitol Planning Commission. Both agencies have notified GSA in writing that they do not consider the construction of a large office building on this site to be in keeping with the city's policy to encourage new office construction in the Downtown Urban Renewal Area.	Union Center Plaza East is located in an authorized Urban Renewal Area and is, therefore, situated in the vicinity deemed best for office development by agencies such as the National Capital Planning Commission and the District Government's Municipal Planning Office. The proposed building is one of a proposed five building complex two of which have been constructed and are occupied.

Criterion	Buzzards Point	Union Center Plaza
6. Availability of food service	The building will have a cafeteria as part of the lease agreement. A nearby building leased to the Government has cafeteria and lounge facilities. These are the only eating facilities within walking distance located in the area. The nearest commercial eating facilities are located at Waterside Mall at 4th & M, S.W.	The building will have a cafeteria as part of the lease agreement. In addition two other buildings that are part of the development project have cafeterias. The developer intends to construct a hotel with a restaurant on the site in time for the Bicentennial Year. Several restaurants, cafeterias, and a drug store are available within a 3-4 block radius of the proposed building site.
7. Enrivonmental Impact	The proposed building will be all electric and comply with all local codes. The site is located on the Anacostia River and would disrupt any plans for park, recreational, or natural use. As such, the proposed development project is opposed by NCPC and the D.C. Government Planning Office. In addition, the Comprehensive Plan for the National Capital designates this site as part of the National Open Space System.	The proposed building will be all electric and comply with all local codes. The site is located in a commercial redevelopment area, consistent with state, regional, and local plans and programs.

GENERAL SERVICES ADMINISTRATION
Services for other agencies, etc.
~~Space assignment~~
~~Including leasing~~
~~Lease validity~~

LEASES
Authority
General Services Administration

LEASES
Propriety

GENERAL ACCOUNTING OFFICE
Decisions
Abeyance
Pending court, quasi judicial, appellate board, etc., action